

SUSPECTED TERRORISTS AND THE DUE PROCESS RIGHTS  
COMPARATIVE STUDY OF DETAINED SUSPECTS IN THE UNITED KINGDOM AND ISRAEL.

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## LIST OF ABBREVIATIONS

AU	African Union
ACHPR	African Charter on Human and Peoples Rights
ACHPR	African Commision on Human and Peoples Rights
CFI	Court of First Intsance
ECHR	European Court of Human Rights
ECHR	European Commissionof Human Rights
ECHR	European Convention on Human Rights and Its Five Protocols
EU	European Union
ICCPR	International convention on Civil and Political Rights
OAU	Organisation of African Unity
Strausbourg	European Court of Human Rights
US	United States
UK	United Kingdom

## EXECUTIVE SUMMARY.

The purpose of the present research is to analyse whether Suspected detained terrorists have the right to enjoy the protection of minimum standards of due process rights as provided by national and international legal instruments in this era where combating terrorism has become the corner stone of every States national security concern.

The thesis specifically underakes a comparative study of detained suspects due process rights: right to information, right to counsel and the use of hearsay evidence in the United kingdom and Israel under their terrorism control legislations that allow administrative detention. Therefore it shall look at the provided rights in light of the treatment accorded to them under administrative detention.

With the complexities of terrorism and the right of States to protect their nationals and territories, application of and enjoyment of due process rights of those suspected have come under abuse and criticisms as a result of States propounding the impossibility of subjecting these suspects under the protection of those guarantees provided by the normal criminal systems. Thus, the thesis maintains that terrorist suspects like any other suspects have the right to benefit from due process rights and further, there is no need to introduce new systems with safegurads there with that infringe on their rights, for the old fashioned criminal system is sufficient enough to oversee the administration of justice for any typr of crime.

The research upholds that the criminal justice system needs no alterations and even if the claim is otherwise for terrorist cases, the reccomendation advocated for is to maintain and respect the due process rights herein researched and other human rights of suspected terrorists.

## INTRODUCTION.

It has become a common trend today to witness and even hear from the media acts of terrorism and loss of lives around the globe, making terrorism a wordly condemned crime as well as crucial and prioritised crime to deal with for many States national security departments. Consequently, its not pertubing to note the various methods employed by States and international organisations to fight terrorism from the initial processes of enacting domestic anti-terrorism legislation, entering into regional and bilateral agreements and enacting international legal instruments as means of forging way forward to combat terrorism. Sadly however, some of the legislations so enacted and methods adopted, have come under immense criticism for being anti-human rights with the consequences of deriving certain human rights to those so suspected, in the name of the inefficiency or over protection of the ordinary criminal system to prevent and punish the suspects and the proclamations of safeguards being undertaken under these new methods such as administrative detention practiced i the united kingdom and Israel to ensure that those rights such as due process rights being researched are protected.

With such sentiments, there remains an uncertainty of what kind of due process rights should terrorist suspects under such schemes benefit from, with the knowldge that at some point national security interests and their due process rights shall interface? Question that is central to this thesis and to which is being researched upon and with emphasis that the in whatever situation those rights researched upon should apply to suspects at all times for they are provided as hunam rights to which they are entitled to.

Therefore, this research relies specifically on primary and secondary sources. Primary sources include legislation and case law derived from domestic legislation, international legal treaties and conventions governing terrorism and due process rights. It also includes a comparative study

of legislative statutes, policies and guidelines from selected case study jurisdictions. The case study jurisdictions for the purposes of this study shall be United Kingdom and Israel. Secondary sources shall include, authoritative literature, articles found in journals and reviews

It shall then be followed by five chapters, with the first chapter reviewing key concepts and terms: Terrorism, Suspect, Due Process Rights, Administrative detention and other key terms relevant to the study encountered during the research. A sum up shall be provided at the end forthwith.

The second chapter tries to ascertain whether terrorist suspects are eligible to enjoy due process rights by examining the universally applicable standards. With the fact that each investigation or trial is unique depending on the circumstances, this section shall be ascertaining any specific strictures and processes that are appropriate in the specific case of suspected terrorists in administrative detention. Special attention will be given to nature of evidence, right to information, right to counsel and habeas Corpus proceedings.

Chapter three shall solely look consider due process guarantees as provided in various international legal instruments, regional and others in the quest of ascertaining whether those rights provided therein are sufficient in safeguarding the rights of suspected terrorists. It shall be concluded with a sum up.

The above shall be followed by Chapter Four which shall comparatively and analytically discuss the treatment of detained suspects rights in the case study jurisdictions under administrative detention laws and procedures.

The Conclusion of the research shall be Chapter five. Taking account of the analysis in chapter two, three and four of the existing practices, this chapter makes conclusions on the findings by answering the question it so sought to address. The answers might take the form of recommendations or any other form that might be found suitable in the course of the study. Together with this the chapter may highlight other possible areas of research that might not be fully addressed by this study.



## CHAPTER 1:REVIEW OF KEY TERMS AND CONCEPTS

### 1.1. Introduction.

This literature reviewed and presented in this section is in a quest of finding out what has been covered in relation to my thesis: suspected terrorists and due process rights( also referred to fair trial rights) . The trend characterised by much scholarly work about national and international laws informs us there is a general acknowledgement that suspects of any kind under the criminal justice system have the right to due process and minimum standards guaranteed thereof.<sup>1</sup>However with the wake of terrorism and other serious crimes, this understanding has come under immense uncertainties.

The rise of terrorism has led to some States proclaiming state of emergencies for example the United Kingdom, with consequences of derogating from fundamental human rights obligations and providing them with grounds of enacting new anti-terrorist laws and numerous counter-terrorism measures, as part of their duty to take reasonable steps to keep persons within their control secure from threats to life.<sup>2</sup>The wish to control terrorism through counter-terrorism measures rather than old fashioned criminal system, has been based on a number of criticisms.

One strong argument relied upon is the inefficiency of the system to guarantee effective prosecution of suspected terrorist,others include,its incapableness of addressing the challenges presented by terrorist activities ,a system that offers too many protection to dangerous people hence the need to use other means such as special courts.<sup>3</sup>Criticisms, which i believe are unfounded, based on the recent trends characterised by judicial decisions, human rights

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<sup>1</sup>European Convention on Human Rights and Fundamental Rights under article 6, The Convention on Civil and Political Rights 1966 under Article 14 and the American Convention on Human Rights 1969.

<sup>2</sup> Rt Hon Lady Justice Arden .M “ Meeting the Challenge of terrorism: The experience of English Courts and Other Courts”, speech Presented at John Lehane Memorial Lecture(Supreme Court of New South Wales, 16 August 2006). Australian Law Journal 802006 p.819

<sup>3</sup> Setty S. “Comparative Perspectives on Specialized Trials for Terrorisms”, Maine Law Review. 63 me. L. rev. 131, 20101, p3

advocacies and adoption of laws that recall and command the respect of due process guarantees at all costs even with alterations provided by the usual criminal system.

Therefore, numerous counter-terrorism measures engaged by many States to control terrorism, such as the use of administrative or preventative detention as provided in different jurisdictions, have had adverse negative effects on due process guarantees of suspects held under such schemes overtime.<sup>4</sup> According to Rt Hon.Lady Justice Mary Arden, besides, the curtailment of due process rights, other rights affected under such measures include, the right to habeas corpus review, freedom of movement, freedom of expression and freedom of association.<sup>5</sup> There have been a number of proposals whose aims have been to make due process rights absolute and non-derogable even in times of emergencies, in order to reinforce the adherence to the existing guarantees but these proposals have been rejected.<sup>6</sup>

Despite the presence of various acknowledged rules of minimum guarantees provided as a baseline such as, those in the Geneva Convention of 1949,<sup>7</sup> The Paris Minimum Standards of Human Rights Norms in a State of Emergency,<sup>8</sup> Declaration of Minimum Humanitarian Standards,<sup>9</sup> the International Covenant on Civil and Political Rights,<sup>10</sup> European Convention on Human Rights and Fundamental Freedoms<sup>11</sup> African Charter on Human and Peoples

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<sup>4</sup>Gross.E. "Human Rights , Terrorism and the Problem of Administrative Detention in Israel: Does A Democracy Have the Right to Hold Terrorists as Bargaining Chips" Arizona journal of International and Comparative Law, Vol 18, No. 3 2001 p.762

<sup>5</sup> Supra note 2. p.818.

<sup>6</sup> Starvos. S "The Right to a Fair Trial in Emergency Situations", International and Comparative Law Quarterly Vol 41 Cambridge University Press 1992 p. 343

<sup>7</sup> The 1949 Geneva Convention and its Protocols .

<sup>8</sup> The Paris Minimum Standards of Human Rights Norms in State of Emergency in The American Journal of International Law, Volume 79, No. 4 ( October 1985)

<sup>9</sup> Declaration Of Minimum Humanitarian Standards , Adopted by an Expert Meeting Convened by the Institute for Human Rights, Abo Akademi University, in Turku/ Abo Finland, 2 December 1990.

<sup>10</sup> The International Covenant on Civil and Political Rights of 1966

<sup>11</sup> European Convention on Human Rights and Fundamental Freedoms 1950.

Rights,<sup>12</sup> and American convention on Human Rights,<sup>13</sup> they do not provide in precise due process rights entitled to suspected terrorists.<sup>14</sup> Hence posing questions on what due process guarantees should be provided to such suspects, bearing in mind the criticisms on criminal system guarantees. In other words, the researcher has not come across studies that are specific to addressing minimum due process guarantees, specifically for suspected terrorists or safeguards in case their due process such as those going to be researched are compromised. Hence the study will examine the development of these concepts through the key terms provided below.

It should be noted however, there shall be limitations to certain aspects in this chapter like the definition of terrorism because the lack of a universal definition is not in contention, some aspects of due process guarantees provided by various legislations shall be discussed in the second and third chapter.

## 1.2. Terrorism

The twentieth century came along with different types of crimes but, the one that stood out is famously known as “crime of terror”. Despite it having no distinct legal definition whatsoever, it has been on the international agenda for over 20 years, growing in profile and attempts to define it under international law futile, posing questions of legal certainty. Defining terrorism has valid rationale such as, legal certainty, recognizing and protecting vital international community values and giving strong effect to the condemnation of terrorism. Saul posits that it “undermines fundamental human rights, jeopardizes the States peaceful politics and threatens international peace and security.”<sup>15</sup>

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<sup>12</sup> African Charter on Human and Peoples Rights 1982

<sup>13</sup> American Convention on Human Rights 1969.

<sup>14</sup> Supra note 4. P. 752

<sup>15</sup> Saul. B et’ all, “Defining terrorism in International Law”, Oxford University Press, Clarendon. Oxford 2008 p. 7

Akin to other scholars, Than elucidates that there is lack of a specific consistent and enforceable definition of terrorism under international law.<sup>16</sup> As a result he observes that “customary and statutory International law have not developed an all embracing crime of terrorism and as such the approach has been a peace meal and incremental, with new developments occurring as a response to each fresh attack and the change in perception of threats which attacks provoke.”<sup>17</sup> Referring to Cherif Bassioni description of terrorism he quotes it to the effect that it is an “ideologically motivated strategy of internally proscribed violence designed to inspire terror within a particular segment of a given society in order to achieve a power –outcome, or to propagandise a claim or grievance irrespective of whether its perpetrators are acting, for on behalf of themselves or on behalf of a State”<sup>18</sup>

By examining the meaning of words “‘terror’, ‘terrorize’, ‘terrorism’ and ‘terrorist’, Saul uses an evolutive approach and notes that they are all plagued by so much indeterminacy, subjectivity and political disagreement in their definition.”<sup>19</sup> He also provides that under their ordinary linguistic meanings at a literally level they connote fear, fright and dread.”<sup>20</sup> Saul’s perception of terrorism though distinct in the way he defines it by providing facts to the literal meaning, his general views are however similar to other scholars. He asserts that “despite the shifting and contested meanings of terror, the peculiar semantic power of the term, beyond its literal

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<sup>16</sup>Than D. C, et’ al, “International Criminal Law and Human Rights”, 1<sup>st</sup> Edition, Sweet & Maxwell, London 2003. P. 231-256

<sup>17</sup> Ibid..

<sup>18</sup> Bassiouni C. “Legal responses to International Terrorism: united states Procedural aspects 1988” in Than D. C, et’ al, “International Criminal Law and Human Rights”, 1<sup>st</sup> Edition, Sweet & Maxwell, London 2003. P. 233

<sup>19</sup> Supra note 15.p. 1-2

<sup>20</sup> ibid

signification, is its capacity to stigmatize, delegitimize, degenerate and dehumanize those to whom it is directed, including legitimate political opponents.”<sup>21</sup>

The Special rapporteur on the ‘Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism’, Prof. Martin Schenin, while acknowledging the lack of an existing comprehensive definition in the international legal framework, adopts the UN Security Councils definition provided in Resolution 1566 (2004).<sup>22</sup> In his opinion, “any offence defined in domestic law as a terrorist crime should meet the following three conditions: (a) committed against members of the general population, or segments of it, with the intention of causing death or serious bodily injury, or the taking of hostages; (b) committed for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act; and (c) corresponding to all elements of a serious crime as defined by the law. Any law proscribing terrorism must adhere to the principle of legality enshrined in article 15 of the International Covenant on Civil and Political Rights (the Covenant), be applicable to counter-terrorism alone and comply with the principle of non-discrimination.”<sup>23</sup>

The above definition I could aver is best so far for it is specific in explaining the three conditions that constitute terrorism and emphasizing the importance of anti-terrorist legislation to possess the legality enshrined in Article 15 of the ICCPR, however it is limited in not providing the practical acts that we clearly know and see when the word terrorism is mentioned. Noone

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<sup>21</sup> Ibid.p. 3

<sup>22</sup>UN Doc A/HRC/10/3/Add.2 , 16 December 2008, Promotion and Protection of all human Rights, Civil. And Political , Economic , Social and Cultural Rights, Including the Right to Development , Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Addendum Mission to Spain: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/173/74/PDF/G0817374.pdf?OpenElement>

<sup>23</sup> Ibid

definition on the other hand, provides those elements that are essential in what is to be considered as terrorism.<sup>24</sup> These practical acts occur every day in different parts of the world such as Iraq and Afghanistan not only instigated by subversive groups but also sometimes States who might be responsible and the aim of terrorism sometimes it is to get a message across. He states that terrorism should be perceived as:

- the nature of the act which embraces the concept of criminal unlawful , politically subversive and anarchic acts, perpetrators,
- States are considered perpetrators along with individual and private groups, Strategic objectives :
- states sponsorship of terrorism as part of a campaign of geographic expansion of political control,
- intended outcome: fear , extortion , radical political change and measures jeopardizing fundamental freedoms are most often the expected results
- Targets; human beings and property are most often specific targets of terrorist acts with special focus on head of states, diplomats and public officials, military targets in non-combat or peacekeeping roles.
- Methods, threats as well as the actual use of violence including theft, sabotage, bombing letter or parcel bombing, use of automatic grenades, rocket launches and hostage taking among other methods as common weapons of terrorists in spreading fear among the targeted population.<sup>25</sup>

From the literature above, it is evident that there is a consensus that the lack of a specific consistent definition not only bears on the legal certainty of terrorism but also leaves a very big gap which may be abused by States when it comes to legislating on what amounts to terrorism, its punitive sanctions and authority there under to fight it. For the purpose of this study, terrorism

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<sup>24</sup> Noone F.M. et'al, „Cases and Materials on Terrorism :Three Nations Response”, Kluwer Law International London, 1997 p.514.

<sup>25</sup> Ray S. Cline and yonah alaxender developed these elements in an unclassified report prepared for the U.S Army on „ State-Sponsored terrorism” (1985), pp 22-23 quoted in Noone.F.M, et'al, “Cases and Materials on Terrorism: Three Nations Response”, Kluwer Law International London, 1997 p.514

shall be construed to mean those acts as laid out by Noone et'al, for their definition is in agreement with my opinion.

### 1.3. Due Process Rights

It is inevitable not to discuss fair trial rights or due process rights especially in view of the fact that the discourse surrounding combating terrorism has a lot to do with investigations, arrest and detentions of civilians considered as suspects, hence the subsequent interface with the concept of due process rights. Many a times, "in emergencies, judicial systems may break down and where they exist, some judicial guarantees are done away with such as due process rights, freedom of movement and association among others."<sup>26</sup> While examining the existence of an interface between justice and emergencies, Aolain finds that it exists and that even then, due process guarantees become central for there are extreme probabilities of violating them under such circumstances<sup>27</sup>.

The right to a fair trial is a principle that embraces all aspects of fairness, whose purpose is to ensure that justice administration is done.<sup>28</sup> It forms the very basis of criminal procedure both in the international criminal justice system and domestic criminal systems. Importantly it "occupies the central place in major human rights treaties: article 14 of the ICCPR, Article 6 of the ECHR, Article 21, Article 7 of the ACHR and statutes of international criminal courts: Article 21 of the ICTY and Article 67 of the ICC."<sup>29</sup> These provisions provide "general notions of fair trial and

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<sup>26</sup> Aolain N.F., "The Individual Right to access to Justice in Time Of Crisis: Emergencies, Armed Conflict, and Terrorism" in Francioni F., et' al, "Access to Justice as a Human Right", Oxford university Press, Oxford 2007

<sup>27</sup> *ibid*

<sup>28</sup> Sottiaux. S. "Terrorism and the Limitation of Rights, The ECHR and the US Constitution", Hart Publishing, Portland USA. 2008 p. 323-324

<sup>29</sup> Sluiter & Zahar, "International Criminal Law, A Critical Introduction", Oxford University Press, Oxford 2008. p. 292

specific minimum guarantees to which must be ensured lest non-adherence inevitably affects the fairness of the trial as such.”<sup>30</sup>

Generally, despite the “many differences in the way fair trial rights are stipulated in the various jurisdictions for example in the Americas, Africa, Asia and Europe, they follow a similar pattern requiring the observance of fair trial procedures supplemented with a number of more specific safeguards particularly for those charged with criminal offences.”<sup>31</sup> These rights include right to an independent and impartial tribunal,<sup>32</sup> right to be tried within a reasonable time,<sup>33</sup> right to be presumed innocent and the privilege against self-incrimination,<sup>34</sup> right to be informed of the charges,<sup>35</sup> right to adequate time and facilities,<sup>36</sup> right to counsel or to defend oneself in person,<sup>37</sup> right to examine witnesses,<sup>38</sup> right to appeal,<sup>39</sup> right to compensation for wrongful arrest or conviction<sup>40</sup> and the protection against double jeopardy.<sup>41</sup>

Following the above rights there is general agreement among scholars and judicial decisions of the notion that the stipulated due process rights have penumbral rights or implied rights attached to them.<sup>42</sup> Zahar & Sluiter propound that “legal doctrine and practice have given rise to a

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<sup>30</sup> *ibid*

<sup>31</sup> Janis, Kay & Bradley, “European Human rights Law, text and Materials”, Oxford University Press, 2000 p 403 in See Sottiaux. S. *Supra* note 28 p. 324

<sup>32</sup> *Supra* note. 29. p 295-300: This is protected in Article 14 (1) ICCPR, Article 6(1) ECHR, Article 8(1) of the ACHR, Article 67(1)& 68 (1) ICC Statute, Article 8(1) ACHR, Article 21(4)(c) ICTY Statute, Article 20 (4)(c) of the ICTR Statute and Article 17(4) (c) of the SCSL Statute.

