Normalizing the Abnormal:
The State of Exception in the Context of Terrorism

By: Ramez Hayek

Submitted to
Central European University Private University
Department of Legal Studies

In Partial Fulfillment of the Requirements for the Degree of Masters of Arts in Human Rights

MA Final Thesis
Supervisor: Boldizsár Nagy
Vienna, Austria

June 2022.

Abstract

In the wake of the September 11, 2001, terrorist attacks, the United States and the world were faced with the urgent need to fight global terrorism. While the United States had a pivotal legal obligation to prevent terrorist attacks and protect its national security from external threats, this necessity was supplemented with a systematic violation of human rights, especially against Muslims, Arabs, and South Asians. Specifically, the state of emergency that was declared after 9/11 facilitated this process since the US government abused it to acquire new exceptional measures it had long been seeking to achieve specific political objectives under the pretext of countering terrorism. Although there are clear regulations on the extent a government is allowed to derogate from specific human rights under a state of emergency, most of the post-9/11 US counter-terrorism policies failed to abide by the set requirements. Instead, the violation was systematic, disproportionate, and discriminatory in many instances, inevitably demonizing classes of people. By focusing on the racial-profiling policies and the state of mass surveillance that instantly occurred following the events of 9/11, this **thesis** seeks to convey whether the post-9/11 US anti-terrorism policy and the measures taken following the declaration of the state of emergency conformed with international law and the proportionality standard enshrined in many international treaties.

Acknowledgments

I would like to earnestly acknowledge the great efforts and sincere support given to me by my supervisor, Professor Boldizsár Nagy. His valuable guidance and feedback have significantly assisted me in completing this thesis and improving it.

I would also like to mention the incredible support and unconditional love that my parents gave me throughout this long and difficult journey. Without them, I could never have completed this project.

Of course, I also have to mention my best friends Zain, Tala, Shadin, and Dalia, who provided me with endless care, support, and motivation throughout my time at CEU, as well as having always been there whenever I needed anything. For this, I thank them.

Table of Contents

Chapter 1

A Clarifying Introduction to the Thesis

1.1. The Effects of the Events of 9/11 on the US Counter-Terrorism Approach: A Brief Historical Background

The September 11, 2001 terrorist attacks against the United States (US) have shifted the US counter-terrorism policy to become more aggressive, especially that it did not necessarily treat global terrorism as an existential threat to its national security nor was it in an official war with any other state before 9/11 had occurred.[1] In particular, the scope of the surveillance state of the United States was considered a small "fraction" of its current size since the US government's domestic surveillance capabilities did not encompass specific sophisticated surveillance systems, such as wiretapping and tracking devices, to harvest the data of certain individuals and entities.[2] In fact, before 9/11, it is heavily argued that the United States did not see the need to install nor utilize such sophisticated surveillance systems in its counter-terrorism policy.[3] Perhaps most crucially, states, including the United States, did not subject travelers to extreme, and sometimes, humiliating security procedures that can often infringe upon their basic rights as individuals.[4] Neither were travelers required to take off their shoes and belts before going through security checkpoints while traveling before 9/11.[5] Nevertheless, in the wake of the events of 9/11, the US official counter-terrorism policy has been drastically altered, resulting in a significant and

[1] Green, Matthew. *How 9/11 Changed America: Four Major Lasting Impacts (with Lesson Plan) - The Lowdown*. 8 Sept. 2017, www.kqed.org/lowdown/14066/13-years-later-four-major-lasting-impacts-of-911.
[2] Ibid.
[3] Ibid.
[4] Schaper, David. "It Was Shoes on, No Boarding Pass or ID. but Airport Security Forever Changed on 9/11." *NPR*, NPR, 10 Sept. 2021, https://www.npr.org/2021/09/10/1035131619/911-travel-timeline-tsa.
[5] Ibid.

conspicuous amendment to the US' concerns and approach towards its "safety, vigilance, and privacy."[6]

As the single deadliest terrorist attack in US history,[7] the events of 9/11 inevitably resulted in an instantaneous overpowered public sentiment that mainly centers around extraordinary fear, along with the scrambling of law enforcement authorities in all parts of the United States, and in several parts of the world, in order to implement concrete policies with the objective of countering and minimizing the threat of global terrorism.[8] It is with no doubt that this particular incident has produced a justified state of shock across different areas of the world as it effectively mirrored an 'abnormal' and enormous sense of vulnerability mainly divulged by the successful brutal terrorist attacks that *Al-Qaeda* perpetrated against the US in 2001.[9] Notably, this horrendous event resulted in almost 3,000 fatalities, and inflicted severe damage on the infrastructure and economy of the United States, in general, and New York City (NYC), in particular, in addition to having inevitable disastrous effects on global markets.[10] Responding to this unforeseen occurrence, the United States, along with several other states, has forthwith enacted 'strict counter-terrorism policies to protect and fortify its national security and allegedly bring safety and security to the world.[11] Nevertheless, the majority of the US counter-terrorism measures adopted to achieve this goal adversely hindered the pursuit of this rather 'angelic' proposition.

[6] *Supra note* 1 (Green).
[7] Huddy, Leonie, et al. "The Consequences of Terrorism: Disentangling the Effects of Personal and National Threat." Political Psychology, vol. 23, no. 3, 2002, pp. 485–486. JSTOR, http://www.jstor.org/stable/3792589.
[8] Prewitt, Kenneth, et al. "The Politics of Fear after 9/11." Social Research, vol. 71, no. 4, 2004, p. 1136. JSTOR, http://www.jstor.org/stable/40971995.
[9] Galston, William A. "Twenty Years Later, How Americans Assess the Effects of the 9/11 Attacks." *Brookings*, Brookings, 9 Sept. 2021, https://www.brookings.edu/blog/fixgov/2021/09/09/twenty-years-later-how-americans-assess-the-effects-of-the-9-11-attacks/.
[10] *Supra note 7* (Huddy).
[11] *Ibid*.

Instead of adopting national security policies that guarantee and align with the protection of human rights, the United States adopted a diverse range of controversial counter-terrorism policies that have systematically targeted certain individuals and communities.[12] While it is vastly contested whether states are able to commit acts that are not harmonious with their obligation towards the protection of the human rights of their citizens for the purpose of protecting the security of the nation, there are a set of preconditions that must be met before such a claim is deemed as legally and morally admissible.[13] Essentially, it is true that terrorism has and still poses a significant threat to the national security of the United States, nonetheless, it must be acknowledged that in certain cases, the US government has weaponized terrorism and utilized it to adopt and implement several policies that have led to acute effects on individuals.[14] Most problematically, some of these policies were not exclusively or directly implemented to combat terrorism only; rather, they served to fulfill specific political goals. It is vital to note that the new empowerments provided to the US government through its post-9/11 anti-terrorism legislation not only led to a breach of human rights obligations; rather, the US also improperly utilized a set of pre-existing policies that enabled the occurrence of such repressive consequences on human rights.

[12] Sharaf, Nabil. "Twenty Years after 9/11: A Reckoning for Anti-Muslim Hostility in the United States." *Arab Center Washington DC*, 10 Dec. 2021, https://arabcenterdc.org/resource/twenty-years-after-9-11-a-reckoning-for-anti-muslim-hostility-in-the-united-states/.

[13] "National Security & Human Rights." *Amnesty International USA*, Amnesty International, 2020, https://www.amnestyusa.org/issues/national-security/#:~:text=On%20multiple%20fronts%2C%20the%20United,U.S.%20law%20and%20international%20law.&text=The%20U.S.%20has%20used%20lethal,countries%2C%20leading%20to%20civilian%20deaths. Accessed, June 15, 2022.

[14] Aoláin, Fionnuala Ní. "Human Rights Advocacy and the Institutionalization of U.S. 'Counterterrorism' Policies since 9/11." *Just Security*, Reiss Center on Law and Security, 9 Sept. 2021, https://www.justsecurity.org/78160/human-rights-advocacy-and-the-institutionalization-of-u-s-counterterrorism-policies-since-9-11/.

The complex dichotomy between national security and human rights has been subject to intense debate with a wide variety of solid arguments in support of and opposition of both sides.[15] In the counter-terrorism field, it could be observed that the majority of states, including the United States, have prioritized national security over human rights. Though under certain circumstances it is often accepted for the state to derogate from certain rights and legal responsibilities towards the protection of its citizens' human rights to protect national security, such derogations must meet specific standards in terms of legality, proportionality, and necessity.[16] States tend to justify some of their controversial counter-terrorism policies by touching upon the notion that there is a requisite trade-off between human rights and civil liberties on the one hand, and national security and anti-terrorism legislation, on the other. This approach has indirectly enabled states to implement counter-terrorism policies that possess a repressive nature, without much regard to human rights or international law, through the justification of combating terrorism and protecting national security.

Whether the US counter-terrorism approach has succeeded or not is quite difficult to assess and is dependent on a set of variables that require thorough analysis. Regardless, it is safe to affirm that several years after the occurrence of the 9/11 terrorist attacks, this approach continues to have a visible impact on different communities within and outside the United States. Whereas the United States has certainly achieved several successes in terms of fighting terrorism and protecting its national security after 9/11, this research paper seeks to manifest the controversy and main challenges that emerged from the US counter-terrorism policy. It is vital to note that

[15] Brysk, Alison. "Human Rights and National Insecurity." National Insecurity and Human Rights: Democracies Debate Counterterrorism, edited by ALISON BRYSK and GERSHON SHAFIR, 1st ed., University of California Press, 2007, pp. 1–2. JSTOR, http://www.jstor.org/stable/10.1525/j.ctt1ppbw5.4.

[16] The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4, Annex (1985). Available at: https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf.

the effects of the counter-terrorism policy adopted by the United States were not exclusive to its territory; rather, it has also affected other regions as well, notably the Middle East, specifically through its military operations as a pivotal aspect of its infamous "War on Terror." The vast majority of statistical data reveals that the most affected by the post-9/11 US counter-terrorism policies were Muslims, Arabs, and South Asians (particularly Sikhs who were mistakenly thought to be Muslims), or those who are perceived as such.[17] After 9/11, the US government denounced the use of racism and rejected the claim that the US counter-terrorism approach has a discriminatory nature to it; yet, there was a substantial increase in the number of cases of racial profiling and surveillance, especially against the aforementioned groups.[18] Would this act constitute unlawful differentiation? If so, is it allowed under specific circumstances? Does national security outweigh human rights in cases of significant threats? I seek to address these questions in this thesis, and provide a theoretical framework that explains the reasoning behind the conclusions and findings I reach.

1.2. Field of Research: Research Question and the Hypothesis Proposed in this Research

The field of research that this paper will inspect is the dichotomy between anti-terrorism legislation and international human rights, concentrating on the United States as a case study. The paper intends to specifically explore whether the national security policies that the United States implemented to counter the threat of terrorism have been compatible with International Human Rights Law (IHRL). Accordingly, the primary research question of this paper is: "**How compatible are the counter-terrorism policies that the US government implemented following the events of 9/11 with international human rights, in particular with the right to**

[17] New York Advisory Committee (NYAC). Civil Rights Implications of Post: September 11 Law Enforcement Practices in New York. Bibliogov, 2004.
[18] Romero, Anthony D. Sanctioned Bias: Racial Profiling since 9/11. ACLU, 2004

non-discrimination and right to privacy?" While the United States has adopted a wide range of policies and other counter-terrorism measures that had a noticeable effect on the two aforementioned rights, the paper, for the sake of specificity, will only concentrate on two specific policies, which comprise **(a)** policies that have racial-profiling elements in it and **(b)** policies of surveillance.