<sup>33</sup> *Ibid.* p 300-302

<sup>34</sup> *Ibid.* p 302-307

<sup>35</sup> *Ibid.* p 307

<sup>36</sup> *Ibid.* p 309-314

<sup>37</sup> *Ibid.* p 308

<sup>38</sup> *Ibid.* p 314-315

<sup>39</sup> *Ibid.* P 314-315

<sup>40</sup> *Ibid.* p 316

<sup>41</sup> *Ibid.* p 317

<sup>42</sup> Ashworth A. “Human Rights, Serious Crimes and Criminal Procedure”, The Hamlyn Trust, Sweet & Maxwell 2002. P.18. See also John V Murray U.K. (1996) 22 E.H.R.R 29 para. 45 in which the Strasbourg court recognized the right to silence and from self-incrimination to form part of Art 6 of the European convention.



number of fair trial elements which are not covered by the specific minimum guarantees such as right to an adversarial system, principle of equality of arms and the right to a reasoned judgment.”<sup>43</sup> Sottiaux adds to this list “the right of the accused to be present at and to take part in oral hearings and components involving the presentation of evidence which is part of due process,”<sup>44</sup> however he expresses that the court (Strasbourg), “refrains from reading into the convention any particular rules of evidence but yet has made it clear that the contracting States discretion in this respect is unlimited for sometimes the use of a certain evidence may amount to a violation of the right to fair hearing.”<sup>45</sup>

There is relative consensus in the literature that human rights, propounds that fairness should be applied at all times during investigations and at trials even though each investigation or trial is unique depending on the circumstances.<sup>46</sup> The dilemma however as most literature reveals, is to ascertain specific strictures and processes that are appropriate to particular inquiries or proceedings especially inquiries such as those under administrative detention levied against suspected terrorists.<sup>47</sup> Therefore in view of the intricacy of the fight against terrorism, Sottiaux propounds that due adherence to fair trial rights offered under ordinary criminal prosecutions might be impossible hence the need to have exceptional trial procedures for terrorist suspects,<sup>48</sup> what is being propounded by this study.

It is common knowledge that combating terrorism has been and continues to be difficult for States especially when making decisions that relate to balancing between their national interests,

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<sup>43</sup> Supra note. 29. p.293.

<sup>44</sup> Supra note 28. p. 325

<sup>45</sup> Ibid. p. 325

<sup>46</sup> Freeman M. “Truth Commissions and Procedural Fairness”, Cambridge university press, Cambridge 2006. p. 88-154

<sup>47</sup> Guiora A.N. “Where Are the Terrorists to be Tried: A comparative Analysis of Rights Granted to Suspected terrorists”, Catholic University Law review, Vol 56. p 805, Case Legal research paper No- 07-13. 2007. p. 806

<sup>48</sup> Supra note. 28.p. 323

security and peace vis –a- vis the fundamental human rights of suspects. These quandaries were noted by the European Union among its member States especially with the endorsement of various anti-terrorism domestic legislations as countermeasures, leading to the adoption of Guidelines on Human Rights and Fight against Terrorism to be applied within the EU.<sup>49</sup> “These guidelines specify restrictions to the rights of defense such as access to and contacts of counsel, anonymous testimony and case file access arrangements that are compatible with the ECHR and consistent with the presumption of innocence.”<sup>50</sup> It should be noted however, that these restrictions are subjected to strict proportionality as to their purpose in regards to protecting the interests of the accused in a bid of upholding fairness of proceedings so as to guarantee that the substance of procedural safeguards are not violated.<sup>51</sup>

Aolain supports the EU standpoint by acknowledging that in emergency situations such as terrorism, States have come to pass legislations with characteristics of providing States with more rights than suspects and to protect themselves they balance their rights against the right of a particular individuals to legal review and oversight.<sup>52</sup> Further she observes that judicial systems have a tendency of keeping away from making binding decision on violations of due process, with the explanations that the fight against terror falls under the ambit of the State security which is the sole responsibility of the State to address.<sup>53</sup> Cryer supports her assertions by stating in this era of combating terrorism, there are difficulties suspected terrorist face in terms of the nature of

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<sup>49</sup> Adopted by the Committee of ministers on 11<sup>th</sup> July 2002.

<sup>50</sup> Ibid. Article IX ( 2) Guidelines on Human rights and the Fight against terrorism.

<sup>51</sup> Ibid.

<sup>52</sup> Supra note 26.

<sup>53</sup> Ibid.

evidence against them and pre-trial detentions that are too long, all these having adverse effect on their due process rights.<sup>54</sup>

However the flaws with the EU guidelines is the limitation of jurisdiction, hence does not provide universally accepted due process standards that should be applied to suspected terrorists. Aolain's attempts as well while accepting that 'certain States have manipulated the events and international response to the threat of transnational terrorism and limited access rights in a domestic context to ends that are extremely dubious on both substantive and procedural ground,'<sup>55</sup> does not address specifically due process rights, makes no recommendations on what other options are there if the existing due process guarantees are infringed, and especially on suspected terrorists due process rights under detention laws. In addition Cryer in passing briefly highlights on those due process rights.

From the literature above and in my opinion, it's clear that there is relative consensus that fair trial rights as those rules that ensure proper administration of justice, protects the human dignity of suspects and must be observed and accorded to victims, defendants, and for the purpose of this research they shall be construed as such.

### 1.3.1.Habeas Corpus.

Several International Human Rights instruments and constitutional provisions in different jurisdictions provide for the right to liberty and those circumstances that may limit its applicability, such as police investigation, national security and so forth, but subject to reasonable balancing between the exigencies and the protection of the curtailed right, which for

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<sup>54</sup>Cryer R. et'al, "An Introduction to International Criminal Law & Procedure", 2<sup>nd</sup> Edition, Cambridge University Press, Cambridge 2010.p 334-336

<sup>55</sup> Supra note. 26.

this research is counter terrorist efforts.<sup>56</sup> In criminal arrest and preventative detention, it is therefore a requirement that, in order to detain a person on criminal charges, there needs to be reasonable suspicion, pointing at the possibility that the suspect has committed the offence.<sup>57</sup> Following this line of thought, if an individual is detained on criminal charges, he has the right to be promptly brought before a court and tried within a reasonable time, but as research has shown, promptness is relative depending with the exigencies of each case,<sup>58</sup> and the absolute limits attached to it.<sup>59</sup>

Nevertheless, there are safeguards that ensure the right to liberty of individuals. The Human Rights Committee have stressed that there are absolute limits to anti-terrorism measures applied to suspected terrorists through the right to habeas corpus review.<sup>60</sup> Seibert-Fohr, relying on examples of the practices in the United Kingdom and United States, on detaining terrorist suspects for longer without promptly bringing them before a court, explains that, its due to the inability of those authorities to provide within a short period of time, enough evidence for the

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<sup>56</sup> Article 5 of the ICCPR

<sup>57</sup> As held in the case of Fox, Campbell and Hartley( Application No. 00012244/86), where the court pointed out that , “Article 5(1-c) of the Convention should not be applied in such a manner as to put disproportionate difficulties in the way the police authorities of the contracting states in taking effective measures to counter organized terrorism. it follows that the contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity.”

<sup>58</sup> Brannigan and McBride V United Kingdom judgement of 26 May 1993 where the European Court of Human Rights, accepted a period of seven days on the basis of the british derogation , implying that a longer period of detention may be justified in a case of a valid derogation. Quoted in See Seibert-Fohr. A “The Relevance of International Human rights Standards for Prosecuting Terrorist”, MaxPlank Institute for the achievement of the Sciences-Max Plank Institute for Comparative Public Law and International Law, 2004. p.146.

<sup>59</sup> In Brogan and others V United Kingdom, Judgement of 29 November 1988. A145-B.p.27. para. 61a case involving detention of terrorist and delay in adducing them before court, The European court of Human rights stated that: “ To attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word, “promptly”. An interpretation to this effect would import into article 5(3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision”.

<sup>60</sup> Seibert-Fohr. A “The Relevance of International Human rights Standards for Prosecuting Terrorist”, MaxPlank Institute for the achievement of the Sciences-Max Plank Institute for Comparative Public Law and International Law, 2004. p.147

courts to uphold the arrest on criminal charges, thereby resorting to use of preventative detention measures.<sup>61</sup> The question arising thereafter is, what is “habeas corpus”?

Amanda Mcrae, averring on the application of habeas corpus within the United States jurisdiction, declares that, at its “basic level, the writ of habeas corpus protects individual from illegal executive detention”.<sup>62</sup> illustrating with cases like *Boumediene V Bush*,<sup>63</sup> *Hamdi V Rumsfield*,<sup>64</sup> *Rasul v Bush*<sup>65</sup> and *Hamden V Rusfield*,<sup>66</sup> involving suspected terrorists detained in Guantanamo bay and which the United States Supreme Court upheld their right to habeas corpus review irrespective of where they were detained, maintained that the right to habeas corpus is “the fundamental instrument for safeguarding individual freedom against arbitrary and lawless State action.”<sup>67</sup>

By way of reference to Blackstone, who referred to the writ of habeas corpus as the most celebrated writ in English law, and introduced into America Constitution,<sup>68</sup> Chemerinsky Erwin, defines it as, “providing individuals with protection against arbitrary and wrongful imprisonment,

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<sup>61</sup> Ibid . p.145,

<sup>62</sup> Mcrae A. “ *Boumediene V Bush*: Another Chapter in the Courts Jurisprudence on Civil Liberties at GuantanamoBay” *Duke journal of Constitutional Law & Public Policy Sidebar* 247. 2009 p.1

<sup>63</sup> Ibid. *Lakhdar Boumediene et al, V George Bush* , former President of the United States, et al on writs of Certiorari to the United States Court of Appeals For the District of Colombia Circuit (June 12, 2008), involved six Algerian nationals seeking habeas corpus review of the legality of their indefinite detentions at Guantanamo Bay , having being detained on allegations of plotting to bomb the United States Embassy in Sarajevo Bosnia

<sup>64</sup> Ibid. *Hamdi V Rumsfield* 542 U.S. 507(2004), Involved U.S citizens considered as enemy combatants by the United States government held in detention without promptly brought before the court. The Court in this case, “ held that that , U.S. citizens detained as enemy combatants must , for due process reasons , be given an opportunity to challenge their detentions before a neutral body.

<sup>65</sup> Ibid. *Rasul V. Bush*, 542. U.S. 466(2004), Involving detention of non-citizens by the US on terrorist allegations and to which the Court provided that the writ of habeas corpus extends even to non-US citizens.

<sup>66</sup> Ibid. *Hamden V. Rumsfield* 548. U.S. 557(2006). Involved detention of suspected terrorists at Guantanamo without judicial involvement. The issue before Court was whether habeas Corpus review could also be applied to persons outside the U.S jurisdiction. The Court in its reasoning to find the applicability, relied on the notion of the US having jurisdiction over Guantanamo.

<sup>67</sup> Ibid.

<sup>68</sup> United States Constitution Article 1(9-2) : “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

viewed as the great writ which it is truly one of the most, if not the single most important part of the constitution which protects individuals rights.”<sup>69</sup>

Similar to Mcrae and Chemerinsky definition, Richard fallon and Daniel Meltzer, maintain that it is an instrument to check the unlawful arbitrary power of the executive that has long played an important role in protecting individual liberty to those detained by the executive without previous judicial involvement.<sup>70</sup> Trying to understand the war on terror and habeas corpus, like Mcrae, they refer to the case of Hamden V Rusfield,<sup>71</sup> to emphasize that the right to habeas corpus review, as held by the court is a fundamental guarantee to an individual which can not be dispensed with, irrespective of jurisdiction, providing further that detention without judicial involvement denied an individual his or her due process.<sup>72</sup>

I fully associate with the above definations for they are crystal clear in their commonality needing no dispute whatsoever even to the extent of the force it exerts that even in times of emergencies, such as the so called war on terror, the writ of habeas corpus or habeas corpus review cannot be suspended. Therefore for the purpose of this research habeas corpus shall be understood as an indispensable deep-seated principle used for protecting individuals civil liberties against whimsical and illegal governmental measures.

### 1.3.2.Right to Counsel.

One of the rights afforded to a defendant, accused or suspect by the criminal justice systems around the globe is the right to counsel, or as referred to other jurisdictions, right to legal aid and

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<sup>69</sup> Chemerisnky E. “Thinking about Habeaus Corpus”, Case Western Reserve Law Review 37, 1986.p 748-749.

<sup>70</sup> Fallon R and Meltzer D. “ Habeas corpus Jurisdiction, Substantive Rights, and the War on terror”, Harvard Law Review, Vol.120 No. 8 June 2007.

<sup>71</sup> Supra note.66

<sup>72</sup> Supra note 70

assistance or ‘equality of arms’.<sup>73</sup> The right to counsel has been held by the European Human Rights Court as a prerequisite to the presumption of innocence of an accused, and therefore, where there is an indigent defendant who can not afford to retain an attorney, the State or Court should at least be able to provide accordingly.<sup>74</sup> In some jurisdictions, such as the United States, the failure to provide counsel has resulted in automatic reversal of convictions.<sup>75</sup>

According to Ashworth, he asserts that, the rationale for the right to counsel in many jurisdictions and legal instruments is based on the powerful arguments that “since the questioning of the suspect relates to a possible criminal offence, there is a great deal at stake for the individual citizen and it is therefore appropriate that he or she should have the right to take legal advice.”<sup>76</sup> This argument could be challenged because it would be construed to infer that, where the defendants have committed minor offences they should not require legal advice. Ashworth clarifies his position by claiming, legal aid and the right to counsel has two justifications.<sup>77</sup> The first is that it would be unjust if the prosecution were represented by an attorney whilst the defendant was not and the second, it would be unjust to distinguish between poor and rich defendants, such that the latter could afford to retain whereas the latter were left unable to afford legal aid, and which may consequently impair the defendants defense, risking convictions of the innocent.<sup>78</sup>

Further discussion on this shall be provided in Chapter two, where it shall be given in detail however, the right, to counsel shall mean the opportunity granted to an accused, suspect or

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<sup>73</sup> Supra note 29.p 308:See also note 42. Ashworth p 28

<sup>74</sup> John Murray V United Kingdom, ECHR case No. 41/1994/488/570.

<sup>75</sup> Article III, Trial Right to Counsel, The Georgetown Law Journal Annual Review of Criminal Procedure, 36 Geo. L.J. Ann. Rev. Crim. Proc. 475

<sup>76</sup> Supra note.42.p. 29

<sup>77</sup> ibid

<sup>78</sup> ibid

defendant to use the services of freely chosen legal trained person in criminal matters and civil matters.

### 1.3.3. Right to Information.

This is a right provided under the various international human rights instruments which also has links with the right to be informed of charges brought against the accused,<sup>79</sup> right to know the evidence adduced against the accused,<sup>80</sup> the right to confront witnesses,<sup>81</sup> right to have proper facilities for the preparation of the accused defense<sup>82</sup> and the presumption of innocence.<sup>83</sup> All these rights are those guarantees that ensure the accused persons have fully enjoyed their right of fair trials. As discussed under the right to counsel and hearsay evidence, certain information is not privy to the accused based on reasons of national security, protection of public interests, order and so forth under administrative or preventative detention. Yet, no safeguards have been proposed in lieu, and in what conditions should they be applied.

### 1.4. Administrative Detention.

Lawful detention is provided by International Human Rights law, Humanitarian law and Constitutional provisions of various States. Under ECHR (Article 5), ICCPR (Article 9), ACHR (Article 7) and ACHPR (Article 6), detention may be used under compelling reasons such as law enforcement, public purposes (health, order) or as prescribed by law. Therefore in this war on terror, using arrest and detention as a measure grounded in reasons of public security may be

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<sup>79</sup> Supra note 29.

<sup>80</sup> *ibid.*

<sup>81</sup> *Ibid.* p. 314-315

<sup>82</sup> *Ibid.* p. 309-314:

<sup>83</sup> *Ibid.* p 302-307:



justified but subject to restrictions on arbitrariness, lengthy periods and ultimately judicial oversight.<sup>84</sup>

Use of administrative detention or preventative detention, provided by States enacted legislation to combat terrorism has become the trend of the day, justified with averments of inefficient and overprotective criminal systems.<sup>85</sup>

Of the same view above is Gross who puts forth the justifications for and against use of administrative detention by looking at the evidentiary point of view, and makes assertions, that most of the evidence and testimony that may be adduced in normal court in terrorist cases, may be rendered inadmissible on grounds of protecting national interests and security, hence the only option is to hold the suspect in administrative detention.<sup>86</sup>

Definition of Administration detention thus can be found in laws of various States especially those that have administration detention laws. Many scholars have put forward the definition of administrative detention which are in consensus with Rudolph's, who avows that administrative detention, "is the detention of an individual as a result of an administrative decree or an administrative proceeding, and not as a result of a conviction and sentence following an ordinary criminal trial court."<sup>87</sup>

Gross looking at the literal meaning of administrative detention as a detention carried out by an administrative power and not by a judicial power or authority maintains that it does not cover the

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<sup>84</sup>Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, Executive Summary, OEA/Ser.L/V/II.116, Doc.5 rev.1(22 October 2002), para 23,25.

<sup>85</sup> Supra note 4.

<sup>86</sup> Supra note 4.

<sup>87</sup> Rudolph H. "Security, Terrorism and Torture. Detainees' rights in south Africa and Israel: a comparative study". Juta & CO, LTD Cape Town 1984 p. 61

substance and actual nature of what it is.<sup>88</sup> He further brings different angle by stating that it is sometimes referred to as prevention detention a situation where a person is held without trial whose primary purpose is to prevent the detainees from committing offences in the future.<sup>89</sup> Waxman simply defines administrative detention to mean detention carried by the executive branch without criminal prosecution in courts.<sup>90</sup>

It's evident from the literature that there is a consensus on the definition of administrative detention and its key features being; orders made by the executive, confinement without trial, it's a preventative nature opposed to past- oriented nature, use of hearsay evidence and the obvious differences in application of due process rights from those provided by ordinary old fashioned criminal system. Interestingly enough, administrative detention is accepted by international law, which is authorized by administrative order rather than by judicial decree. Under international law, on deprivation of liberty, it is allowed under certain circumstances, the acceptability however is subject to limitations, only in context of serious emergencies that can not be averted by less harmful means.<sup>91</sup>

For the purpose of this study, and from the analysis of the general consensus on what it entails, administrative detention shall mean detention that is carried out without a charge or trial and which is authorized by an administrative order rather than by judicial order.

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<sup>88</sup> Supra note. 4

<sup>89</sup> Ibid. p. 752

<sup>90</sup> Waxman. M. "Administrative Detention Why Detain, and Detain Whom?" (March 19, 2009). Columbia Public Law Research Paper No. 08-190; Columbia Public Law Research Paper No. 08-190. Available at SSRN: <http://ssrn.com/abstract=1305267>;

<sup>91</sup> Alexander J.G. "The illusory Protection of Human Rights by National Courts During Emergency", Human Rights Law Journal vol 1 1984. p 2

## 1.5. Suspect

For the purpose of this study a suspect shall mean to be “a person believed to have committed a crime or an offence.”<sup>92</sup>

## 1.6. Hearsay Evidence

Murphy Peter propounds that the, “rule against hearsay evidence is one of the most important and commonly applied rules of the law evidence, and yet at the same time, the least understood by students, the profession, and the judiciary.”<sup>93</sup> Referring to Cross on Evidence, he provides the following definition:

“ It is evidence from any witness which consists of what another person stated (whether verbally, in writing, or by any other method of assertion such as gesture) on any prior occasion , is inadmissible if its only relevant purpose is to prove that any fact so stated by that person on that prior occasion is true. such a statement may, however, be admitted for any relevant purpose other than providing the truth of facts stated in it.”<sup>94</sup>

Emphasizing the reasons for the originating of the rule against hearsay in centuries-old judicial awareness, he relies on the words of Lord bridge of Harwich in the *case of Bastand*:

“The rationale of excluding (hearsay evidence) as inadmissible, rooted as it is in the system of trial by jury , is a recognition of the great difficulty, even more acute for a juror than for trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subjected to any test of reliability by cross examination”<sup>95</sup>.

Like Murphy, other scholars maintain the same reasons for prohibiting the use of hearsay evidence. Park Roger, expresses that the, “conventional explanation for the exclusion of hearsay

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<sup>92</sup>Garner. B. “Blacks Law Dictionary”, 7<sup>th</sup>ed, West Group USA 1999

<sup>93</sup> Murphy. P. “ Murphy on Evidence”, OxfordUniversity Press, 8<sup>th</sup> Edition, 2003. p 198-199.

<sup>94</sup>Ibid.

<sup>95</sup> Ibid. p. 201 Basland Case (1986) Ac 41 at 54

centers on the danger of admitting evidence that has not been tested for reliability, providing further that unlike court room witnesses, hearsay declarants have not been tested under oath, in the presence of the trier of fact, and subjected to cross examination.”<sup>96</sup> He extends his arguments against, by referring to cross examination as an exceptionally indispensable safeguard because of the chance it presents to test the credibility by exploring weakness in a declarants perception, narrative, sincerity and memory.<sup>97</sup>

Schuler Regina, providing on ‘expert evidence, the influence of secondhand information jurors decisions,’<sup>98</sup> provides the same disadvantages that ordinary witnesses may present and proceeds to affirm that despite the Canadian courts and America “finding solutions to the potential hearsay evidence, that is, providing triers of fact with cautionary limiting instructions that specify the permissible and impermissible ways in which the information may be used,” there is still the problem of ascertaining and contending those facts relied by the expert and not proved in evidence.<sup>99</sup>

In sum, despite the exceptions provided by various legal instruments in various jurisdictions as to the admissibility of hearsay evidence such as the death of an eye witness among others, the fact still remains, reliability will always be an issue. Finman Ted, avows, an averment to which I strongly support inter alia, that, “at the heart of the hearsay rule is the conviction that cross examination is,”<sup>100</sup> “the greatest legal engine ever invented for the discovery of

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<sup>96</sup> Park. R. “The Hearsay rule and the stability of Verdicts: A Response to Professor Neeson”, Minnesota Law review 1985.

<sup>97</sup> Ibid

<sup>98</sup> Schuler. R. “ Expert Evidence and hearsay, The Influence of “secondhand” Information on jurors’ decisions”, American Psychology-Law Society, law and Human Behaviour, Vol. 19, No. 4, 1995. P.345.

<sup>99</sup> Ibid. . p.348.

<sup>100</sup> Finman Ted, “Implied assertions as hearsay: Some Criticisms of the Uniform Rules of Evidence”, Stanford Law review, Vol.14 p.682.

truth.”<sup>101</sup>Therefore for the purpose of this research, hearsay evidence shall be understood as explicated by Murphy because it provides an extensive description and analysis of what it is, disadvantages and the arguments behind its proscription.

### 1.7. Sum Up

The literature reviewed under this chapter indicates an agreement in terms of definition of the key terms. It also shows the interlinks between terrorism, suspects and due process rights emphasizing that whilst it's acknowledged that acts of terrorism, “undermine fundamental human rights, jeopardizes the State, peaceful politics and threatens international peace and security,”<sup>102</sup>it is imperative that when addressing the crime of terrorism either through criminal prosecutions under ordinary criminal provisions or special antiterrorism laws, there should always be a constant adherence to the rule of law and fundamental human rights.<sup>103</sup>

The literature however identified gaps such as the lack of a universally accepted definition of terrorism and uncertainty of due process rights suspected terrorist should be provided or as Than puts it the “extent to which it is possible to regard terrorist suspects as having different or may be lesser human rights than other people.”<sup>104</sup>These are the knowledge gaps especially the due process guarantees for terrorist suspects, right to counsel, right to information, right of habeas corpus and hearsay evidence that the study seeks to fill and shall be further presented in chapter two and three respectively.

<sup>101</sup> .State V Eddon, Wash.292, 301,36 Pac.139,142(1894) in Finman. Ibid.

<sup>102</sup> Supra note 15 .p. 7

<sup>103</sup> Supra note 28. p. 323

<sup>104</sup> Supra note 16. p.252

## CHAPTER 2: IT IS A MESH: DUE PROCESS RIGHTS VERSUS TERRORISM.

### 2.1. Introduction.

September 11<sup>th</sup> 2001 attacks have been referred by many scholars as the most notorious and appalling carnage against humanity which ‘created a danger to human rights in multiple ways’.<sup>105</sup> Perhaps then it would not be erroneous to state the obvious that it was the triggering effect that brought about the beginning of the intensive war on terror, a war that has been directed at protecting the lives of many as well as the debate on due process rights vis –a- vis terrorist suspects. Seibert –Fohr states that “since terrorism causes a serious threat to the life of numerous individuals that State officials are aware of, it is not difficult to argue that the States are under an obligation to combat terrorism in their territories in order to prevent future casualties.”<sup>106</sup> In line with Seibert –Fohr averments, international human rights and humanitarian treaties recognize States have the discretion, margin of appreciation, of making decisions that are aimed at protecting the lives of their people in accordance with fundamental human rights principles.<sup>107</sup>

Whilst some of the measures adopted by States are pro-human rights some however are not, and their usage have been based on grounds of protecting and promoting national security.<sup>108</sup> Nonetheless, criminal prosecution of terrorists, use of administrative detention, incommunicado detention without habeas corpus, tightened immigration laws, electronic surveillance without court order, extraordinary rendition and use of military tribunals and

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<sup>105</sup> Supra note 78 p 126

<sup>106</sup> Ibid. p 133

<sup>107</sup> European Court of Human rights judgment of *Kaya v turkey* of 28 march 200, appl. No. 22535/93, ECHR 2000-III, para 85. The Court held that “Duty on the State to secure the Right to Life by putting in place effective criminal law provisions to deter the commission of offences”.

<sup>108</sup> United Nations General Assembly, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin. Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight. Fourteenth session Human Rights council A/HRC/14/46.

specialized courts are just but some of the examples of the tactics that the States are or have adopted in protecting the lives of their citizens.<sup>109</sup>

Albeit as stated above and despite the discretion given to States, the discretion is subject to adherence and upholding of human rights as expected of democratic States that observe the rule of law. Consequently, in dealing with criminal prosecutions or terrorism cases, States are not only supposed to provide a remedy to the injured party but also required to ensure that the accused fundamental due process rights are respected.<sup>110</sup>

For the above reasons and in view of the fact that the discourse surrounding combating terrorism has to do with investigations, arrest trial and detentions of civilians considered as suspects, it inevitably has a bearing on the concept of due process rights. The purpose of this chapter therefore is to make that assessment in the specific case of suspected terrorists in administrative detention. The chapter will first establish the relationship between the two and thereafter look those specific due process guarantees that I believe are in contention and forms the basis of these research, that is, nature of evidence, right to information, right to counsel and habeas Corpus proceedings.

## 2.2. Due Process Rights

The definition of what due process right entails has already been introduced in chapter one as a principle that embraces all aspects of fairness, whose purpose is to ensure that justice administration is done and which forms the very basis of criminal procedure in the international and national criminal systems, applicable in times of peace or emergencies.<sup>111</sup> Emergencies such as wars have consequences not only on the political economic, social spheres of life but also on

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<sup>109</sup> Supra note.3.p.3

<sup>110</sup> As provide by various human rights treaties despite providing for margin of appreciation to States.

<sup>111</sup> Supra note. 28. p 323-324

the fundamental human rights, and as such not only are the judicial structures weakened but also those guarantees protected judicially. An interlink many a times negative i must maintain, ensues between administration of justice and the need to protect, preserve and promote peace and security. A perfect example is the on going war on terror, and the acts of balancing State rights against individuals rights which have become the norm, with rights of individuals always becoming the lesser evil, easily disregarded without any legal review or oversight in pretext of national security. This assertion, which i sadly believe to be factual is supported by Aolain analysis of problems caused by legal regulation of terrorism, challenges faced by States and how these conflicts have an effect on an individual access to justice.<sup>112</sup> Those guarantees of interest to this research are discussed below.

### 2.2.1. Habeas Corpus

Habeas corpus goes hand in hand with arrest, investigations and detention of individuals as provided in chapter one. Though not provided specifically as one of the due process rights in any legal instrument, it is considered as one of the fundamental safe guards accorded to individuals detained as suspects either through improper judicial involvement and arbitrary arrest and detentions and which is non-derogable.<sup>113</sup> Habeas corpus therefore is relevant to this research based on the fact that, States have a prosecutorial duty.<sup>114</sup> The possibility of the State to abuse its powers can not be excluded especially with the war on terror, illustrated by the Guantanamo bay suspects. Habeas corpus is a safeguard against arbitrary State power as posited by Chemerinsky

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<sup>112</sup> Supra note. 26

<sup>113</sup> Inter American Court of Human Rights Advisory Opinion OC-9/87 on Judicial Guarantees in States of Emergency (6 October 1987) where it stated that, "the right to habeas corpus or Amparo, and other effective remedies before a tribunal to guarantee the respect for non-suspendable conventional rights are essential judicial guarantees which are not subject to derogation according to article 27(2) of the Convention." See In Seibert-Fohr. A Supra note. 60. p. 157.

<sup>114</sup> United Nations General Assembly, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin. Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight. Fourteenth session Human Rights council A/HRC/14/46.



Erwin and many other scholars discussed in chapter one.”<sup>115</sup> In my opinion, even if scholars such as those discussed refer to habeas corpus according to their countries legislation provisions, it cannot be contested that it is not provided world wide in various constitutions, emphasizing that it indeed protects individuals liberty from any form of arbitrariness

Judicial systems have taken a very strong position on the restriction or suspension of the writ of habeas corpus by the executive arm as stipulated by the constitutions and like various scholars have maintained its ferociousness in protecting individual liberty. Administrative detention or preventative detentions have been used to detain terrorist suspects for longer periods without subjecting those suspects to prior judicial involvement. For example in the United States case of *Boumediene case* majority of the Court, in the opinion written by Justice Kennedy, provided that all detainees at Guantanamo bay have a constitutional right of habeas corpus review of their detention, finding that section 7 of the Military Commissions Act of 2006 in contention to be unconstitutional and Combatant Status review tribunal proceedings inadequate as substitute for habeas review.<sup>116</sup>

The Human Rights Committee similar to the jurisprudence around the world holds that there are absolute limits to anti-terrorism measures such as administrative detention, incommunicado detention and so forth.<sup>117</sup> It has time and again reiterated in its interpretation of the ICCPR that, detainees may never be dispossessed of the right to habeas corpus review.<sup>118</sup> For instance, In its concluding report on Peru, the Committee pointed out that increased intervals of preventative detention of alleged terrorists without judicial review raise grave issues with regard to liberty

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<sup>115</sup> Supra note. 70

<sup>116</sup> Supra note 62. p. 5. Lakhdar Boumediene et al, V George Bush , former President of the United States, et al on writs of Certiorari to the United States Court of Appeals For the District of Colombia Circuit (June 12, 2008).

<sup>117</sup> .Supra Note 60. P. 147

<sup>118</sup> .Ibid

under the ICCPR,<sup>119</sup> and in the concluding remarks on the United Kingdom and Northern Ireland in 2001, the Committee condemned the British practice of protracted preventative detention of foreigners based on grounds that they pose a threat to national security, yet they can not be deported for it would be in conflict with the principles in the ICCPR.<sup>120</sup>

The Strasbourg Court approaching the position of the courts in *Boumediene case* and Human rights Committee in the case of *Chahal V Uk*, pointed out that deprivation of liberty under the provision of detention for reasons of deportation or extradition may be justified in so far as deportation proceedings are underway, but if they are not, and due diligence is not exercised, the detention is not permissible.<sup>121</sup> In *Al-nashif V Bulgaria*, the Court criticized Bulgarian authorities' practices of holding foreign nationals incommunicado without judicial review and access to a lawyer on grounds of national security.<sup>122</sup>

It's evident that applicability of habeas corpus is universally accepted, however many States have employed means such as administrative detention to circumvent its applicability and accessibility by terrorist suspects.<sup>123</sup> The United Kingdom after the observations of the Committee and the European Court of Human Rights decision, derogated from Article 9 restricting arbitrary arrest and detention of persons leaving room for interpretation that for them prevention detention is justified without judicial review, and of recent under their control orders<sup>124</sup> Such derogations and usage of preventative detention according to me leaves one to wonder

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<sup>119</sup> United Nations Human Rights committee concluding observations on Peru, UN Doc. A/51/40 (25 July 1996) para 356.

<sup>120</sup> United Nations Human Rights Committee Concluding Observations on the United Kingdom and Northern Ireland report, UN Doc. CCPR/CO/73/UK; CCPR/Co/73/UKOT (6 December 2001) para.6

<sup>121</sup> *Chahal V United Kingdom*, Judgment of 15 November 1996 in Supra Note. 60. p.147

<sup>122</sup> *Al-Nashif V Bulgaria* (Application 50963/99) Judgment of 20 June 2002.

<sup>123</sup> Supra note 60. p. 149

<sup>124</sup> Ibid.p.148

how different the end result would be, from that of the criminal system which provides imprisonment as punishment, If the end result is detention, then why not guarantee due process?.

### 2.2.2. Right to counsel.

As provided in Chapter one, it means the opportunity granted to an accused, suspect or defendant to use the services of a freely chosen legal trained person in criminal and civil matters.<sup>125</sup> The right to counsel accordingly attaches at critical stages of a criminal prosecution equally to terrorism prosecutions. Though provided for, it is not absolute and can be waived by the defendant, but in many jurisdictions where criminal charges against the defendant are felonies, the defendant is cautioned and sometimes the court advises the retaining of a lawyer for counsel purposes.<sup>126</sup>

The right to counsel has come under focus in this era of global war on terror. The focus however has not been on its curtailment rather than its observance. Since it is not absolute, States have used their discretion to circumvent its enjoyment by detaining terrorist suspects with reasons of safeguarding confidential information, sources and generally protecting national security interests.<sup>127</sup>

According to Gross, the consequences that flow from the protection of confidential information, constitutes the continuous holding of the suspect in administrative detention or to set him free the latter hardly exercised, because justification for administrative detention is founded on the idea of a person being the lesser of the two possible evils, thus protection of society and release of a

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<sup>125</sup>Supra note 29. p.308

<sup>126</sup> Article III, Trial Right to Counsel, The Georgetown Law Journal Annual Review of Criminal Procedure, 36 Geo. L.J. Ann. Rev. Crim. Proc. 475

<sup>127</sup> Supra note. 4.

suspect is weighed side by side.<sup>128</sup> They have however provided other means such as use of special advocates,<sup>129</sup> use of a judge acting as an advocate, to evaluate the supposedly confidential evidence.

In an adversarial criminal system, which most jurisdictions in the world follow, cross-examinations of witnesses and discovery of evidence are tenets that ensure the accused prepares and provides a defense, meaning therefore that the State will be forced to reveal information in their possession to the defendant.<sup>130</sup> However as discussed, this is nearly next to impossible in the majority of cases concerning terrorism. In the case of *Rowe Davis V United Kingdom*, “the court explained that the entitlement to disclosure of relevant evidence was not an absolute right and that national security concerns had to be weighed against the rights of the accused.”<sup>131</sup>

The same position was reached at in the United Kingdom the *A case* as provided above under the Hearsay subsection. In a subsequent *case of RE MB*, concerning questions whether terrorist suspects subjected to UK control orders were given fair trial, considering the evidence used against the defendant was not provided, a violation of Article 6(10) of the ECHR was found thereby quashing the control order.<sup>132</sup> However on appeal by the Secretary of State to the Court of appeal, the appeal was upheld and in so doing Justice Phillips stated:

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<sup>128</sup> Ibid.