In particular, this thesis seeks to analyze if the US government has utilized these policies on a discriminatory basis, specifically in a way that systematically targeted Arab, Muslim, and South Asian individuals. Under international law, there is a wide consensus that in exceptional circumstances, precisely in states of emergency, states are legally entitled to derogate from specific human rights for a limited period of time for the purpose of dealing with the existing emergency the state is encountering. Given that the events of 9/11 were of an extraordinary nature that had forced the US government to declare a state of emergency and take instantaneous measures to protect its national security, was it legally justified for the United States to adopt counter-terrorism measures that could have derogated from certain human rights in a discriminatory manner? The paper will inspect if the derogations made by the US in its counter-terrorism approach efforts after 9/11 were allowed or forbidden in times of emergency.

The **hypothesis** of this research paper indicates that the United States has exploited its emergency powers to install and utilize a range of repressive measures through the justification that such measures were requisite to restore constitutional order and fight terrorism. More precisely, the state of emergency that was declared after the occurrence of the 9/11 terrorist attacks provided the United States with a plausible pretext to normalize and permanently install the emergency powers it acquired following the events of 9/11. This paper will rely on three main determiners to explore this hypothesis and answer the research question, which consist of

the **(a**) legality, **(b)** proportionality, and **(c)** necessity of the counter-terrorism policies implemented by the US government after it had declared a state of emergency due to the 9/11 terrorist attacks. The paper will also shed light on the policies that remained in place until now and whether they can still be justified now. Finally, it is vital to note that this paper will not attempt to inspect nor specify policies that were adopted before the 9/11 attacks to counter terrorism. Therefore, the scope of this research is limited to post-9/11 counter-terrorism measures as a result of the significance of this incident and its impact on reshaping the counter-terrorism approach of the United States.

1.3. Political and Legal Significance

The exploitation of anti-terrorism legislation in a way that provides states with exceptional powers that are not exclusively intended to be utilized for counter-terrorism purposes, but rather to achieve various political objectives is a dangerous phenomenon that is mostly associated with authoritarian regimes, such as Egypt, Saudi Arabia, and most recently, Turkey. This research study seeks to delineate, through the example of the United States, how even democracies could abuse their anti-terrorism legislation and directly infringe upon IHRL. Further, the proposed research question holds significant relevance in the current political and legal landscape surrounding the issue of counter-terrorism.

The answer to the question could potentially manifest that the United States also does not pay much regard to international law and the protection of human rights in its prolonged fight against terrorism, similar to several countries it criticizes for the approach they adopt to combat terrorism. This particular aspect of the research furnishes the political significance of this study as it illustrates the main inconsistencies and hypocrisy surrounding human rights in the context

of counter-terrorism. This is not to propose that the aforementioned countries should not be condemned or criticized for abusing their anti-terrorism legislation since the US government also does this; rather, it is to affirm that spotlight should be equally distributed to both parts of the world since violations of human rights in the context of counter-terrorism occur within both.

In terms of its legal significance, this study highlights the direct and indirect consequences and implications that inevitably stem from the anti-terrorism legislation adopted by the United States, and how compatible it has been with relevant international human rights treaties and customary international law. It also divulges the controversy behind states of emergency, mainly exploring whether the United States has utilized it as a pretext to justify the adoption of repressive laws that were in contravention of its international legal obligation and have inflicted long-lasting political, material, social, and human costs to a large number of individuals; the majority of whom were Muslims, Arabs, and South Asians. The paper will also touch upon the international legal framework regarding states of emergency and the main regulations put by international law to ensure that it does not get exploited by states, through the case of the United States.

1.4. Research Framework: Design and Methodology

The following research study has a relational aspect to it as it seeks to analyze the relationship between anti-terrorism legislation and human rights. In order to assess this complex dichotomy, the thesis adopts the 'case study' research design, specifically concentrating on the case of the United States and inspecting some of the most controversial policies it has implemented to combat terrorism following the 9/11 attacks. After examining the post-9/11 counter-terrorism policies in question, the paper employs an analytical method to analyze and investigate the legality and impact of these measures. In general, a mixed methodology will be employed to

evaluate the legality and impact of the counter-terrorism policies implemented by the United States, which consist of the following:

(a) The first research method that this paper applies is **doctrinal research** as it provides a systematic exposition of the central legal principles and regulations regarding the issue of counter-terrorism and the state of emergency. It predominantly relies upon several primary sources, which consist of human rights treaties, relevant case law, regulations (legal principles), and domestic law. The main relevant primary sources that will be utilized in this paper to assess the **legality** and **proportionality** of the US anti-terrorism legislation are:

1. The Universal Declaration of Human Rights (UDHR);
2. The International Covenant on Civil and Political Rights (ICCPR);
3. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
4. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights;
5. The U.S. Constitution.

(b) The second research method employs **fundamental research** since, in addition to exploring the legal dimensions of counter-terrorism, it also aims to analyze the overall impact and socio-political implications of the US anti-terrorism legislation. Accordingly, the thesis will utilize anthropological analysis to manifest the potential consequences that arose from such legislation on individuals and societies within the United States. The thesis relies on several relevant secondary sources, such as books and UN and civil society reports, in this method, to provide such analysis. Further, it will complement this

analysis by providing some statistical data, when seen as necessary and fit for the research, hence applying quantitative research methods as well.