<sup>129</sup> Special Advocates according to Brown Jagers, a definition adopted by this research” means, those advocates vetted by the Attorney General, to represent the interests of defendants during closed hearings. They may see restricted documents, however once they have done so they may not take instructions from their Clients, do not have access to a full legal team and cannot call witnesses.” In Jagers. B, “Anti-terrorism Control Orders in Australia and the United Kingdom: A comparison” Law and Bills Digest section, Parliament of Australia, Department of Parliamentary Services, Parliamentary Library Research paper of 29 April 2008, no. 28,2007-08, ISSN, 1834-9854. p 15

<sup>130</sup> Article III, Trial Right to Counsel, The Georgetown Law Journal Annual Review of Criminal Procedure, 36 Geo. L.J. Ann. Rev. Crim. Proc. 475

<sup>131</sup> Supra note.60. p. 152

<sup>132</sup> Jagers . B, “Anti-terrorism Control Orders in Australia and the United Kingdom: A comparison” Law and Bills Digest section, Parliament of Australia, Department of Parliamentary Services, Parliamentary Library Research

“... the Secretary of State would be in the invidious position of choosing between disclosing information which would be damaging to security operations against terrorists, or refraining from imposing restrictions on a terrorist suspect which appear necessary in order to protect members of the public from the risk of terrorism.”<sup>133</sup>

MB subsequently appealed to the House of Lords on the fair trial point to which he argued that the control trials constituted criminal proceedings hence, criminal fair trial procedures should have applied.<sup>134</sup> The House of Lords “rejected the criminal proceedings arguments but found that civil fair trial guarantees were breached by the lack of information provided to the defendants, and the use of special advocates by the Court did not provide sufficient procedural justice.”<sup>135</sup> According to Jaggars, the case was referred back to High court for further consideration but to which nothing has been done so far.<sup>136</sup>

From the foregoing, there are questions to be raised such as, who and how can the suspect be represented efficiently if he can not choose counsel and can not be asked by a special advocate on issues pertinent to his case because of protecting governmental interest?. And who has the last oversight of the special advocate or judge considering International law and Constitutional norms require judges to be impartial, because the outcome of a just and fair trial also depends on his impartiality?.

### 2.2.3. Right to Information.

This is a right provided under the various international human rights instruments which interconnects with other rights with the aim of ensuring that accused persons enjoy fully their

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paper of 29 April 2008, no. 28,2007-08, ISSN, 1834-9854. p 15. Re: MB92006) EWHC 1000(Admin) , 12 April 2006, in

<sup>133</sup> Ibid.

<sup>134</sup> Ibid

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

due process guarantees as presented in chapter one. As discussed under the right to counsel and hearsay evidence, certain information is not privy to the accused based on reasons of national security, protection of public interests, order and so forth under administrative or preventative detention.

The Straousbourg court, whilst on one hand consider the right to information as an essential guarantee to a fair trial and emphasizes that, “the prosecuting authorities should disclose to the defense all material evidence in their possession for or against the accused”,<sup>137</sup> it on the other hand holds that:

The entitlement to disclosure of all relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigating crime, which must be weighed against the rights of an accused. In some cases it may be necessary to withhold certain evidence from the defense so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defense which are strictly necessary are permissible under Article 6(10). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to defense by limitation of its rights must be sufficiently counter balanced by the procedures followed by the judicial authorities.<sup>138</sup>

Equivalent to the Courts standpoint is Gross observation of the Israeli administrative detention system, in which he provides that the administrative law of Israel guarantees that the suspect is told of the charges against him, reasons of detention be provided with legal advice and he must be present in the court, but goes forth to say to the contrary, security reasons may preclude disclosing or informing the detainee suspect of his or her rights.<sup>139</sup>

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<sup>137</sup> Edwards V U.K. (1992) 15. E.H.R.R. 417 para 36 and also Rowe and Davis V Uk. 200 para 3 See Ashworth A. Supra note 42. p. 32

<sup>138</sup> Rowe and Davis V UK. 200 para 3, See Ashworth A. Supra note 42. . p.32-33.

<sup>139</sup> Supra note.60. p. 152

Therefore, with no chance of knowing the evidence against him, it is nearly impossible for the accused to prepare an effective defense. Even if counterbalancing procedures are adopted, in my opinion, a challenge that shall always remain is who has oversight of the judge advocate or the special advocate. I could not agree more with Lord Bingham in the *MB Case* where he posited as follows:

This is not a case ... in which the order can be justified on the strength of the open material alone. Nor is it a case in which the thrust of the case against the controlled person has been effectively conveyed to him by way of summary, redacted documents or anonymised statements. It is a case in which, on the judge's assessment which the Court of Appeal did not displace, MB was confronted by a bare, unsubstantiated assertion which he could do no more than deny. I have difficulty in accepting that MB has enjoyed a substantial measure of procedural justice, or that the very essence of the right to a fair hearing has not been impaired.<sup>140</sup>

Clearly i believe its shown above that those minimum guarantees already guaranteed in various constitutions and treaties, may be restricted and as provided in the various judicial jurisprudence, as long as there are counterbalancing mechanisms, restrictions may be legitimate. However, the questions that these positions leave are whether these counterbalancing measures are constitutionally and convention friendly. In addition since there are no concrete answers to their compatibility and in addition, i would ask the mantra question, who has the last oversight on the judge and special advocate?.

### 2.3. Nature of Evidence: hearsay Evidence.

In any criminal proceeding i believe it is entirely the responsibility of the prosecuting authorities to prove the commission or the omission of an act beyond reasonable doubt relying on credible evidence save for those circumstances when the burden to proof is placed on the defendant. In

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<sup>140</sup> Re: MB (2006) EWHC 1000(Admin), 12 April 2006, in Jaggers. B, "Anti-terrorism Control Orders in Australia and the United Kingdom: A comparison" Law and Bills Digest section, Parliament of Australia, Department of Parliamentary Services, Parliamentary Library Research paper of 29 April 2008, no. 28,2007-08, ISSN, 1834-9854.

addition i understand that, the use of hearsay evidence in any jurisdiction since time immemorial has been forbidden except in exceptional circumstances, and even in those circumstances, collaborating evidence has been required in support. These principles apply to any defendant irrespective of the crime committed, including suspected terrorists. According to Setty analysis, she observes that, “constitutional guarantees on Criminal trials in many jurisdictions such as the United States, require among other things that obligations that the government proves its case beyond reasonable doubt before conviction, that admissible evidence conform to the applicable evidentiary rules, the right to discovery of relevant evidence in the governments possession and exculpatory evidence be turned over to the defendant.”<sup>141</sup> She further affirms that these have been taken as short comings by critics who fear that, relying on such guarantees shall afford too much protection to suspected and accused terrorists, posing the risk of inefficiently combating the war on terror, thereby justifying the use of hearsay evidence to avoid the risk of revealing sensitive or classified information that could also endanger national security interests.<sup>142</sup>

Its common knowledge within the legal field and perhaps others that Courts initial duty is to protect fundamental human rights and freedoms in the course of administering justice and in addition, their judicial decisions inform or provide strong strictures which act as guides to either policies, practices and procedures. That having been said, i have no doubt that i am not being hasty in concluding that, even in this war on terror, their judgements especially on liberty and due process guarantees among others have an impact on those governmental decisions pursued to address the stated war.

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<sup>141</sup> Supra note 3. p3

<sup>142</sup> Ibid.



Therefore, getting back to their role in determining the admission of evidence against terrorist suspects, especially hearsay evidence, majority of the courts have been less restrictive in their admissibility by accepting arguments of national interests contrary to the defendants rights to evaluate evidence against him and confront witnesses. Instead they have provided that the use of special advocates and judges are better substitute in redressing this gap. My averment at this point would be that this may not only be prejudicial to the defendants generally, but the judges biasness and lack of the advocating sharing information with the defendant may never be redressed.

For instance, in the *Case of AB V Israel*, the Israeli Supreme Court sitting as a Court of criminal appeals had to determine, the interpretation of the provisions of Unlawful combatants law, whether the arrangements provided in the law were constitutional, to what extent the law was consistent with International Humanitarian Law and the use of confidential information against the appellants leading to their deprivation of their liberty.<sup>143</sup> It reasoned that , “it is a fact that administrative detention is an unusual and extreme measure, and that in view of the fact that it violates the constitutional right to personal liberty, the State is required to prove with clear and convincing evidence, that the conditions of the definition of unlawful combatant under the Israel law are satisfied and that the conditions of the detention is essential.”<sup>144</sup>

It went further to emphasize that, “utmost importance should be placed on the quantity and quality of the evidence against the detainee and to the extent the relevant intelligence information is up to date.”<sup>145</sup> Despite this position the Court did not stipulate in clarity the prohibition thereof

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<sup>143</sup> A & B .V. The State of Israel Crim Appeals 6659/06, Criminal Appeal 1757/07, Criminal Appeal 8228 and Criminal Appeal 3261/08, SCCA. Para. 22 and 24

<sup>144</sup> Ibid

<sup>145</sup> Ibid

of admitting hearsay evidence or confidential but rather left doubts by making pronouncements such as, “the use of administrative detention is justified in circumstances where other measures, including the holding of a criminal trial are not possible, because of a lack of sufficient admissible evidence or because it is impossible to disclose privileged sources.”<sup>146</sup>

Another example can be drawn from the United Kingdom in the case of the case of *A. and others V. The United Kingdom*,<sup>147</sup> In this case the applicants detained terrorist suspects brought claims against the UK before the Strasbourg Court for breach of their Article 5(1-4-5) together with Article 13 and Article 6 (1&2) of the Convention. Alleging that their detention was unlawful, denied the fair trial before an impartial tribunal by law by being tried by special tribunal and denied access to information, information privy to special advocates appointed by the government and confidential information assessed by a trial judge, the Court found no violation of Article 5 (1) in respect of some applicants, a violation of Article 5 (4) of some applicants, Article 5(5) inadmissible and no violation of Article 6 if read together with article 5(4) and further on the basis of the examination of the special courts.

In reaching a decision of no violation on fair trial rights, the Court reasoned that there are circumstances that may necessitate the curtailing of the use of the adversarial system in criminal trials, especially in light of a strong countervailing public interest such as national security, the need to keep police methods of investigations or the protection of the fundamental rights of another person.<sup>148</sup> On disclosure of material evidence, the court reiterated the necessity of withholding information on public interests but subject to counterbalancing techniques, special

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<sup>146</sup> Supra note 4.p.762

<sup>147</sup> Supra note 3. pp.6-7.

<sup>148</sup> Ibid.

advocate and judge and omitted to maintain whether these counterbalancing measures are compatible with the conventions rights, article 5(4) and 6 respectively.

The US decisions are not any different from those of United kingdom and Israel as shown by the cases like *Hamdi V Rumsfield* where the Supreme Court held that, hearsay for example may be accepted as the most reliable evidence from the government in such proceedings, likewise the Constitution will not be offended by a presumption in favor of the Governments evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.”<sup>149</sup>

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<sup>149</sup>Supra note 62. p.2. Yasser Esam Hamdi and Esam Fouad Hamdi as next of Friend of Yaser Esam Hamdi V. Donald H. Rumsfield, Secretary of Defense, et al, on Writ of certiorari to the United States Court of Appeals for the Fourth Circuit( June 28, 2004).

## CHAPTER 3: INTERNATIONALLY RECOGNISED PRINCIPLES OF CRIMINAL JUSTICE UNDER INTERNATIONAL LEGAL INSTRUMENTS: DUE PROCESS RIGHTS

### 3.1. Introduction.

I believe this research would not be comprehensive if due process guarantees were to be discussed without taking a brief look at some international, regional human rights and humanitarian legislations that specify them out. The justification lies within their overall framework that sets threshold for various minimum guarantees for various practices and procedures when dealing with human rights protection. Accordingly while they provide the same general minimum standards applicable to accused persons whether in deprivation of liberty or during trials, nevertheless make no classification of those accused persons nor define accused or suspected persons. In my opinion this omission may have contributed to the vast definition of suspected terrorists by States legislation leading to different standards of application of due process rights. Be it as it may, their provisions have great relevance because without them, the situation of most suspected terrorists would be dreadful, or the lack of pointing to some minimum guarantees recognized to be applicable across the board. Therefore, this chapter shall try to look into these treaties with focus on suspected terrorists and due guarantees.

### 3.2. The International covenant on Civil and Political Rights.

The ICCPR is one of the bill of rights relied upon by the international community as a basis on one hand of obligating States to punish violators of human rights and the other affording protection to suspects from arbitrary powers of States through the minimum guarantees therein. Even though it does not outline specific measures that should be emulated to punish the perpetrators, the meaning of the Covenant has been elaborated by the Human Rights Committee,

individual communication system, reporting system and a number of general comments.<sup>150</sup> The Human Rights Committee has been in the fore front of ensuring that even due process rights are being observed by States as illustrated through its continuous condemnation of terrorist activities and provision of strong recommendations to State parties to combat terrorism in order to protect fundamental human rights.<sup>151</sup> According to Seibert –Fohr, he observes that the Human Rights Committee’s powers “derives from the protect and ensure provision a duty of the State parties to take measures to criminally punish deprivation of life”.<sup>152</sup>

Notwithstanding this standpoint, the Committee advocates for the adherence of human rights in whichever situation, including the process of arrest, detention and prosecution of terrorist suspects, emphasizing that certain limitations should be taken into consideration during their prosecution.<sup>153</sup> The committee’s observation on the right to fair trials in respect of conducting fair trials for terrorist suspects, have been that, they should be conducted in civilian courts,<sup>154</sup> and if military courts were to be used to try these civilians, they should be done in exceptional circumstances taking place under circumstances which authentically offer the full attainment of the guarantees stipulated in article 14 of the ICCPR.<sup>155</sup> General comment No 32, replacing Comment No.13, on Article 14, the Committee emphatically provided for the respect of accused

<sup>150</sup>Supra note 60 p.. 306 Qouted in Frowein. J. A. et’ al, “Max Plank Year book of United Nations Law”, Vol.6, 2002, 301-344, Kluwer Law International, Netherlands.2002.

<sup>151</sup>United Nations Human Rights Committee, General Comment No. 6 on Article 6 (1982) para, 3 in HRI/GEN/1/Rev.5/add.1 (18 April 2002). An illustration of its position is evidenced by its stance on the Northern Ireland murders caused by terrorist activities in 2001 in which it stressed the importance of prosecuting the persons responsible.

<sup>152</sup> Supra note 60. Qouted in Frowein Supra note 150 p. 301-344

<sup>153</sup> Supra note 60. p. 137. For instance such limitations are , protecting the right to life, deprivation of liberty without probable cause, arbitrary arrest and detention, right to fair trial, non-refoulment and prohibition of torture.

<sup>154</sup> Fals Borda V Colombia Communication No. 46/1979(27<sup>th</sup> July 1982) in which the Committee provided that “trials of non military persons should be conducted in civilian courts before an independent and impartial judiciary”. See also UN Doc. CCPR/CO/76/EGY(28<sup>th</sup> November 2002) in which the committee’s concluding remarks observed with dismay that Egyptian military courts had jurisdiction to try civilians accused of terrorism although there were no guarantees of the courts independence and no recourse to appeal before a higher court as provided under Article 14 (5).

<sup>155</sup> General comment No. 13 on article 14, para 4 (1984)in : HRI/GEN/1/REV.5/Add(18t April 2002):

rights either under civil or criminal prosecution.<sup>156</sup> Stressing on the importance of providing equality of arms, respecting the right to counsel throughout the criminal proceedings, right to examine witnesses, disclosure of material, undue delay presentation to an impartial tribunal or court of law, the Committee provided that these guarantees among others in Article 14, ‘must be respected by State parties regardless of their legal traditions and their domestic laws’.<sup>157</sup>

Seibert-fohr, supports the Committees view point by observing that “ the duty to prosecute should not be misunderstood as providing States with a pretext for unrestricted prosecution of human rights but needs to be read in context , for the duty to prosecute finds a counterbalance in the human rights of suspects.”<sup>158</sup>. In reference to the Northern Ireland-united kingdom situation, the Committee caution to the States was that they should not extend the current fight against terrorism to measures which conflict with the rights protected under the ICCPR.<sup>159</sup> Similar standpoint was directed to New Zealand, Sweden ,Moldavia, Yemen and many other countries with emphasis on them where the giving effect to their obligations to combat terrorism pursuant to security council resolution 1373, and their in full compliance with the provisions of the covenant.”<sup>160</sup>

Finally, in General comment No 29, the Committee making observations on derogation from the Covenant obligations during times of public emergencies, categorically provided that, even in

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<sup>156</sup>United Nations, Human Rights Committee, General Comment NO.32, “Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial” CCPR/C/GC/32/ of 23 August 2007.para 1: [http://www.ccprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.GC.32\\_En.pdf](http://www.ccprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.GC.32_En.pdf)

<sup>157</sup> Ibid

<sup>158</sup> Supra note 60. p.138

<sup>159</sup> Supra note 151

<sup>160</sup> UN Doc. CCPR/CO/73/UK: CCPR/ CO/73/ UKOT96th December 2001) para .6

such times, there are certain obligations that must not be derogated like those found under Article 14, fair trial rights.<sup>161</sup>

### 3.3. Regional Treaties.

#### 3.3.1. European Convention on Human Rights.

Similar to the Human Rights Committee functions under the ICCPR, Strasbourg court is fundamental in ensuring that the rights provided in the Convention are promoted and respected by the States parties according to the Covenant and responsibility they bound themselves under Article 1 and 2.<sup>162</sup> It has maintained in its case law that the Convention is a living instrument which needs to be interpreted as such, and that the relationship between its jurisdiction and those of the national courts of the State parties is that of a subsidiary nature.<sup>163</sup> However, through its jurisprudence such as that in *Pretty V Uk* it has emphasized that besides the subsidiary relationship and the margin of appreciation accorded to States, the last oversight lies within its reach.<sup>164</sup> Therefore from the foregoing, if those due process guarantees provided under Article 5

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<sup>161</sup> United Nations, Human Rights Committee, General Comment NO.29, "States of Emergency Article 4", CCPR/C/21/REV.1/Add.1 of 31 August 2001, para 16:

[http://www.cccprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.21.Rev1.Add11\\_%28GC29%29\\_En.pdf](http://www.cccprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.21.Rev1.Add11_%28GC29%29_En.pdf):

"Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant".

<sup>162</sup> Yourow, H. C. "The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence", Martinus Nijhoff Publishers 1996, p 1-2.

<sup>163</sup> Ibid

<sup>164</sup> *Pretty V United Kingdom*, 2002-III Eur. Ct. H.R. 155, 185 in Wada, E, "A Pretty Picture: the Margin of Appreciation and the Right to Assisted Suicide", *Loyola of Los Angeles and Comparative Law Review*, 2005, p. 275-276

and 6 are infringed, and there is no remedy provided to the victim or suspect, the court is bound to make a ruling whether there has been a violation.<sup>165</sup>

The question to be ascertained then is how the court has dealt with terrorism cases especially those complaints brought under Article 5 and 6 rights and I must limit them to those involving the research areas. Adjudicating over terrorism cases has not been an easy task for the court according to my opinion, however it's been the platform where it has condemned terrorist acts and infringement of suspected terrorist rights, reiterating the importance of prosecuting terrorist criminals but at the same time emphasizing conformity with the norms of the convention.<sup>166</sup>

The Court has in a number of cases granted wide discretion to State parties even where there are or have been apparent non-conformity with the conventions norms based on the wide margin of appreciation.<sup>167</sup> An example of this assertion is the case of *Klass V Germany*, where the court while cautioning the government on adopting whatever measures they deemed fit to fight terrorism, accepted arguments that, certain measures are necessary to fight terrorism based on State security and held that, "the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security/and /or for the prevention of disorder or crime"<sup>168</sup>.

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<sup>165</sup> Supra note 162. p.22.

<sup>166</sup> A. And Others V The United Kingdom, Application No 3455/05 Judgment of 19 February 2009. In Supra note 3. pp. 6-7

<sup>167</sup> Supra note 162. p. 193.

<sup>168</sup> *Klass v Germany* (1979-80) 2 EHRR 214, 6 September 1978, is a case involving applicants challenging a specific Germany law allowing interception and surveillance of mail of individuals suspected undertaken with the authorization of the relevant minister and overseen by a judicial officer as having violated their Article 8 right. The government in rejecting the applicant's submissions argued before court that such powers, procedures were necessary in a democratic State that was fighting terrorism and espionage.



The above holding does not mean however that the court cannot or has not made rulings to the contrary as illustrated in *Fox, Campbell and Hartley V Uk* involving use of secret evidence against suspected terrorist.<sup>169</sup> In the case of *Brogan V Uk* the court found in favor of the four applicants whose rights under Article 5(3) for failure of the relevant UK authority to adduce them promptly before court.<sup>170</sup> It held that to allow detention of four days or even longer in terrorist cases, “would import into Article 5(3) a serious weakening of the procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by that provision....the undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5(3).”<sup>171</sup>

Assertions of the ineffectiveness of the criminal system to adjudicate over matters of terrorism held by some scholars can unfortunately be justified further by the Courts jurisprudence when it hold that its a special kind of crime needing speacial treatment.<sup>172</sup> In addition, the Court jurisprudence on balancing national interest and those of the individual rights which according too Ashworth Andrew are scattered and which i affirm forms another basis.<sup>173</sup> According to him, by looking at the British interpretation of the Courts jurisprudence on Article 6, believes that the

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<sup>169</sup> Fox, Campbell and Hartley V UK, (Application No. 12244/86) Judgment of 30August 1990: This Case involved the use of police powers to arrest persons suspected of being terrorists. The Court in this case noted that there maybe instances where secret evidence or secret sources may be used by the police in arresting suspected terrorists but emphasized that reasonableness should always be applied. It noted that” the exigencies of dealing with terrorist crime cannot justify stretching the notion of ‘reasonableness to the point where the essence of the safeguard secret by article 5(1-c) is impaired .

<sup>170</sup> Brogan V Uk (Application No; 11386/85) Judgment of 29 November 1988 in Ashworth A. “Human Rights, Serious Crimes and Criminal Procedure”, The Hamlyn Trust, Sweet & Maxwell 2002. p54

<sup>171</sup> Ibid.

<sup>172</sup> Brannigan & McBride v UK 1993 17 EHRR 539 paras 59-65 : See also in Ashworth A Supra note. 42. p55.

<sup>173</sup> Supra note 42. p. 63

British legal system have taken the position that balancing rights in Article 6 can be done, by deducing the ‘over broad statements’ made by the Court in relation to State security.<sup>174</sup>

In sum therefore, despite the court condemnation of terrorism, narrowing the margin of appreciation in certain instances and allowing for some special limitations to rights under the Convention such as Article 5 and 6, it creates gaps by failing to mention concrete procedural safeguards for this special crime leaving room for various interpretations and application of its decisions.

### 3.3.2. European Union Legislations.

Besides the ECHR that obliges State parties in the Council of Europe to respect and uphold fundamental human rights and freedoms, the European Union Treaties, obligates State parties to uphold fundamental Human rights and rule of law among the State parties with ECJ making interpretations thereof.<sup>175</sup> Accordingly, observance of due process is one principle under the rule of law objectives and to which the EU can be seen to be tackling within their Counter-terrorism policies.<sup>176</sup> Guild States that EU became an important security actor after 11<sup>th</sup> September 2001 attacks on the US both within the member States and outside the territory of the EU.<sup>177</sup> Discussing on the abuse of the terrorist lists as sanctioned by the security council and adopted by the EU legislators, he points out that there are three key requirements that Court of

<sup>174</sup> Salabaiku V France (Application No: 10519/83) Judgment of 7 October 1988 in Ashworth A. Supra note 42. p. 64.

<sup>175</sup> Allot .P “Fundamental Rights in the EU”, The Cambridge Law Press, The Cambridge Law Journal, Vol. 55 .No.3 (Nov. 1996) p 411.

<sup>176</sup> Alegre. S. “The EU’s External Cooperation in Criminal Justice and Counter –Terrorism: An Assessment of the Human Rights Implications with a Focus on Cooperation with Canada”. Centre For European Studies Centre. 2008: <http://www.ceps.eu> p. 1-4

<sup>177</sup> Guild. E. “The Uses and Abuses of Counter-Terrorism Policies in Europe: The case of the terrorist List” Journal of common Market studies, Vol. 46, No.1 January 2008.p. 174.

First Instance of the European Communities(CFI) are supposed to apply to those individuals or groups classified under the terrorist list.<sup>178</sup>

These Key requirements include the right to fair hearing, the obligation to state reasons and the right to effective judicial protection.<sup>179</sup> Pertaining to fair hearing, he states that the CFI maintains that an individual should be given ample time to prepare his defense, view evidence against him and be accorded ample time to submit his views, upholding the CFI rejection of the EU council and the UK government's submissions that such rules apply to penal and not to administrative matters such as administrative procedures used by a number of EU member States to deal with terrorists.<sup>180</sup> Further, he observes that coercive sanctions are applied via administrative law rather administrative law which makes the distinction and which is important but, according the CFI it believes, "it is the exercise by the State of its power to punish that gives rise to the individual to a fair hearing, not the categorization by the State of the proceedings as civil, administrative or penal."<sup>181</sup>

The justification of the CFI which I agree with entirely on wide interpretation of the right to effective judicial protection is 'because it constitutes the only procedural safeguard ensuring that fair balance is struck between the need to combat international terrorism and the protection of fundamental rights'<sup>182</sup> therefore, relying on confidential evidence can not suffice and even though it may sometimes be allowed, the CFI position is that it should be subjected to evaluation by the national courts before its usage.

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<sup>178</sup> Ibid

<sup>179</sup> Ibid

<sup>180</sup> Ibid

<sup>181</sup> Ibid..p. 175

<sup>182</sup> Ibid

I find the position of the CFI interesting of not categorizing where and by which means suspected terrorist should be tried for the right to fair hearing stems from the States power to punish. However, neither the CFI nor the EU regulations provides for minimum due process rights that can be enjoyed by suspects apart from the generalized three key elements. To the contrary, derogation from some fundamental human rights may be allowed such as those due process guarantees, if it is for the promotion of peace and security as demonstrated in the ruling of the CFI in *Yusuf and Kadi case*.<sup>183</sup>

### 3.3.3. African Regional Legislations on Terrorism.

The African Region equally like the other regions has had its share of terrorist attacks such as the 1998 bombings in Kenya and Tanzania, 2010 bombings in Uganda and the constant bombings in the Republic of Somalia.<sup>184</sup> On the same note, they have taken the initiative to address terrorism within their domestic criminal systems and entering into bilateral agreements. Apart from private initiatives, the African Union plays a role in providing measures for combating terrorism within the region; measures that it propounds should be pro-human rights and observe the rule of law.<sup>185</sup> According to Ewi and kwesi, the AU works as a catalyst to empower State parties to fulfill

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<sup>183</sup> Eckes.C. “Judicial Review of European Anti-Terrorism Measures – The Yusuf and Kadi Judgments of the Court of First Instance” European Law Journal Vol.1, Issue 1, January 2008. p. 90 : The Yusuf and Kadi judgment involved the applicant and others filling a petition to the CFI in 2001, seeking the annulment of the Regulation according to [Article 230 EC Treaty](#). They argued that that the insertion of their names in the list of Terrorists provided by the Security Council and applied to them was inaccurate, and, moreover, that the mechanism of the insertion itself breached their fundamental rights and was incompatible with EU Law. . The CFI held that Regulation 881 and the list may not be challenged, because they derive from the U.N. Security Council determinations which bind Member States according to the U.N. Charter. Accordingly they cannot be impugned even when translated into European norms, unless they violate jus cogens. However, the CFI found that such a measures fell outside the reach of judicial review and does not infringe the universally recognized human rights of the person (jus cogens): the right to respect for property and the right to a fair hearing. The right to judicial review, even if is one of the fundamental rights contemplated by the jus cogens, can be derogated for reasons of international peace and security. It consequently held that the EU had competencies to freeze individual’s funds, especially in the fight against Global terror

<sup>184</sup> Powell.C.H. “Terrorism and Governance in south Africa and Eastern Africa” in Ramraj. V.V. et’ al, “Global Anti-Terrorism Law and Policy”, Cambridge University Press. 2005 p.555.

<sup>185</sup> Moller.B. “The African Union as a Security Actor: African Solutions to African Problems”, Working Paper NO. 57 Regional and Global Axes of Conflict, Danish Institute for International Studies, Working Paper series No. 2. 2009. p.10

their obligations under continental and international terrorism treaties,<sup>186</sup> through various instruments that shall be given briefly herein relevant to the research.

The Constitutive Act of the African Union is the first document that provides out rightly that one of the objectives of the Union and which is the Executive council responsibility is of overseeing, “respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities”.<sup>187</sup> This Act however does not provide for due process guarantees save for emphasizing the observance of fundamental human rights principles such as liberty and the rule of law.<sup>188</sup> The AHRC like the ICCPR, EU treaties, American convention and ECHR, provides the right to liberty, but with curtailment on grounds of national security, public order and health.<sup>189</sup> It also highlights the fair trial rights similar to those underscored in named treaties.<sup>190</sup>

The OAU Convention on the Prevention and Combating terrorism and its protocol, also called the Algiers convention is so far the first and only instrument obliging States, to criminalize terrorism.<sup>191</sup> It defines jurisdiction of States in regards to prosecuting terrorism, encourages cooperation and for the purpose of his research provides expressly for the right to counsel, right to be informed of charges for an arrested terrorist and other rights shall be subject to the national laws of the State with jurisdiction.<sup>192</sup>

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<sup>186</sup> Ewi. M and Kwesi.A, “Assessing the Role of the African Union in Preventing and Combating Terrorism in Africa”, African Security Review, Institute For Security Studies. 2006.pp. 32-35

<sup>187</sup> Article 4 (o) of the African Union Constitutive Act of 2000 in. Ibid, Ewi. M and Kwesi.A p. 35

<sup>188</sup> Ibid. Article 3 and 4.

<sup>189</sup> Article 12 of the African Charter on Human and Peoples rights of 1986.

<sup>190</sup> Article 7 of the African Charter on Human and peoples Rights of 1986.

<sup>191</sup> Supra note 186. p. 40

<sup>192</sup> Article 7(3& 4) of the OAU Convention on Prevention and Combating Terrorism 1999.

Other instruments and frameworks that provide for terrorism do not make mention of due process guarantees but oblige States to cooperate with each other, enact and review their legislations to criminalize terrorism, tighten security measures within their territory and follow international norms when combating terrorism.<sup>193</sup> These other measures, institutions or frameworks are; Declaration Code of the Conduct for Inter-African Relations, Counter-terrorism Committee, Declaration Against terrorism of 2001, The Plan of Action on Prevention and Combating of Terrorism in Africa and the African Center for the study and Research on terrorism.<sup>194</sup>

In conclusion, the AU as posited by kwesi and Ewi has a long way to go in effectively realizing the fight against terrorism due to non-implementation of the measures so undertaken. This leaves room for various arguments, and according to my opinion, the lack of implementation renders arbitrary application of domestic measures which are not human rights friendly especially to suspected terrorists.

### 3.4. UN Action to Counter Terrorism

According to Article one of United Nations Charter, the UN core responsibilities are to maintain international peace, promote security, encourage peaceful relations between nations, and human rights among other responsibilities provided in the Charter.<sup>195</sup> Terrorism is one of the 20<sup>th</sup> century emergencies that has caused the suffering and loss of lives of many people in the world posing insecurity to every living soul. It is logical that the UN would therefore, be frontward in

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<sup>193</sup> Supra note 186. p. 41

<sup>194</sup> Ibid. p. 35-41.

<sup>195</sup> Charter of the United Nations 1945, Article 1: <http://www.un.org/en/documents/charter/index.shtml>

ensuring that terrorism though already an insecurity issue, does not pose further threat to international peace and security.<sup>196</sup>

Rosand Eric provides that, after the September 11<sup>th</sup> carnage, the Security council took a number of steps in the fight against terrorism like, condemning global terror, recognizing the right to self defense under article 51, and most importantly, passing of resolution 1373 that formed the counter-terrorism Committee.<sup>197</sup> Its other efforts are visible from the thirteen international legal instruemnts already mentioned in chapter one, several terrorism conventions worked on by its legal committee and to which it encourages States to adopt.<sup>198</sup>

Observing fundamental human rights, the rule of law and due process are some of the emphasis that the UN relays through its resolutions and press to States, urging them to adopt and uphold those principles at all times, more especially when dealing with terrorism issues.<sup>199</sup> This commitment is illustrated by Ombudsperson of the UN Kimberly Frost in her 2011 report where she posited that while the United Nations recognized the imperativeness of using sanctions in fighting terrorism, making reference to sanctions levied against the individual and entities linked

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<sup>196</sup> Rostow. N., “ Before and After: The Changed UN Response to Terrorism Since September 11<sup>th</sup>,” 35 Cornell International Law journal 475 2002.p 333

<sup>197</sup> Ibid

<sup>198</sup> 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft, 1970 Convention for the Suppression of Unlawful Seizure of Aircraft , 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 1979 International Convention against the Taking of Hostages, 1980 Convention on the Physical Protection of Nuclear Material, 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation , 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1997 International Convention for the Suppression of Terrorist Bombings, 1999 International Convention for the Suppression of the Financing of Terrorism .

<sup>199</sup> United Nations General Assembly Resolution 64/297, “The United Nations Global Counter –Terrorism Strategy” 13 October 2010: <http://daccess-dds ny.un.org/doc/UNDOC/GEN/N09/479/65/PDF/N0947965.pdf?OpenElement> .

with Taliban and Al-Quida, the Security council on the other hand emphasizes the requirement of fairness and due process for those implicated.<sup>200</sup>

The UN position is also emphasized by the 2010 press release of the UN Special rapporteur on Protecting Human Rights while countering terrorism which reiterated the UN commitment in fighting terrorism.<sup>201</sup> He further pointed out that there was a trend within the Domestic judicial and administrative systems that indicated a ‘continuous lack of procedural fairness’ applied to those persons suspected to be terrorists and therefore there was the need to observe due process.<sup>202</sup>

Speaking of Al-Quida, the Taliban sanction regime, initiated by the Security Council under Resolution, 1267(1999) and the terrorist list, he noted that there were issues of due process rights at stake and while recommending that the UN should look into these issues, he reaffirmed that the UN commitment under its mandate..<sup>203</sup> He also pointed out the difficulties of sanctioning terrorist acts, especially future acts because of the lack of a universally binding definition.<sup>204</sup>

The rapporteur’s press release indicates clearly the trends and gaps in international forum of lack of observance of due process rights and the lack of precise due process rights applicable to terrorist suspects. Consequently even if the UN is in the front seat in upholding and promoting the observance of human rights such as due process rights, they have not been in a position to lay down those due process that should be specifically applied to terrorist suspects. Yet they

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<sup>200</sup> Frost Kimberly, United Nations Ombudsperson, Press release on the Report of the Security council, “Security Council Stresses Need For Due Process in Al- Quida Sanction Regimes”.

<http://www.un.org/apps/news/story.asp?NewsID=37640&Cr=terror&Cr1>.

<sup>201</sup> Scheinin Martin, United Nations Special Rapporteur on Promoting human Rights while Countering terrorism, Press release of 26th October 2010.

<sup>202</sup> Ibid. [http://www.un.org/News/briefings/docs/2010/101026\\_Scheinin.doc.htm](http://www.un.org/News/briefings/docs/2010/101026_Scheinin.doc.htm)

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.



recognize that sometimes those due process rights are not applicable in the fight against terrorism and if they are regardless, they are blatantly neglected by States at the expense of suspects rights.

### 3.5. Various Anti-Terrorism Treaties.

A closer look at the anti –terrorist treaties may be helpful in answering the questions being researched and as previously mentioned in the United Nations section, thirteen treaties have been mentioned which directly deal with combating terrorism.<sup>205</sup> According to Seibert-Fohr, he is of the view that, “human rights protection plays a secondary role in the present treaties on the prevention and combating of terrorist activities”<sup>206</sup> and proceeds to propound that some of these treaties do not include any provisions for the protection of the accused but focus on the international cooperation to hold terrorists criminally accountable.”<sup>207</sup>

However, he notes that, there have been slight changes in the recent treaties such as those in the Article 9 of the Convention on Prevention and Punishment of Crimes Against Internationally Protected Persons stipulating that fair treatment should be applied to persons in connection with the crime at every stage of the proceedings set forth in Article 2.<sup>208</sup> Another example is Article 8 paragraphs 2 of the International Convention against the Taking of Hostages that introduces the enjoyment of persons accused of all the domestic rights and guarantees.<sup>209</sup> Further examples include the inclusion of clauses such as respect for United Nations Charter, international

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<sup>205</sup> Supra note 198

<sup>206</sup> Supra note 60. p. 127-129

<sup>207</sup> Ibid.