(c) Lastly, the thesis will contain a slight use of **theoretical research** method, precisely when tackling the issue of states of emergency to further explicate the legal framework surrounding it, along with the main potential issues that could arise from it, if left unchecked and improperly utilized. In this regard, the thesis will rely on Giorgio Agamben to provide this analysis.

1.5. Thesis Structure

In total, this thesis comprises four chapters, including this introductory chapter. The **second chapter** is a literature review that generally inspects the dilemma of national security prioritization over human rights in the context of counter-terrorism, and clarifies the role that the state of emergency can play in diminishing human rights and providing states a legal pretext to derogate from their responsibilities as human rights protectors. This chapter intends to discuss the principle of derogation, specifically showing which rights States are legally entitled to derogate from, and what the regulations surrounding this principle are in order to later assess the legality of the post-9/11 counter-terrorism policies enacted by the United States.

The **third chapter** analyzes racial profiling in-depth as the first US counter-terrorism policy. This chapter particularly focuses on three dimensions; first, it discusses the main counter-terrorism procedures the US law enforcement officials have utilized by relying on racial profiling; second, it assesses the proportionality and overall impact of these procedures on individuals, with a precise focus on Muslims, Arabs, and South Asians; and third, it evaluates the

legality and compatibility of these procedures with IHRL and which rights were infringed upon if a violation had occurred.

The **fourth chapter** explains how the US government has utilized surveillance as a counter-terrorism policy. Similar to chapter two, this chapter contains three dimensions to it; first, it addresses how surveillance was used by the United States to fight terrorism; second, it assesses the overall impact of this policy and shows the main controversies and issues behind its usage; third, it explicates the international framework of the right to privacy and its parameters and evaluates whether this particular counter-terrorism policy has been compatible with IHRL, in terms of legality, proportionality, and necessity.

The last part of this thesis is the **conclusion.** It mainly offers a summary that highlights the major points and findings of the study, focusing on how the examined case study addresses the research question and hypothesis raised in this paper.

Chapter 2

The Dichotomy Between Human Rights & National Security: Real or False Dilemma?

2.1. Introduction

In the name of national security, fundamental human rights and international law have been blatantly infringed upon by several states in both, the Global North and South through a diverse range of policies that were meant to combat terrorism, but have proven to be repressive and disproportionate in nature nonetheless. Perhaps most controversially, these policies have been often misused and exploited by states in order to enforce their dominance and control over different aspects of the lives of their citizens.[19] In this sense, certain states have adopted such measures in order to achieve specific political objectives that are irrelevant to fighting terrorism, at least exclusively, under the pretext of counter-terrorism.

In general, the promotion of human rights and the protection of national security are largely perceived as in inherent tension by foreign policymakers and experts in the United States[20] In fact, they assert that most US administrations have treated the two objectives as mutually exclusive.[21] The United States pushed the baseless narrative that the promotion of human rights can only be reached at the expense of national security and the act of protecting national security

[19] Gearty, Conor. "Terrorism and Human Rights." *Government and Opposition*, vol. 42, no. 3, 2007, pp. 340–62. *JSTOR*, http://www.jstor.org/stable/44483201.
[20] Burke-White, William W., "Human Rights and National Security: The Strategic Correlation" . Faculty Scholarship at Penn Law. 960. 201, p. 249 https://scholarship.law.upenn.edu/faculty_scholarship/960,
[21] *Ibid.*

can only be achieved while overlooking some international human rights.[22] Most human rights defenders and national security experts assert that human rights concerns continue to be subordinate to national security issues by states, which is explicitly mirrored by relevant political rhetoric and statements used by heads of states: "the focus is protecting the Nation first."[23] This traditional and problematic separation of human rights and national security is clearly reflected in the US counter-terrorism approach as it has inevitably resulted in grave human rights violations under the justification that such measures are requisite to protect national security and "the Nation."

In many instances, states of emergency have been substantially abused by states in order to acquire more powers and the authority to adopt a set of repressive measures for reasons that tend to exceed the chief purpose of the emergency or national security threat.[24] Given this, this chapter will explore the conflictual and complex relationship between national security and human rights, and provide a theoretical framework that explains derogations and the limits that are imposed on states when declaring a state of emergency. The next chapter will review the US state practice to assess the legal implications of the state of emergency and derogations made by the US government, in accordance with IHRL. Although this topic has been well-researched, this thesis seeks to convey whether the state of emergency that was implemented by the US after 9/11 conformed with the necessary, legal, and proportional standards that it has to abide by, as well as showing that the US has often misused the powers it acquired to achieve other political objectives. It is worth noting that this particular aspect of the US counter-terrorism policy has not been extensively analyzed. This chapter mainly relies on analyzing the United States. In terms of

[22] *Ibid*.
[23] *Ibid* at 253.
[24] Fitzpatrick M, Joan. *Protection Against Abuse of the Concept of "Emergency*," *in* Human Rights: An Agenda For The Next Century. American Society of International Law, 1994, p. 203.

structure, this chapter consists of two parts; the first part analyzes the main effects of the primacy of national security over human rights; the second part discusses how the United States has abused emergency powers under the framework of counter-terrorism.

2.2. The Effects of the Primacy of National Security over Human Rights in the US Context

Under the pretext of combating terrorism, states have been able to enact different repressive laws that have led to grave human rights infringements and are in direct conflict with IHRL, especially against human rights defenders and civil society actors.[25] The first UN Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, Martin Scheinin affirmed that "for a while, the global consensus about the imperative of combating terrorism was so compelling that authoritarian governments could get away with their repressive practices simply by renaming political opponents as terrorists."[26] In several parts of the world, states have depicted various forms of expression that articulate a contradictory view to the official position of the state as a "form of terrorist activity or violent extremism," as well as a broad threat to the national security of the state.[27] This has allowed the government in question to adopt certain measures, including surveillance, censorship, and imprisonment against certain individuals and organizations that question the legitimacy of such measures.