<sup>208</sup> Ibid p. 127.

<sup>209</sup> Ibid.

humanrights laws<sup>210</sup> and provisions to the effect that fair treatment should be applied to anyone affected by anti-terrorism measures even if those measures are not directed at him or her.<sup>211</sup>

These instruments do not conversely, provide extensive list of those fair treatments guarantees that they are propounding, but in addition enclose limitation clauses that present how far the human rights are applicable. For example, Article 21 of the International Convention for the suppression of the Financing of terrorism, provides on one hand that international human rights should be applied but on the other hand limits the application by providing that it should not be construed to mean that it is a “guarantee of human rights but clarification as to the relationship between the conventions to other sources of international law provided the State parties are bound by these sources.”<sup>212</sup>

Nevertheless it should be noted, that so far there is a treaty, The Inter-American Convention against Terrorism which is does not limit the application of International Human rights as well as other regional terrorism Frameworks such as the European Union that also command full respect of International Human rights law and humanitarian law envisaged in the Geneva conventions.<sup>213</sup>

### 3.6. Other Recognised Legal Instruments.

There are other legal instruments to which States have ratified or adopted in relation to terrorism and command the respect of international human rights laws, norms, humanitarian law, fundamental principles of human rights and the rule of law. However like the rest of the anti-terrorism laws, they fall short of providing comprehensively, due process guarantees, especially minimum that should be accorded to suspected terrorist.

<sup>210</sup> Article 114 of the International Convention for the Suppression of Terrorist Bombing of 1988 in Supra note 78, Seibert-Fohr. A p.128

<sup>211</sup> Ibid. p. 128 : Article 19 of the International Convention for the Suppression of terrorist Bombings

<sup>212</sup> Ibid: Article 29 of the International Convention for the Suppression of the Financing of Terrorism.

<sup>213</sup> Supra note 49.

The **Declaration of Minimum humanitarian standards** is one example of those legal instrument though not prominent like the ICCPR is recognized by States, and propounds that States have an obligation not to derogate from those human rights responsibilities they have entered into, either under the International Human Rights Law, Humanitarian law or Customary norms whether in the course of public emergencies or peace.<sup>214</sup>

This Declaration goes forth to provide those due process rights to be upheld such as, the right to have a judgment delivered by a well 'constituted Court affording all the judicial guarantees which are recognized as indispensable by the community of nations,<sup>215</sup> trial within a reasonable time,<sup>216</sup> right to habeas corpus,<sup>217</sup> access to information or particulars of offence to the accused,<sup>218</sup> the right to be presumed innocent until proven guilty,<sup>219</sup> right to be tried in his or her presence,<sup>220</sup> right against self incrimination,<sup>221</sup> and right from retrospective application of law<sup>222</sup> among others.

One effect of the September 11 2001 bombings in the United States led to the declaration of public emergency by some States such as the United Kingdom leading to their derogation from some obligations in various International human rights treaties (article 9 ICCPR), adopting measures and enacting of stringent anti-terrorism legislation to criminalize terrorism acts.<sup>223</sup>

Terrorism being declared a public emergency makes it probable to argue that it falls within this

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<sup>214</sup> Declaration Of Minimum Humanitarian Standards , Adopted by an Expert Meeting Convened by the Institute for Human Rights, Abo Akademi University, in Turku/ Abo Finland, 2 December 1990.

<sup>215</sup> Ibid. Article 9

<sup>216</sup> Ibid. Article 9 (a)

<sup>217</sup> Ibid. Article 4(3)

<sup>218</sup> Ibid. Article 9 (a)

<sup>219</sup> Ibid. Article 9 (c )

<sup>220</sup> Ibid. Article 9 ( d)

<sup>221</sup> Ibid. Article 9 ( e)

<sup>222</sup> Ibid. Article 9 ( f-g)

<sup>223</sup> Supra note 2. p.818

Declaration and therefore any actions adopted or taken, especially against terrorist suspects should be in accordance with its norms.<sup>224</sup>

However, not many States are party to this Declaration; less can be said of its application directly to terrorist suspects. Despite Article 10 provision enumerating that where there are security needs, and it is considered imperative by States to administratively detain any person, such decisions should be subject to procedures prescribed by law affording all the judicial guarantees recognized as indispensable by the international community, it is weak.<sup>225</sup> Reasons being, it gives a wide margin of appreciation to States to decide what procedures are fit without providing supervision thereof. With the reports from UN Ombudsperson, United Nations Rapporteur on Terrorism and the various interrogation practices and detention methods adopted by States its without a doubt that there is abuse of those internationally recognize community norms of due process.<sup>226</sup> Hence the declaration falls short of answering the question this research puts forward.

Another similar Instrument is the **Paris Minimum Standards of Human Rights Norms in a State of Emergency**, which specifies in great detail fundamental human rights that are non-derogable such as such as the right to life, freedom from torture, right to liberty, habeaus corpus among many other rights, duties and obligations.<sup>227</sup> However, this instrument is slightly different from all the rest for it mentions and provides scanty guidelines to be considered when a person is deprived liberty, and is subjected either under administrative detention.<sup>228</sup> Article 5 paragraph 1 allows for deprivation of liberty in accordance with the prescribed law while paragraph 2 goes

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<sup>224</sup> Supra note 214

<sup>225</sup> Ibid . Article 10

<sup>226</sup> Supra note 200

<sup>227</sup> The Paris Minimum Standards of Human Rights Norms in State of Emergency in The American Journal of International Law, Volume 79, No. 4 ( October 1985), pp 1072-1081

<sup>228</sup> Ibid. Article 5 p 1076-1077

forth to provide that those laws providing for administrative detention shall secure the minimum rights of the detainees such as the right to a lawyer, informed of charges against him, entitled to regular visits, treated with dignity habeas corpus and right to appear before an impartial tribunal or court of law.<sup>229</sup>

Pertaining, the right to fair trial, the Paris legislation has similar rights as those enumerated in Article 14 of the ICCPR and maintains that those minimum guarantees of fair trial should be applied to persons charged of penal offences without discrimination.<sup>230</sup>

### 3.7. Sum Up.

There is no doubt that the above analyzed instruments provide a threshold for the application of due process rights. The anti-terrorism treaties have been specific but scanty in providing for those minimum guarantees required to be accorded to accused persons but refer to international human rights and international community accepted norms as applicable with limitations. These treaties similarly have left a wide margin of appreciation to governments to determine those fair rights in accordance with their domestic legislation and which have had consequences, perhaps for lack of a universal definition of crime of terrorism, set standards and supervision as propounded by the UN Rapporteur and the Ombudsperson report to the detriment of the suspects and accused.

The Paris instrument so far is the only instrument that has referred to certain rights as non derogable unlike the others. It is extensive and can be depicted by its provisions on administrative detention, the rights to be accorded to those detained, the procedures to be followed and the Fair trial rights provisions similar to those provided by the ICCPR. However, despite its comprehensive nature, it is similar to the other international, regional and other legal

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<sup>229</sup> Ibid.

<sup>230</sup> Ibid. Article 7. p. 1079

instruments for reasons that it does not aver the minimum guarantees entitled to suspected terrorist, such as those the research seeks out.

The illustrated Court judgments indicate that Courts recognize the dilemma that governments endure in combating terrorism classifying such cases as special necessitating compromises that sometimes entailing curtailing those due process rights guaranteed in the treaties, to ensure that national interests are protected. The foregoing clearly indicates that even if there is no abrogation from international human rights law, they do not offer answers to human rights questions raised in the fight against terrorism and how the balance should be struck between the measures adopted and protection of persons affected by those measures. Hence, they have left gaps with questions such as, if terrorism as a crime is construed to be unique, that cannot be efficiently dealt with under the ordinary due process criminal prosecution model, shouldn't there be a set of minimum guarantees or safeguards set for it.?

## CHAPTER 4: TERRORISM AND ADMINISTRATIVE DETENTION IN THE UNITED KINGDOM AND ISRAEL.

### 4.1. Introduction.

The discussion of suspects and due process rights in the last chapter leads on naturally to an analysis on their application by the case study jurisdictions the United Kingdom<sup>231</sup> and Israel<sup>232</sup> under administrative detention laws and procedures. Having examined the definitions of terrorism and other key terms such as administrative detention and those specific due process guarantees in chapter one and two, this chapter will go straight to accomplishing its objective of exploring comparatively the administrative laws and procedures applied to terrorist suspects. This will be done by carefully analyzing their differences in treatment of suspects especially their due process rights. Illustrations from case law will be employed. The chapter will be summed up with a conclusion.

### 4.2. Summary of Similarities and Differences.

As provided earlier, executive ordered detentions in both Britain and Israel are neither shot of debates, from arguments advanced in support of them, or against by persons in politics to scholars in the human rights law sphere, who have extended justified strong but divergent opinions, grounded on principles of rule of law, democratic societies and human rights. Israel and UK have much in common: they have governments perceiving themselves to be democratic and which follow the rule of law, They both have long standing history of fighting terrorism, they also perceive themselves to be under a state of emergency and claim to apply principles of proportionality between the values of individual liberty and security in their counter terrorism mensuration's.

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231 Fenwick and Phillipson, "Legislative over-breadth, democratic Failure and the Judicial Response: Fundamental rights and the UK's anti-terrorist Legal Policy", in Ramraj.V.V et' al, "Global Anti-terrorism law and Policy", Cambridge University Press, Cambridge. 2005.p. 455-489

232 Rudolph H. "*Security, Terrorism and Torture. Detainees' rights in south Africa and Israel: a comparative study*". Juta & CO, LTD Cape Town 1984

The measures so adopted have been characterized by various regimes of preventative detention of terrorist suspects such as Britain control orders and Israel Combatant laws, some of which discriminate against foreigners and nationals, and despite their balancing views on national security and human rights in the context of fighting terrorism these measures continue to be in question. Further, irrespective of the recent changes in the terrorist measures, the executive and military authorities continue to claim extraordinary power and seek to dilute the normal judicial checks. This has led to criticisms, pro and against from the judiciary and the public, attitudes which of recent, seem to play a big role in the way the executive employed measures are adopted in the ongoing war against terror. Similarly, they gradually introduced what they call procedural safeguards namely, ‘judicial review’ of detained suspects, use of special advocates and judges, all having adverse effects on certain rights of suspects discussed in this research.

On the other hand however, there are differences between the two States: the historical background and evolvement of administrative detention with their subsequent applications in the two jurisdictions. For example Israel administrative detention policy for the Palestinians considered of being unlawful combatants and Israel citizens. Britain Anti-Terrorism, Crime, and Security Act (ATCSA) 2001 had laws distinguishing between its citizens and foreigners but it was abolished after a House of Lords ruling, finding it incompatible with the European Convention on Human Rights.<sup>233</sup> By contrast therefore, whilst Britain treats terrorist under the banner of normal criminals it nevertheless uses preventative detention measures. In addition, there are variations in the duration of detention, manner in which suspects are to consult with

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233. Blum . S.C, “Preventative Detention in the War on Terror: A Comparison of How The United States, Britain and Israel Detain and Incapacitate Terrorist Suspects”, The Journal of the Naval PostGraduate School Center For Homeland Defense and Security, Vol IVNo.3 2008.



their counsel, disclosure of information and the process of judicial review. Israel can hold a suspect up to 6 months whereas Britain long detentions without review are prohibited.

### 4.3. United Kingdom

#### 4.3.1. Historical Background

The history of United Kingdom government response against terrorism, use of preventative detention, and compromising due process guarantees are not new phenomenon, because according to Setty, it has had its share of tackling significant internal and external threats to its national security for many decades.<sup>234</sup> Supporting her assertion she provides that, ‘the development of the UK modern national security regime was largely determined by the government’s response to the violent conflicts between catholic nationalists and Protestants unionists known as ‘The Troubles’ in Northern Ireland, which escalated in the 1970s, and were largely resolved in 1998 with the signing of the Belfast Agreement.”<sup>235</sup> It’s estimated that during the troubled years, 2750 died whereas the casualty figures stood at 31,900, making it easier to conclude that “the public demand for firm counter-measures is easy to imagine.”<sup>236</sup>

Opining on the measures the UK government has adopted to fight terrorism, Fenwick maintains that, there are three standard policies pursued by the government, “one being, a military one, treating the fight against terrorism as a form of warfare, two, a police –based approach , treating it as a form of criminal activity to be detected and defeated perhaps using an improvised version of a criminal justice system and the third a political one, viewing it as a form of armed rebellion to be resolved through negotiation and the political process.”<sup>237</sup> For Freedman Lawrence the UK

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234 .Supra Note .3. p.7

235. Ibid

236. Supra Note.98. p. 1933

237. Fenwick and Phillipson, “Legislative over-breadth, democratic Failure and the Judicial Response: Fundamental rights and the UK’s anti-terrorist Legal Policy”, in Ramraj.V.V et’ al, “Global Anti-terrorism law and Policy”, Cambridge University Press, Cambridge. 2005.p. 455-489

counter terrorism measures were reshaped largely by 9/11 bombings and as he looks at it, the war on terror was now viewed as, “not a matter of choice but a strategic imperative”.<sup>238</sup> Hence, a shift in the UK legislation could be perceived which leaned more to the ‘intelligence –based and proactive methods with the primary aim of preventing terrorism, rather than responding to events and attempting to solve crimes after they occur’.<sup>239</sup> Consequently, the continuance of the usage of preventative detention, imprisoning persons not because of what they have actually done but for the fear of what they shall supposedly execute, and bearing in mind it was in fact in practice since the Northern Ireland wars in the 1970s.

For example **Regulation 14B**, promulgated in 1915, allowing the Home Secretary to order the internment of any person, if according to him it was necessary for the preservation of public safety or the detention or in view of the persons hostile origin or association.<sup>240</sup> Another is **Regulation 18B** criticized for denying internees right to trial by giving the Home Secretary the power to confine any individual, if in his view was necessary to proscribe actions that were ‘prejudicial to public safety of the defense of the realm.’<sup>241</sup> In addition to the ordinary criminal procedure rules at the time and the Regulations, there existed a regime of emergency powers in **The Special Powers Act 1922**, which according to Michael O’Boyle was a “a traditional weapon at the disposal of the Stormont regime in dealing with threats against the security of the State”, providing wide powers of detention for interrogations on reasonable suspicion and which was ordered by the executive.<sup>242</sup>

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238 Freedman L., et’ al, “Superterrorism Policy Responses,” Blackwell Publishing 2002,p.44 in Ibid .p. 1329.

239. Supra Note 237.

240. Supra Note 98. p 1935

241. Ibid.

242. Michael. P O’Boyle, “Torture and Emergency Powers under the European Convention on Human Rights: Ireland V. The United Kingdom”, American Law Journal on International Law, Vol. 71, No.4, (Oct, 1977). p. 674.

With the emergency situation in Northern Ireland, this Act was replaced by *Temporary Provisions Act of 1972*, which was more of a preventative measure, giving the U.K government the power to more intelligence information about the IRA from detaining individuals on the guise of prevention, especially those that could not be subjected to the ordinary criminal system procedures. It was renewed at frequent intervals depending on continued violence,<sup>243</sup> In 1974, the parliament enacted the *Prevention of Terrorism (Temporary provisions) Act of 1974, (hereinafter PTA)* disparaged for having lots of short comings in context of due process requirements, introducing administrative detention and at the same time revered for changing the modus of operandi in Britain's way of enacting temporary provisions to enacting permanent emergency legislation. Following the injustices flowing from the above legislation's, partly and reasons of crime control, In 1984, another legislation was passed, *The Police and Criminal Evidence Act (PACE)*, which, "was introduced in order to provide clear and general police powers, but these were supposed to be balanced by greater safeguards for suspects which took into account the need to ensure that miscarriages of justice."<sup>244</sup>

*Criminal Justice and Public Order Act of 1994* was later enacted and it increased police powers tremendously while restricting a number of suspect rights specifically the right to silence and since its objectives were to control crime it was supposed to ensure due process guarantees but which were significantly undermined by this Act.<sup>245</sup> Up to 1997 other Acts were promulgated, but of importance and worth mentioning is the *Human Rights Act* that came into force in 1998., which Scholars have written that it was the best way to addressing human rights violations and checking the executive powers of the UK government especially in those circumstances

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243. Supra Note 4.p. 778

244. Supra Note. 231. p.1103.

245. Ibid. p. 1104.

involving treatment of terrorist suspects where the need to discard due process is the strongest, whilst others maintained that it would not bring a radical changes since the UK as they avow has a tradition of observing due process.<sup>246</sup>

#### 4.3.2. Post 9/11

Post 9/11 saw the enactment of the **2000 Terrorism Act** which is considered a fundamental Act by scholars and have pointed as having extensive powers than those enacted during the Irish troubles, with broad definition of terrorism and offenses, broad powers to the police to stop search and seizure under section 44, lengthy periods of detention under pre-trial detention under section 43, withholding of evidence and discretion to arrest based on reasonable suspicion among others which have been claimed to be too extensive and abused by the state officials.<sup>247</sup>

Several other legislation have been passed such as the **2001 Anti-terrorism, Crime and security Act** (hereinafter ATCA), which provided unlimited authority to the British security service in various sectors such as, interrogations, detentions, investigations and surveillance. Like all the other Acts with their downside, ATCA, is reflected in Part 4 which authorizes the Minister of Interior to administratively detain suspected non-nationals without trial, and who are not eligible to be deported back to their countries, conduct unbecoming of a State which claims to uphold the rule of law and democratic principles.<sup>248</sup> This treatment was actually challenged in the *Case of A* in which the House of Lords found it abhorring and against principles of natural justice to treat non-nationals differently under terrorism legislation's, let alone relying on secret evidence thereby depriving them their due process guarantees.<sup>249</sup> Despite the position of the House of

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246. Ibid. p.1105.

247. Ibid. p. 456-462

248. Supra Note. 119

249. Supra Note 2.

Lords in the stated decision, secret evidence continues to be drawn on and to rationalize control orders.<sup>250</sup>

#### 4.3.3. Control Orders and Due Process Guarantees.

Succeeding the above judgment, the British parliament passed the *2005 Prevention of Terrorism Act* which continues to be in force and which provides in lieu of administrative detention and discrimination between foreigners and British nationals, house arrests and restrictions on movement, formally referred to as control orders<sup>251</sup>. Like the 2001 Act, the House of Lords in the case of *MB v secretary of State for Home Department* found these restrictions to curtail individual's freedoms in terms of issuing orders as well as the prolonged detention without trial that had adverse impact on the physical and mental health of those concerned.<sup>252</sup> In 2006 a further Law, *Terrorism Act*, was introduced making amendments to the 2000 Act by adding broad new offenses and harsher sentences, and 'permitting the detention of terrorist suspects for up to 28 days before they are charged'.<sup>253</sup> The issue of pretrial –detention, extension of holding suspects continued to be in the agenda of the executive with the claims that the 28 days period was actually not enough, the prohibition of intercept evidence and disclosure of confidential national security details, necessitating the tabling of the Counter terrorism Bill that was passed into an Act of Parliament in November 2008.<sup>254</sup>

#### 4.3.4. Current UK Legislation and Practices.

It's apparent that the British parliament like any other Country in the guise on war on terror have been busy passing legislation's empowering the executive with powers of detain or to make

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250. Christian L. "Secret Inquests Secret Evidence: Now the government has dropped proposals for secret inquests we must scrutinize their use of secret evidence", The Guardian.co.uk, Friday May 2009.: <http://www.guardian.co.uk/commentisfree/libertycentral/2009/may/15/secret-inquests>

251. Supra Note. p. 831

252. *MB v secretary of State for Home Department* 2004 EWCA civ 324

253. Supra Note.233

254. <http://www.guardian.co.uk/commentisfree/libertycentral/2009/may/15/secret-inquests>

control orders. Currently in the UK, the 2000 Act 2005, 2006 act and 2008 among others are being used to fight this war on terror. As illustrated in some instances, these laws have fallen short of protecting suspected terrorists and abiding by the already set human rights standards such as those under the Human Rights Act 1997. Rtd Hon Arden, fears that there “is a risk that powers of detention or to make control orders that are based on intelligence may turn out to be wrong so that innocent people suffer, that judges must always bear in mind the possibility that innocent people have become caught up in the activities which give rise to suspicion.”<sup>255</sup>

Despite continuing criticisms against the use of control orders that are in lieu of preventative detention, they are constantly renewed and applied to suspected terrorist. Undertaking a comparative analysis of Anti-terrorism control orders in Australia and the UK, Jagers Brownwen highlights situations where the UK laws have come into logger heads with human rights laws, and to which the Courts have taken a strong stand in protecting them, with techniques of balancing between, individuals subjected to control orders, human rights and national security.<sup>256</sup> For example he notes that control orders infringes on certain human rights such as right to liberty and some fair trial rights as held by the House of Lords in the **2006 Re: MB case** where justice Sullivan found that the usage of closed material evidence was inconsistent with MB’s fair trial rights, and in **Secretary of State for the Home Department V JJ and Others, [ft.]** House of Lords refused to upheld any curfews that exceeded 18 hours claiming they amounted to deprivation of liberty.<sup>257</sup>

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255. Supra Note 2.p.835

256. Supra Note 141. p.14

<sup>257</sup> Ibid

#### 4.4. Due Process Guarantees

##### 4.4.1. Right to Counsel:

The 2005 Prevention of terrorism Act provides for the use of special advocate, and as summarized diligently by Rt. Hon. it is allowed, “at the hearing of any proceedings for the making or confirmation of a control order, or permission to make a control order, the court may hear evidence in open and closed sessions, If the sessions are closed, the subject of the proposed control order and his legal representative are excluded but a special advocate who represents the interests of the individual concerned will be appointed. The special advocate cannot communicate with the subject of the proposed control order after he has been served with the closed material”.<sup>258</sup>

For Christian, the use of special advocate has become too rampant in terrorism cases and beyond, supporting my thesis assertions that this is a fountain of abuse of fair trial rights first right to counsel, then right to information which a suspect is entitled and to which the suspect can base to prepare his defense.<sup>259</sup> In addition, the defense set up on behalf of the suspect may be questioned due to the fact that it is the special advocate replying to the facts rather than the suspect because the special advocate is forbidden to discuss it with the suspect.

The Courts in UK seem to allow the use of special advocates or special judge terming it a procedural safeguard, which I find absurd to be absurd, especially when they recognize that, one an injustice may be suffered by the suspect and second it being accepted by an authority that understands the whole concept of equality of arms and due process in general. In the eventuality it causes confusion of actually what should be adopted, the use of special judge, advocate or is it about finding the true facts and administering justice? To which I aver if it is the first two, then

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<sup>258</sup>Supra Note 2. p. 831

<sup>259</sup>.Supra Note 250

injustice shall always be done to the suspect or accused. In the case of *Secretary of state for the Home Department v. MB*, the court of appeal upheld the examining of closed material without being shown to the subject as long as special advocate had access to them, and which was compatible with Article 6 of the Human rights Act.<sup>260</sup>

In the case of *A. & Others*,<sup>261</sup> the court referred to the reasoning's of various Lords In the *case of Secretary of State for the Home Department (Respondent) v. MB (FC)*,<sup>262</sup> to address the issue, "whether procedures provided for by section 3 of the 2005 Act, involving closed hearings and special advocates, were compatible with Article 6 of the Convention, given that, in the case of one of the appellants, they had resulted in the case against him being in its essence entirely undisclosed, with no specific allegation of terrorism-related activity being contained in open material. Some lords decided to look at individual cases as a whole, while others settled on reliance on the special judge to counterbalance any harm others looked at the test of public interest whereas others recognized in essence that violations may occur. Hence quoting Lord Brown to whom I agree with stated:

There may perhaps be cases, wholly exceptional though they are likely to be, where, despite the best efforts of all concerned by way of redaction, anonymisation, and gisting, it will simply be impossible to indicate sufficient of the Secretary of State's case to enable the suspect to advance any effective challenge to it. Unless in these cases the judge can nevertheless feel quite sure that in any event no possible challenge could conceivably have succeeded (a difficult but not, I think, impossible conclusion to arrive at ...), he would have to conclude that the making or, as the case may be, confirmation of an order would indeed involve significant injustice to the suspect. In short, the suspect in such a case would not have been accorded even 'a substantial measure of

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260. Secretary of state for the Home Department Vs-MB 2006 EWCA

261. Supra Note 119

262. Secretary of State for the Home Department (Respondent) v. MB (FC) (Appellant) [2007] UKHL 46



procedural justice' (*Chahal* [cited above] § 131) notwithstanding the use of the special advocate procedure; 'the very essence of [his] right [to a fair hearing] [will have been] impaired' (*Tinnelly & Sons Ltd and McElduff and others v United Kingdom* [cited below] § 72).<sup>263</sup>

#### 4.4.2. Right to Information

This should be read together with the above right to counsel because disclosure of secret information plays a big role in terrorist cases, and as provided, there are certain information that the suspect is not privy if Article 3 of Prevention of Terrorism Crime Act is invoked. In the Case of *A. & Others V The United Kingdom*, the court stated that if non-disclosure of evidence or information should be counterbalanced and where open material is used, if the decisive conclusion is reached based on closed material then there might be violations of Art 5(4) of the convention is found.<sup>264</sup> However to me counterbalancing measures still have their downside. Yet as held in the second chapter right to information bears on other rights too. The other right to be considered is right to information during pre-charge detention and trial. I concur with Lord Birnham wise words in the case of *Secretary of state for the Home Department V AF & Anor*,<sup>265</sup> [2009] UKHL 28 where Commenting on the decision of *R (Roberts) v Parole Board*, he remarked at Para 34:

"I do not understand any of my noble and learned friends to have concluded that the requirements of procedural fairness under domestic law or under the Convention would be met if a person entitled to a fair hearing, in a situation where an adverse decision could have severe consequences, were denied such knowledge, in whatever form, of what was said against him as was necessary to

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263. Ibid

264. Supra Note 119

265. Secretary of state for the Home Department V AF & Anor, [2009] UKHL 28

enable him, with or without a special advocate, effectively to challenge or rebut the case against him."<sup>266</sup>

Comparing further **AF case** with the **MB case** he maintained the same opinion and stated at Para 43:

This would seem to me an even stronger case than *MB's*. If, as I understand the House to have accepted in *Roberts*, the concept of fairness imports a core, irreducible minimum of procedural protection, I have difficulty, on the judge's findings, in concluding that such protection has been afforded to AF. The right to a fair hearing is fundamental. In the absence of a derogation (where that is permissible) it must be protected. In this case, as in *MB's*, it seems to me that it was not.<sup>267</sup>

## 4.5. ISRAEL

### 4.5.1. History Background.

As provided earlier, the war on terror experience in the Israelite Republic is similar with the UK experience in various aspects .It's nevertheless been reeked with the criticisms on the treatment of suspected terrorists from the denial of due process guarantees to subjection of torture and inhuman degrading treatment under administrative detention. Administrative powers of the executive according to Rudolph, was “ introduced into Israel, then Palestine by the British in 1945, through the *Defense (Emergency ) Regulations 1945* made in terms of the *Palestine (Defense )order in council 1937*, which had been enacted in Britain as part of its Pre-world war II emergency legislation”<sup>268</sup> The strength of this law could be found in section 6 of the Palestine order, stipulating that they shall be “all embracing and powerful, for they could amend any law, suspend the operation of any law and apply any law with or without

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266. *R (Roberts) v Parole Board* [2005] UKHL 45; [2005] 2 AC 738,

<sup>267</sup>. Supra Note 265

268. Supra Note 232.p. 61

modification”<sup>269</sup> According to his opinion these orders were executed vigorously by the British mandatory government and despite objections in regards to their vigorous applications and infringement of people’s rights, these criticisms were never heard for to attack the “validity of administrative detention orders had virtually become a ‘mission impossible in itself’<sup>270</sup>

One would have thought that the British evacuating from Israel such laws would have been abolished as well; however, they were not and were consequently absorbed into the Israel legislation’s in 1948 through the enactment of the **Law and Administration Ordinance** by the Provincial Council of State, responsible for legislating. Like the British legislation’s that were kept being modified, the Israel had the same and introduced Regulations therein that were modified with time depending with the emergencies that occurred. For example section 9 of the *Law and administration Ordinance 5708-1948* was modified to “to cater for the imminent Arab invasion of the newly independent State stating. '[U]pon such declaration being published in the official gazette, the provisional Government [may] authorize the Prime minister or any other Minister to make such emergency regulations as...seem to him expedient in the interest of the defense of the State, public security and the maintenance of supplies and essential services’<sup>271</sup>

In regards to the position of the judicial system, these laws were upheld despite their arbitrary application to persons so suspected to be a threat to the nation of Israel, especially suspected Palestinians from the occupied Palestinian territories.<sup>272</sup> According to Ramahi Sawsan, he posits that “a largely neglected instrument of legal Israeli repression used against the Palestinian people is that of administrative detention. Thousands of men as well as women and children are held

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269. Ibid

270. Ibid p. 62, 65,85

271. Ibid p. 66-69

272. Supra Note 47.p17

indefinitely and under horrendous conditions in detention centers dotted across the occupied territories without charge, access to a fair trial or even having been accused of committing a crime. This renders administrative detainees exceptions to the rules that would govern convicts, placing them outside the normal legal system and procedures and beyond the remit of the Red Cross.”<sup>273</sup>

#### 4.5.2. Current Legislation in Israel

Israel has a three track system fighting war on terror, that is using military courts proceeded upon by military judges and the use of administrative detention laws,<sup>274</sup> which are codified in the 1979 Special Emergency Power (detention Act) a replica of Article 85 of the **1945 Defense Emergency Regulation Act**, which can only take place when the Knesset declares a State of emergency and common knowledge it is that the State of Israel has been in a State of emergency since its founding.<sup>275</sup> With the declaration of emergency it's obvious that Israel derogated from its obligation under the ICCPR Article 9 akin to the British under Article 5 of the ECHR, which provide that under such circumstances, measures so adopted should be strictly required by the exigencies of the situation. Besides the two, in 2002 Israel enacted another legislation, The **Internment of Unlawful combatants Law**, hugely applied in Gaza strip and which also provides for administrative detention of persons hostile to the State of Israel, either through direct or indirect participation and can be made for unlimited by Chief of Staff or an officer retaining the Rank of a major-general in the belief that that person poses a risk to State security.<sup>276</sup> This law allows the detention of person's members of a force executing acts of hostility to the State of Israel, a dangerous law criticized for its use arbitrary against persons suspected of having mere

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273. Ramahi. S. “Administrative Detention: A Legal & Lethal Tool of Israel Repression”, Middle East Monitors, UK. 2010. p. 1

274. Supra Note.34 p. 19

275. Supra note 35.p 5

276. Ibid

association with those alleged terrorist associations. This research however shall not extensively explore administrative detention under this law, save for pointing its downside briefly in context.

Like criticisms levied against British control orders or preventative detention, the Israelite law has been criticized for not observing measures so required strictly by the exigencies of the situation by breaching fundamental rights of persons such as due process guarantees like, allowing longer detention of individuals such as half a year with possibilities of extension, lack of suspects bringing them before the courts in a timely manner and affording them public hearings, under the Internment law detention without trial and holding suspects as bargaining chips, use of secretive and hearsay evidence, right to counsel and despite judicial review offered every three months as safe guard, it is always fruitless to the accused since its secretive/confidential intelligence evidence adduced indicating that the accused continues to pose security threats and which the suspect cannot challenge, hence the circle of renewing the detentions continues.<sup>277</sup>

A further critique against this law is the power granted to the Minister of defense under Article 2(a) to administratively detain an individual which may be subject to political abuse.<sup>278</sup> Administrative detention also can be carried under the order of a Military Commander, tried by a military court especially in the West Bank which is subject to independent judicial review by the high Court of Justice.<sup>279</sup>

Courts in Israel in some instances like the UK House of Lords have not taken kindly to the indefinite detention of individuals without trial. For example in the case of *Kawasma V Minister*

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277. Supra Note. 233

278. Ibid

279. Ibid. Exaples of these millitary order include, Millitary Order No1228 and 1281

*of Defence*, involving an order by the Minister of Defense to administratively detain the applicant after an acquittal in a criminal trial based on the ground that his release will cause a danger to public security, Chief Justice I. Cohen held that his detention was unlawful, with the court ordering his immediate release at the same time cautioning the relevant authorities that careful determination of appropriate measures should be adopted and administrative detention be left to deterrence of future offenses rather than punishing past offenses.<sup>280</sup>

#### 4.6. Due Process Guarantees

With the introduction of judicial review orders in the 1979 law, one would have believed that suspects would be guaranteed safeguards when it came to their rights. However as Gross puts it, “even after the reforms judges have continued to examine the legality of detention orders without investigating the reasons for the detentions itself”,<sup>281</sup> This is similar to the UK courts role of judicial review that excludes looking into merits when ascertaining whether the Secretary of State control order decision is acceptable and can either quash it or give directions on either revocation or modification of the order accordingly.<sup>282</sup> Thus both distance themselves from questioning the discretionary powers of the State authority making the order. In the case of *Kahane V Minister of Defence*, the court stated that,

The decision whether to detain a person is not left to the Court, but the detention order is made by the Minister of Defence, and he decides whether it is advisable to deny the freedom of a person for the reasons specified in Section 2 of the law. The detention even if subject to judicial review is still an administrative detention. The function of the court when dealing with an application for approval of a detention order is to examine the considerations of the Minister of Defense ...But it is clear from the provisions of Section 4(c) that the court may not substitute its

<sup>280</sup> . *Kawasama V Minister of Defence in the case of A&B V State of Israel* SCCCA 3261/08

281. *Supra* Note 4. p .759

282. *Supra* Note 141 p. 12

own considerations for those of the minister of defense and there is no room to compare the courts function of review under the Detention Law to the function of a court sitting in a criminal case”.<sup>283</sup>

#### 4.6.1. Right to Counsel

It is a right presumed to have a connection with the presumption of innocence a very crucial principle in the criminal justice sphere. Administrative detention practices in Israel have a negative impact in the enjoyment of this right by/for the suspected terrorist and defendants accordingly. By its very nature of relying on intelligence information only privy to the courts and the government prosecutorial authorities circumscribes this right. Despite the fact that certain laws such as the Internment of unlawful Combatants under section 6 stipulates the right of the internee to meet with their lawyer as early as possible and within seven days, it is not absolute and if one may read in conjunction with section 5 of the same law,<sup>284</sup> certain rules of procedures may be departed from such as adducing evidence and evidence to the lawyer and detainee or suspect to even undertaking ex parte hearings in the absence of the suspects counsel.<sup>285</sup> According to my opinion, it actually renders the use of counsel obsolete if in certain aspects his services may not be needed with consequences of depriving totally the suspect this right. My opinion is clearly supported sadly by opinion of Judge Rubinstein in the case of *Agbar v. I.D.F Commander in Judea and Samaria*, Where he stated,

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283. Ibid p. 759

284. Section 6 (a) Incarceration of Unlawful Combatants Law, 2002: “ The prisoner may meet with a lawyer at the earliest possible date on which such a meeting may be held without harming State security requirements, but not later than seven days prior to his being brought before a judge of the District court, in accordance with the provisions of section 5 (a).

285. Section 5(e) Incarceration of Unlawful Combatants Law, 2002: “It shall be permissible to depart from the laws of evidence in the proceedings under this law, for reasons to be recorded: the court may admit evidence, even in the absence of the prisoner or his legal representative, or disclose such evidence to the aforesaid if, after having reviewed the evidence or heard the submissions, even in the absence of the prisoner or his legal representative , t is convinced that the disclosure of the evidence to the prisoner or his legal representative is likely to harm State security or public security; this provision shall not derogate from any right not to give evidence under chapter Three of the Evidence Ordinance[New version], 5731-1971.”