[25] Aoláin, Fionnuala Ní. *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism on the Role of Measures to Address Terrorism and Violent Extremism on Closing Civic Space and Violating the Rights of Civil Society Actors and Human Rights Defenders*. Human Rights Council, 1 Mar. 2019, A/HRC/40/52 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/057/59/PDF/G1905759.pdf?OpenElement.

[26] Martin Scheinin and Mathias Vermeulen, "Unilateral exceptions to international law: systematic legal analysis and critique of doctrines that seek to deny or reduce the applicability of human rights norms in the fight against terrorism", European University Institute Law Working Paper (2010).

[27] *Supra note* 25 (Aoláin) at 4.

Scheinen states that while it was mostly authoritarian states that have exploited this to secure their rule by "silencing voices questioning their legitimacy or their policies on human rights grounds" through the justification of preserving national security, democratic states have also indirectly engaged in similar acts that violate IHRL.[28] In this sense, terrorism has been weaponized by several states to authorize repression and discriminatory measures against civil society members and citizens on the basis of spurious grounds, specifically for the purpose of maintaining their dominance over their citizens.[29] Most problematically, the prioritization of national security over human rights has provided certain states excessive power and tools to qualify any existing or potential political dissent or opposition as a "direct threat" to the security of the state, and thus enabled the government to censor this dissent, or surveil on the actors that engage in such dissent.[30]

The promotion of universal human rights has long been viewed as a luxurious act by the US government for the most part, in the sense that it would only be pursued when it does not directly jeopardize or pose a conflict with the national security of the state and when the government has "spare diplomatic capacity" to do so.[31] In fact, the US government has typically perceived the act of promoting human rights as "competing with or even comprising core issues of national security," ever since the birth of the Human Rights Movement.[32] This traditional tension is further manifested by what a former Congress member had asserted that "there will always be a tension between our foreign policy as classically defined in terms of the United States'

[28] *Ibid at* 3.
[29] *Ibid* at 4.
[30] *Ibid* at 3.
[31] *Supra note* 20 (Burke-White) at 251.
[32] *Ibid*

economic, political, and strategic interests and our human rights interests."[33] Inevitably, this complex and long-lasting 'competition' between human rights and national security has produced disastrous and crippling effects on human rights, in addition to marginalizing them.[34] While it must be acknowledged that the US government has a genuine concern and pivotal obligation to protect its national security from any external threat, as enshrined in the US Constitution[35], the central issue stems from the fact that national security protection could be easily exploited as a pretext to restrict civil liberties and human rights.[36]

It is important to note that the depiction of individuals as an existential threat to national security includes random law-abiding and innocent individuals who have been basely suspected of posing a "threat," based on having specific characteristics, such as religion, national origin, and appearance, as manifested by the case of Muslims after 9/11.[37] This act of repression tends to take the form of racial and ethnic profiling, which is undertaken by "physical, computerized, and behavioral screening initiatives," sponsored by some governments, under the justification of protecting national security.[38] Racial profiling has proven to subject certain individuals, especially minorities, to increased "scrutiny and suspicion" just for having a specific appearance that is considered "suspicious" by the government.[39] It can be observed that in the name of national security, more governments are increasingly adopting racial profiling policies that

[33] *Ibid*

[34] UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 32, Human Rights, Terrorism and Counter-terrorism*, July 2008, No. 32, available at: https://www.refworld.org/docid/48733ebc2.html

[35] United States of America: Constitution [United States of America], Article IV, Section 4. 17 September 1787, available at: https://www.refworld.org/docid/3ae6b54d1c.html [accessed 16 June 2022]

[36] *Supra note* 25 (Aoláin) at 4.

[37] Kleiner, Yevgenia S. Racial Profiling in the Name of National Security: Protecting Minority Travlers' Civil Liberties in the Age of Terrorism. 2010, lawdigitalcommons.bc.edu/twlj/vol30/iss1/5/.

[38] *Ibid*.

[39] *Ibid*.

disproportionally violate human rights and solidify "harmful racial stereotypes" about certain minority groups.[40]

Further, the primacy of national security has been translated into polarizing political rhetoric that centers around the notion: "with us or with the terrorists."[41] This has left individuals and civil society members that question or problematize the legitimacy of counter-terrorism policies vulnerable and subject to constant harassment by the state.[42] Particularly, Bush projected identical political rhetoric following the 9/11 terrorist attacks through the process of dividing "**us**" (the United States) and "**them**" (the Arab and Islamic world and terrorists) as an attempt to secure the national identity of the US, utilizing the logic of "friends versus enemies."[43] This securitization firmly adheres to the Schmittian conception of sovereignty through the leader's determination of allies and enemies, and the determination that terrorism is a "threat that requires exceptional measures."[44]

In general, the lack of a universal and comprehensive definition of terrorism is largely viewed as a crucial factor for the emergence of the restrictions imposed on civil liberties and rights, especially freedom of expression and the right to privacy, as it underpins most of the subsequent challenges at the national level.[45] In numerous instances, several states have legally prohibited the circulation of news that deal with anything concerning the issue of terrorism, specifically by the "criminalization of [...] the publication of news or other material likely to promote

[40] *Ibid*.
[41] *Supra note* 25 (Aoláin) at 4.
[42] *Supra note* 25 (Aoláin) at 4.
[43] Sherwood, Percy. Tracing the American State of Exception from the George W ... Western Journal of Legal Studies, 2017, p.5, ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1286&context=uwojls.
[44] *Ibid* at 5.
[45] *Supra note* 25 (Aoláin) at 10.

terrorism."[46] The primary concern of such measures is that they eliminate transparency and the ability to hold governments accountable for possible human rights abuses, as well as having a particularly acute impact on journalists, media workers, and human rights defenders as part of their counter-terrorism efforts. In this regard, the Bush administration has been accused of being "one of the most secretive and nontransparent in [US] history" as it has consistently rejected to disclose information related to its counter-terrorism approach under the justification of "Government secrecy."[47]

Following the 9/11 terrorist attacks, the US government had led a vast campaign of reclassification and increased secrecy by federal agencies, including "the expansion of a catch-all category of sensitive but unclassified."[48] It has been proven that on multiple occasions, the US government has made broad claims of "state secrets" to stymie judicial review of several counter-terrorism policies that have directly infringed upon Americans' civil liberties.[49] Further, the US government has expressed deep interest in prosecuting journalists under the Espionage Act of 1917,[50] as an attempt to halt the role of media and civil society members in exposing "questionable, illegal, and unconstitutional conduct, including the maintenance of secret CIA prisons and the National Security Agency (NSA) wiretapping program.[51] As a result, the US government was able to silence individuals who question the legitimacy and effectiveness of its

[46] *Supra note* 25 (Aoláin) at 12.
[47] *Supra note* 25 (Aoláin) at 12.
[48] ACLU. "Top Ten Abuses of Power Since 9/11." American Civil Liberties Union, 2007, www.aclu.org/other/top-ten-abuses-power-911.
[49] *Ibid.*
[50] Becker, Michael D. The Espionage Act & An Evolving News Media: Why Newspapers That Publish Classified Information May Face Criminal Charges as They Enter the Digtial Age. American University Washington College of Law, 2014, https://mtsu.edu/first-amendment/article/1045/espionage-act-of-1917.
[51] *Ibid.*

counter-terrorism approach under the pretext of protecting national security.[52] This specifically conflicts with the Human Rights Council's Resolution 7/36, which stresses the need to ensure that "the invocation of national security [...] is not used unjustifiably or arbitrarily to restrict the right to freedom of opinion and expression."[53]

2.3. Derogations and the Abuse of the State of Emergency in the Context of Counter-Terrorism

It is argued that in most cases of emergency, rule of law and democracy tend to have a conflictual relation as they tend to seldom go hand in hand, especially since it becomes incredibly incoherent and difficult to apply them together in such situations.[54] Essentially, the fact that states of emergency have been often exploited by certain states in order to provide them with a plausible pretext to adopt a range of repressive measures for purposes that are necessarily relevant to the existing emergency has made this relationship even more difficult to fix.[55] The US state of emergency that was declared after the 9/11 attacks also mirrors this since it had left its "mark" on American democracy by immoderately utilizing emergency powers and expanding presidential authority to enable the government to utilize torture and unwarranted surveillance against individuals, under the guise of combating terrorism.[56] This has inevitably resulted in grave human rights infringements on American citizens.

[52] *Ibid.*
[53] *Supra note* 25 (Aoláin) at 11.
[54] Choukroune, Leïla. "When the State of Exception Becomes the Norm, Democracy Is on a Tightrope." The Conversation, 11 Nov. 2020, theconversation.com/when-the-state-of-exception-becomes-the-norm-democracy-is-on-a-tightrope-135369.
[55] *Ibid.*
[56] *Ibid.*

It is widely acknowledged that extraordinary situations, including acts of terrorism directly confront the state with serious challenges that need to be immediately tackled.[57] These challenges raise the question of what an appropriate and lawful measure would the state take in response, whether these extraordinary situations require or justify "extraordinary powers." However, this approach has been regarded as overly problematic as it has resulted in cases of abuse of power, as easily reflected in the cases of Egypt, Israel, and Syria.[58] Nevertheless, international human rights law has furnished a compromise solution to tackle this issue by providing states with the option of taking special measures, in which they are authorized to derogate from certain rights, but such derogation faces limited and safeguards that prevent abuse.[59]

The state of emergency cannot be utilized to vest a state with absolute powers and green light to ignore or infringe upon human rights.[60] As established by international law, specifically through treaties, there are several non-derogable rights that have to be respected and protected fully even in times of emergency, such as the right to life, the prohibition of torture and other ill-treatment, the prohibition of slavery, etc.[61] Moreover, human rights treaty bodies and courts have substantially expanded the scope of non-derogable rights to encompass particularly essential judicial guarantees, such as the right to *habeas corpus*, the right to an effective remedy, as well

[57] Bantekas, Ilias and Lutz Oette, *International Human Rights: Law and Practice*, (Cambridge: CUP, 3rd edition, 2020), p. 80.
[58] *Ibid*.
[59] F. Ní Aoláin and O. Gross, 'A Skeptical View of Deference to the Executive in Times of Crisis' 41 Israel Law Review 545, 2008; REDRESS, Extraordinary Measures, Predictable Outcomes: Security Legislation and the Prohibition of Torture, 2012.
[60] *Supra note* 57 *(*Bantekas and Oette) at 81.
[61] *Ibid*.

as recognizing the principle of non-discrimination to be non-derogable.[62] Even in the case that a right is derogable, any state measure taken is subject to a "proportionality test," in which it must be strictly requisite to address the threat, have a connection to the threat, be temporary, and non-discriminatory.[63] While the legal framework concerning states of emergency is well developed, there are still considerable concerns that states invoke "emergency rationales" by relying on the language of security and counter-terrorism to diminish human rights.[64] By this, states are awarded with broad powers while restricting, or even excluding, remedies, oversight, and accountability, which inevitably leads to "veritable states of exceptionalism antithetical to the rule of law, and, by definition, human rights protection."[65]