In this situation the detainee does not enjoy a full and adequate opportunity to defend himself against the arguments raised against him - he is not exposed to the majority of the evidences, he cannot review them and he is unable to cross examine. This obliges the court to employ extra care and strict examination of the evidence brought before him. The court must become “temporary defense attorney”.<sup>286</sup>

#### 4.6.2. Right to Information

Imperative it is for any defense party to be given ample time and information in order to prepare its defense, for it is a principle of criminal law observed over the years and which is considered central to the notion of equality of arms. The Israel courts in its many cases terrorist cases such as *Fahima v State of Israel* have noted this and held that considering the administrative detention uttermost measure and in point of view of its infringement of constitutional rights such as individual liberty, its exigent that distinct and provable evidence is adduced in order to authenticate a security threat that founds a ground for administrative detention.<sup>287</sup>

However in subsequent cases such as *A&B V State of Israel*,<sup>288</sup> this application is to the contrary. In that case the appellants complained of the illegality of the internment orders against them and breach of some of their constitutional basic rights including, deprivation of liberty, right to a lawyer and to information. The court here relied on Section 5 (e) which accepts departure from certain rules of procedures and the right to disclose information to the suspect, detainee or his counsel if it is likely to harm security of the State but which the judge can read and pass a judgment on it.<sup>289</sup> They further reinforced their decision by relying in their precedent *Kadri V IDF commander in Judea and Samaria*, where it was held that, and “...the court has a

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<sup>286</sup> Agbar v. I.D.F Commander in Judea and Samaria, in the case of A&B V State of Israel SCCCA 3261/08

<sup>287</sup> Fahima v State of Israel 2005 Isrc 59(3) 258

<sup>288</sup> A&B V State of Israel Crim A 6659/06:( 11/06/08.)

<sup>289</sup> Supra Note 143



special duty to act with great care when examining privileged material and to act as the “mouth” of the detainee where he has not seen the material against him and cannot defend himself<sup>290</sup>

**Hearsay Evidence:** From the forgoing, it is apparent that hearsay evidence is admissible as far as protecting State security and public security is concerned. Administrative detention for security reasons as provide in the judgment of **A& B V State of Israel** necessitates the use of evidence that does not conform to the admissibility tests of rules of evidence and procedure which as pioneers of administrative detention propound cannot stand in an ordinary criminal trial.

Interestingly the Israel courts recognize this and actually admit the consequences that flow from it for the defense and what they have done is taking a judicial activism of reviewing the evidence on behalf of the defendant / suspect and his lawyer, claiming it a safeguard with the aim of preventing miscarriage of justice. For example in *Khadri v. I.D.F Commander in Judea and Samaria*, Justice Procacia opined to the effect that, “The administrative detention entails, more than once, a deviation from the rules of evidence, among other reasons, since the materials raised against the detainee are not subjected to his review. This deviation imposes on the court a special duty to take extra care in the reviewing of the confidential material, and to act as the detainee’s “mouth” where he is not exposed to the adverse materials, and cannot defend himself.”<sup>291</sup>

#### 4.7. Sum Up.

From the preceding, similarities and differences between the two jurisdictions have been highlighted and bottom line is that both practice preventative detention and as a result certain due process rights discussed are curtailed, and despite mechanisms developed by both in the guise of

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290. Kadri V IDF Commander in Judea and Samaria HCJ 11006/04(unreported decision of 13 December 2004)

291.Ibid

providing safeguards, these same safeguards do not protect in essence the rights of those so sought to protect. The thesis of this research still maintains the conventional rights are applicable in every circumstance, and even when there is need to alter or adjust them, the rights of the suspects should be paramount.

## CHAPTER 5: CONCLUSION- TOWARDS ACCESS OF MINIMUM DUE PROCESS RIGHTS.

Providing security, essentially State security and individual security among other types of security is a major component of a State responsibility especially in a democratic society. In our world today there are very many security concerns ranging from food insecurity, economic, social, cultural, natural disasters insecurities and the focus of this thesis, terrorism. Therefore, it is very natural for individual States to enact security measures that suit each type of insecurity that arises within its jurisdiction and which does not intrude on individual liberties. It is acknowledged however on one hand, that some of these measures may intrude on certain individual liberties enjoyed by their citizens and non –citizens respectively, but on the other hand, these measures are supposed to have safeguards that ensure that these liberties are not inadvertently restricted. Accordingly, terrorism as illustrated in this research is one of those areas whose scale of threat is very high and to which has provoked a lot of controversies, which emanate from the measures adopted in addressing it, especially in the treatment of those suspected of having committed terrorism acts.

Preventative detention or administrative detention as discussed in the text is an example of a method in usage by various States like the analyzed practices of Israel and the United Kingdom that limits on certain human rights of those suspected. Some case law from Israel and the United Kingdom like the judgment of Lord Brown in the case of *Secretary of State for the Home Department v. MB (FC)* evidently displays the downside of using such methods with distinct findings of their curtailing suspected terrorist fair trial rights.<sup>292</sup> This brings out a statement and question posed by Rtd Honorable Lady Arden to the effect that, “....Despite the scale of the threat of terrorism we must keep the threat in perspective .....the question society has to ask itself

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<sup>292</sup>Supra Note 262

is whether the incomplete security which counter-terrorist measures provide for the protection of its members justifies their effect on the liberty of the individual members.”<sup>293</sup>

Similarly I could point to Presidents Barrack’s judgment in reply to the question whether torture could be used against a terrorist suspect in a ticking bomb situation in the case of *The Public Committee against Torture in Israel V. The State of Israel*, ‘where he held,

We are aware of that this judgment of ours does not make confronting reality an easier. That is the fate of democracy, in whose eyes not all means are permitted, and to whom not all the methods used by her enemies are open. At times democracy fights with one hand and tied behind her back. Despite that, democracy has the upper hand, since preserving the rule of law recognition of individual liberties constitute an important component of her security stance. At the end of the day, they strengthen her and her spirit, and allow her to overcome her difficulties.<sup>294</sup>

Thus what follows from the above is the need of finding proper balance between the measures adopted and human rights of individuals suspected of terrorism. As Arden puts it, “it would seem pointless so to restrict individual liberties in the hope of making people more secure if the result is to destroy the essential characteristics of a free or a democratic society, indeed to cause harmony between the groups who feel that they are wrongly made the targets of the new powers, there is no point in being more secure if you are less safe”<sup>295</sup>

Certain safeguards such as special advocates and use of special judges discussed in the text would be applauded as the best way out in the interest of national security. However on an individual level, it does not seem so as shown by the research for there are no guarantees of actually protecting the interest of the suspected terrorists on trial. Consequently without

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<sup>293</sup>Supra Note 2. p. 838.

<sup>294</sup>The Public Committee against Torture in Israel V. The State of Israel HCJ 5100/94, 53(4), PD 817, 845

<sup>295</sup>Supra Note 2.p. 838.

repeating too much of the conclusions provided in every chapter, the thesis maintains firmly that despite the lack of consensus between scholars and States practices on the issue of what procedures to be applied to suspected terrorists, the guarantees provided by the conventional criminal system are appropriate and efficient in prosecuting those suspected. Further, even though there might be need of alterations in certain circumstances, they should not abrogate those due process guarantees that have been discussed herein for they are the only protection the suspects can rely upon to protect their own human rights. In the extremities, in cases where it's still held that the due process guarantees under the conventional criminal systems are overprotective or insufficient, the I believe and propose further research on using the Paris laws or modifying them or better yet, adopting a whole set of rules that suit suspected terrorists, and within these rules, maintain the existing due process guarantees of detention and fair trial. Thus the way forward is for States and judicial organs to realize curtailing these rights is not the path to pursue, but more of intruding further on individual liberties.

## BIBLIOGRAPHY.

### JUDICIAL DECISIONS.

A&B V State of Israel Crim A 6659/06:( 11/06/08.)

A. And Others V The United Kingdom, Application No 3455/05 Judgment of 19 February 2009

Al-Nashif V Bulgaria (Application 50963/99) Judgment of 20 June 2002.

Brannigan & McBride v UK 1993 17 EHRR

Brogan V Uk (Application No; 11386/85) Judgment of 29 November 1988

Chahal V United Kingdom, Judgment of 15 November 1996 in Supra Note. 60. P.147

Edwards V U.K. (1992) 15. E.H.R.R. 417

Fahima v State of Israel 2005 Isrc 59(3) 258

Fals Borda V Colombia Communication No. 46/1979(27<sup>th</sup> July 1982

Fox, Campbell and Hartley V UK, (Application No. 12244/86) Judgment of 30August 1990

Hamden V. Rumsfield 548. U.S. 557(2006).

John Murray V United Kingdom, ECHR case No. 41/1994/488/570.

Kawasama V Minister of Defence in the case of A&B V State of Israel SCCCA 3261/08

Kadri V IDF Commander in Judea and Samaria HCJ 11006/04(unreported decision of 13 December 2004)

Klass v Germany (1979-80) 2 EHRR 214, 6 September 1978

Lakhdar Boumediene et al, V George Bush , former President of the United States, et al on writs of Certiorari to the United States Court of Appeals For the District of Colombia Circuit (June 12, 2008).

MB v secretary of State for Home Department 2004 EWCA civ 324

Pretty V United Kingdom, 2002-III Eur. Ct.H.R. 155, 185

Rasul V. Bush, 542. U.S. 466(2004),

R (Roberts) v Parole Board [2005] UKHL 45; [2005] 2 AC 738,

Secretary of state for the Home Department V AF & Anor,[2009] UKHL 28

Secretary of state for the Home Department Vs-MB 2006 EWCA

Secretary of State for the Home Department (Respondent) v. MB (FC) (Appellant) [2007] UKHL 46

State V Eddon, Wash.292, 301,36 Pac.139,142(1894)

The Public Committee against Torture in Israel V. The State of Israel HCJ 5100/94, 53(4), PD 817, 845

United Nations Human Rights committee concluding observations on Peru, UN Doc. A/51/40 (25 July 1996) para 356.

United Nations Human Rights Committee Concluding Observations on the United Kingdom and Northern Ireland report, UN Doc. CCPR/CO/73/UK; CCPR/Co/73/UKOT (6 December 2001) para.6

Yasser Esam Hamdi and Esam Fouad Hamdi as next of Friend of Yaser Esam Hamdi V. Donald H. Rumsfield, Secretary of Defense, et al, on Writ of certiorari to the United States Court of Appeals for the Fourth Circuit( June 28, 2004).

#### Texts

Ashworth A. "Human Rights, Serious Crimes and Criminal Procedure", The Hamlyn Trust, Sweet & Maxwell 2002

Alegre. S. "The EU's External Cooperation in Criminal Justice and Counter –Terrorism: An Assessment of the Human Rights Implications with a Focus on Cooperation with Canada". Centre For European Studies Centre. 2008

Alexander J.G. "The illusory Protection of Human Rights by National Courts During Emergency", Human Rights Law Journal vol 1 1984

Allot .P "Fundamental Rights in the EU", The Cambridge Law Press, The Cambridge Law Journal, Vol. 55 .No.3 (Nov. 1996)



Aolin N.F., “The Individual Right to access to Justice in Time of Crisis: Emergencies, Armed Conflict, and Terrorism” in Francioni F., et’ al, “Access to Justice as a Human Right”, Oxford university Press, Oxford 2007

Article III, Trial Right to Counsel, The Georgetown Law Journal Annual Review of Criminal Procedure, 36 Geo. L.J. Ann. Rev. Crim. Proc. 475

Banks C. W “United States responses to September 11”, in Ramraj.V.V et’ al, “Global Anti-terrorism law and Policy”, Cambridge University Press, Cambridge. 2005.

Bassiouni C. “Legal responses to International Terrorism: united states Procedural aspects 1988” in Than D. C, et’ al, “International Criminal Law and Human Rights”, 1<sup>st</sup> Edition, Sweet & Maxwell, London 2003

Blum . S.C, “Preventative Detention in the War on Terror: A Comparison of How The United States, Britain and Israel Detain and Incapacitate Terrorist Suspects”, The Journal of the Naval PostGraduate School Center For Homeland Defense and Security, Vol IVNo.3 2008.

Cyrer .R. et’al “An Introduction to Criminal Law and Procedure”, 2<sup>nd</sup> Ed, Cambridge University press, UK. 2010

Christian L. “Secret Inquests Secret Evidence: Now the government has dropped proposals for secret inquests we must scrutinize their use of secret evidence”, The Guardian.co.uk, Friday May 2009

Chemerisnky E.“Thinking about Habeaus Corpus”, Case Western Reserve Law Review 37, 1986.

Eckes.C. “Judicial Review of European Anti-Terrorism Measures – The Yusuf and Kadi Judgments of the Court of First Instance” European Law Journal Vol.1, Issue 1, January 2008.

Ewi. M and Kwesi.A, “Assessing the Role of the African Union in Preventing and Combating Terrorism in Africa”, African Security Review, Institute For Security Studies. 2006.

Fallon R and Meltzer D. “ Habeas corpus Jurisdiction, Substantive Rights, and the War on terror”, Harvard Law Review, Vol.120 No. 8 June 2007.

Fenwick and Phillipson, “Legislative over-breadth, democratic Failure and the Judicial Response: Fundamental rights and the UK’s anti-terrorist Legal Policy”, in Ramraj.V.V et’ al, “Global Anti-terrorism law and Policy”, Cambridge University Press, Cambridge. 2005.

Freeman M. “Truth Commissions and Procedural Fairness”, Cambridge university press, Cambridge 2006.

Francioni F., et’ al, “Access to Justice as a Human Right”, Oxford university Press, Oxford 2007

Freedman L., et’ al, “Superterrorism Policy Responses,” Blackwell Publishing 2002.

Finman Ted, “Implied assertions as hearsay: Some Criticisms of the Uniform Rules of Evidence”, Stanford Law review, Vol.14

Frost Kimberly, United Nations Ombudsperson, Press release on the Report of the Security council, “Security Council Stresses Need For Due Process in AI- Quida Sanction Regimes”.

<http://www.un.org/apps/news/story.asp?NewsID=37640&Cr=terror&Cr1>

Galligan D.J. “Due Process and fair Procedures, A study of Administrative Procedures”, Clarendon Press. Oxford 1996.

Garner. B. “Blacks Law Dictionary”, 7<sup>th</sup> Ed, West Group USA 1999

Guiora A.N. “Where Are the Terrorists to be Tried: A comparative Analysis of Rights Granted To Suspected terrorists”, Catholic University Law review, Vol 56. p 805, Case Legal research paper No- 07-13. 2007

Gross.E. “Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does A Democracy Have the Right to Hold Terrorists as Bargaining Chips” Arizona journal of International and Comparative Law, Vol 18, No. 3 2001

Guild. E. “The Uses and Abuses of Counter-Terrorism Policies in Europe: The case of the terrorist List” Journal of common Market studies, Vol. 46, No.1 January 2008

Janis, Kay & Bradley, “European Human rights Law, text and Materials”, Oxford University Press, 2000

Jaggers. B, “Anti-terrorism Control Orders in Australia and the United Kingdom: A comparison” Law and Bills Digest section, Parliament of Australia, Department of Parliamentary Services, Parliamentary Library Research paper of 29 April 2008, no. 28,2007-08

Michael. P O’Boyle, “Torture and Emergency Powers under the European Convention on Human Rights: Ireland V. The United Kingdom”, American

Mcrae A. “ Boumediene V Bush: Another Chapter in the Courts Jurisprudence on Civil Liberties at Guatanamo Bay” Duke journal of Constitutional Law & Public Policy Sidebar 247. 2009

Moller.B. “The African Union as a Security Actor: African Solutions to African Problems”, Working Paper NO. 57 Regional and Global Axes of Conflict, Danish Institute for International Studies, Working Paper series No. 2. 2009

Murphy. P. “ Murphy on Evidence”, Oxford University Press, 8<sup>th</sup> Edition, 2003

in Noone.F.M, et’al, “Cases and Materials on Terrorism: Three Nations Response”, Kluwer Law International London, 1997

Park. R. “The Hearsay rule and the stability of Verdicts: A Response to Professor Neeson”, Minnesota Law review 1985.

Powell.C.H. “Terrorism and Governance in south Africa and Eastern Africa” in Ramraj. V.V. et’ al, “Global Anti-Terrorism Law and Policy”, Cambridge University Press. 2005

Ramahi. S. “Administrative Detention: A Legal & Lethal Tool of Israel Repression”, Middle East Monitors, UK. 2010.

Rostow.N., “ Before and After: The Changed UN Response to Terrorism Since September 11<sup>th</sup>,” 35 Cornell International Law journal 475 2002

Rudolph H. “Security, Terrorism and Torture. Detainees’ rights in south Africa and Israel: a comparative study”. Juta & CO, LTD Cape Town 1984

Saul. B et' all, "Defining terrorism in International Law", Oxford University Press, Clarendon.Oxford 2008

Setty S. "Comparative Perspectives on Specialized Trials for Terrorisms", university of Maine School of Law, Maine Law Review. 63 me. L. rev. 131, 20101

Starvos. S "The Right to a Fair Trial in Emergency Situations", International and Comparative Law Quartely Vol 41 Cambridge University Press 1992

Than D. C, et' al, "International Criminal Law and Human Rights", 1<sup>st</sup> Edition, Sweet & Maxwell, London 2003.

Ramraj.V.V et' al, "Global Anti-terrorism law and Policy", Cambridge University Press, Cambridge. 2005.

Ramahi. S. "Administrative Detention: A Legal & Lethal Tool of Israel Repression", Middle East Monitors, UK. 2010

Rostow.N., " Before and After: The Changed UN Response to Terrorism Since September 11<sup>th</sup>," 35 Cornell International Law journal 475 2002.

Rt Hon Lady Justice Arden .M " Meeting the Challenge of terrorism: The experience of English Courts and Other Courts", speech Presented at John Lehane Memorial Lecture(Supreme Court of New South Wales, 16 August 2006). Australian Law Journal 802006

Saul. B et' all, "Defining terrorism in International Law", Oxford University Press, Clarendon.Oxford 2008

Seibert-Fohr. A “The Relevance of International Human rights Standards for Prosecuting Terrorist”, MaxPlank Institute for the achievement of the Sciences-Max Plank Institute for Comparative Public Law and International Law, 2004

Sottiaux. S. “Terrorism and the Limitation of Rights, The ECHR and the US Constitution”, Hart Publishing, Portland USA.2008.

Scheinin Martin, United Nations Special Rapporteur on Promoting human Rights while Countering terrorism, Press release of 26th October 2010

Schuler. R. “ Expert Evidence and hearsay, The Influence of “secondhand” Information on jurors’ decisions”, American Psychology-Law Society, law and Human Behaviour, Vol. 19, No. 4, 1995

Sluiter & Zahar, “International Criminal Law, A Critical Introduction”, Oxford University Press, Oxford 2008

Waxman. M. “Administrative Detention Why Detain, and Detain Whom?” (March 19, 2009). Columbia Public Law Research Paper No. 08-190; Columbia Public Law Research Paper No. 08-190

Whittaker .J.D, “Counter-Terrorism and Human Rights”, Pearson Education Limited, Edinburg, UK. 2009

Yourow.H. C. “ The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence”, Martinus NijHoff Publishers 1996.