In his book, *State of Exception*, Giorgio Agamben, a prominent Italian philosopher, comprehensively addresses the concept of the state of emergency. He states that the state of exception happens within a state of emergency where civil rights and liberties can be diminished or rejected, shedding light on the role of the sovereign in forming the normal legal system through its ability to decide "upon what is exceptional to its order."[66] Specifically, Agamben affirms that the power of the sovereign is essentially grounded in the emergency associated with a certain state of war, in the sense that the metaphor of war turns into a crucial part of the presidential "political vocabulary" whenever decisions of vital importance are being imposed.[67] The strategic decision of President George W. Bush to constantly refer to himself as the

[62] See HRCtee, General Comment 29, paras. 6–16; Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights) (IACtHR) (1987); Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights) (IACtHR) (1987).
[63] HRCtee, General Comment 29, particularly paras. 4, 5 and 8; *Supra note* 57 *(*Bantekas and Oette) at 81.
[64] *Supra note* 57 *(*Bantekas and Oette) at 81.
[65] L. Doswald-Beck, Human Rights in Times of Conflict and Terrorism. Oxford University Press, 2011.
[66] Passavant, Paul A. "The Contradictory State of Giorgio Agamben." Political Theory, vol. 35, no. 2, 2007, pp. 147–74. JSTOR, http://www.jstor.org/stable/20452544. Accessed 16 Jun. 2022.
[67] Agamben, Giorgio. A Brief History of the State of Exception, An Excerpt from an State of Exception, Translated from Kevin Attel, University of Chicago Press. 2004, p. Available at: https://press.uchicago.edu/Misc/Chicago/009254.html.

"Commander in Chief of the Army" after 9/11 must be examined in the context of the aforementioned presidential claim to sovereign powers in cases of emergency.[68] In accordance with this, the assumption of this title primarily entails a direct reference to the state of exception as it can be observed that Bush was trying to generate a condition, in which the emergency "becomes the rule" by using this "political vocabulary."[69]

Agamben affirms that in contemporary governance, the state of exception stopped resembling "the exception to the rule;" rather, the exception started to growingly resemble "the rule itself," creating a complex and "paradoxical position."[70] This intruding process is deemed as the "preliminary condition for any definition of the relation that binds and at the same time abandons the living being to law."[71] Agamben comprehensively investigates the process of transforming the state of emergency, which often results in the suspension of different essential laws and rights, into a "prolonged state of being."[72] In general, the rationale behind prolonging states of emergency is to normalize the repressive measures that are adopted by the state, through the justification that such measures are required to restore constitutional order.[73]

According to Agamben, there are two different schools of thought that extensively tackle the legal basis of the state of exception.[74] Specifically, the first school of thought is codified in international law as "derogation," and it concedes the legality of the exception as "an integral part of positive law" because the need that grounds it is "an autonomous source of law."[75] In this

[68] *Ibid*.
[69] *Ibid*.
[70] *Supra note* 43 (Sherwood) at 7.
[71] *Supra note* 67 (Agamben) at 1.
[72] *Supra note* 43 (Sherwood) at 7.
[73] *Ibid a*t 3.
[74] *Supra note* 67 (Agamben) at 22.
[75] *Ibid at* 23.

particular view, states are authorized by international human rights conventions and treaties to suspend or infringe upon specific human rights, under exceptional cases of emergency that may threaten the national security of these states. This clause is explicitly embodied in Article 4 of the International Covenant on Civil and Political Rights (ICCPR), which acknowledges the existence of a "public emergency [that] threatens the life of the nation and the existence of which is officially proclaimed."[76] This specific article legally permits state parties to "take measures derogating from their obligations under the present Covenant [ICCPR] to the extent strictly required by the exigencies of the situation."[77]

Similarly, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights affirm that the limitations on human rights under the ICCPR must meet standards of "legality, evidence-based necessity, proportionality, and gradualism."[78] These principles are perceived as a foundation on which to establish–in emergencies–state restrictions on human rights in all public emergencies[79] Essentially, they establish that state policies must be evidence-based and cannot be arbitrary or discriminatory against certain groups or individuals.[80] Section E[81], paragraph 64, of the Siracusa Principles states that derogation is an "authorized and limited prerogative" in order to adequately tackle a "threat to the life of the nation," as well as ensuring that the rule of law shall prevail even in a

[76] *Supra note* 43 (Sherwood) at 2.
[77] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html
[78] *Ibid* at 16.
[79] *Ibid* at Introductory Note (3-4) ; O'Donnell, Daniel. "Commentary by the Rapporteur on Derogation." *Human Rights Quarterly*, vol. 7, no. 1, 1985, pp. 23–34. *JSTOR*, https://doi.org/10.2307/762037. Accessed 16 Jun. 2022.
[80] *Ibid*.
[81] "*Some General Principles on the Introduction and Application of a Public Emergency and Consequent Derogation Measures.*"

public emergency. Under the same Section,[82] it is established that the derogating state has the burden of justifying its actions under the law.[83] The state has also the burden of considering the disproportionate impact on "specific populations or marginalized groups" in the case of any curtailment of rights.[84]

In regards to national security cases, it is affirmed in the Principles that national security cannot be utilized as a pretext for imposing "vague or arbitrary" restrictions and can only be invoked when certain adequate safeguards and effective remedies against abuse exist.[85] It is also declared that the systematic violation of human rights imperils true national security as it may jeopardize global peace and security.[86] States responsible for such violations shall not invoke national security as a justification for certain actions that aim to suppress opposition to these violations or to perpetrate repressive measures against the local population.[87] Essentially, the second paragraph[88] of Article 4 of the ICCPR affirms that state parties are still legally obligated to protect a set of fundamental human rights that cannot be deviated or suspended regardless of the level of the emergency.[89] The rights that are always protected by the ICCPR during a state of emergency contain "the right to life; prohibition of torture and slavery; and judicial guarantees; including the right to a fair trial, legal personality, freedom of thought, conscience, and religion."[90]

[82] Section E.
[83] *Ibid*.
[84] *Supra note* 16 (Principles) para 64.
[85] *Ibid*.
[86] *Ibid* para 31.
[87] *Ibid* para 32.
[88] "No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision."
[89] *Supra note* 54 (Choukroune).
[90] *Supra note* 54 (Choukroune).

It is important to also address that when national crises prompt states to derogate certain human rights, the states have a legal obligation to decide whether suspending ordinary human rights safeguards is "strictly required by the exigencies of the situation."[91] This standard requires and demands "case-specific analysis."[92] In multiple critical respects, the ICCPR depends on "open-textured" legal standards to regulate states' recourse to derogation during states of emergency.[93] However, these legal standards require a process of translation into "more specific rules," in order to be ripe for enforcement.[94] On the other hand, the second school of thought depicts the state of exception as "extrajudicial" and as a state that opens a legal space that leads to "unrestricted state action" for a temporary period of time that is required to "restore constitutional order."[95]

[91] Criddle J. Evan. "Protecting Human Rights During Emergencies: Delegation, Derogation, and Deference." *Faculty Publications*. 1840, 2014, p.199. https://scholarship.law.wm.edu/facpubs/1840
[92] *Ibid* at 199.
[93] *Ibid* at 202.
[94] *Ibid* at 202.
[95] *Supra note* 43 (Sherwood) at 3.

Chapter 3

State Violence Perpetrated by the US Racial-Profiling Policy

3.1. Introduction

In February 2001, President George W. Bush publicly denounced racial profiling and declared that it is "wrong and we will end it in America."[96] He then attempted to abolish it, precisely in 2003, when the US government released a set of guidelines promulgated by the Civil Rights Division of the Department of Justice entitled, *Regarding the Use of Race by Federal Law Enforcement Agencies*.[97] In general, racial profiling in this context[98] (counter-terrorism policies) is defined as the discriminatory practice by law enforcement authorities of targeting specific individuals for suspicion of crime on the basis of the individual's race, ethnicity, religion, or national origin.[99] Despite President Bush's rhetorical posturing and efforts in putting an end to racial profiling against Muslims and Arabs after the 9/11 attacks, such efforts miserably fell far short of fulfilling this objective.[100] It is important to affirm that the guidelines that were proposed by President Bush in 2003 lack any legal power or capacity since they are only a set of guidelines; compared to a law or an executive order, "they have no teeth."[101] These guidelines

[96] Romero, Anthony D. Sanctioned Bias: Racial Profiling since 9/11. ACLU, 2004, p.1.

[97] Guidance Regarding the Use of Race by Federal Law Enforcement Agencies. June 2003, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/guidance_on_race.pdf.

[98] While profiling itself does not necessarily have to have a negative meaning, this thesis explores it in the context of counter-terrorism policies that the US government applied.

[99] "Racial Profiling: Definition." *American Civil Liberties Union*, https://www.aclu.org/other/racial-profiling-definition.

[100] Bornstein, Avram. "Antiterrorist Policing in New York City after 9/11: Comparing Perspectives on a Complex Process." *Human Organization*, vol. 64, no. 1, 2005, pp. 52–53. *JSTOR*, http://www.jstor.org/stable/44127004.

[101] *Supra note* 96 (Romero) at 1.

conceded that racial profiling was deemed as a big national concern and is controversial; yet, they did not provide any enforcement apparatuses or specific methods for tracking "whether or not federal law enforcement agencies are in compliance" with the guidelines, making them relatively ineffecient[102]

Ironically, the non-compliance with the aforementioned guidelines is permitted in the case of defending national security or the integrity of the Nation's borders, which serves as an admission by the Department of Justice that the US depends on racial and ethnic profiling in its domestic counter-terrorism efforts.[103]" In numerous reported instances, the US government, along with the FBI, has been involved in gravely problematic practices that produced serious human rights violations against Muslims and other minority groups following the 9/11 attacks, explicitly reflecting the phony nature of President Bush's claims and "attempts" at ending racial profiling in the United States.[104] In fact, it has been the official policy (shortly after the occurrence of 9/11) of the United States to "stop, interrogate, and detain individuals without criminal charge," often for long periods of time, based on specific characteristics, such as national origin, ethnicity, and religion.[105] While it can be argued that these measures were considered necessary to protect national security in the US context, many of them (as will be manifested in this section) have directly proven to be disproportionate and inconsistent with international and human rights standards, thus making them unlawful for the most part.

[102] *Ibid*

[103] Patel, Faiza. "Ending the 'National Security' Excuse for Racial and Religious Profiling." Brennan Center for Justice, 22 July 2021, https://www.brennancenter.org/our-work/analysis-opinion/ending-national-security-excuse-racial-and-religious-profiling.

[104] *Supra note* 96 (Romero) at 1.

[105] *Ibid*.

3.2. The Disproportionality of the US Counter-Terrorism Measures against Muslims, Arabs, and South Asians.

3.2.1. Arbitrary Detentions

American Muslims have been subjected to a variety of discriminatory and humiliating procedures by law enforcement officials following the 9/11 attacks, merely on the basis of their religion and appearance. It had been reported that within a few hours of the terrorist attacks of 9/11, the FBI raided a large number of Arab, Muslim, and South Asian neighborhoods throughout the United States, and then proceeded with detaining men from "sidewalks, as well as their homes, workplaces, and mosques."[106] In addition, the Department of Justice launched an immense program of preventive detention, often considered the first extensive detention of a group of people merely on the basis of country of origin and ancestry since "the internment of Japanese Americans during World War II."[107] Just in the very first few days after the 9/11 terrorist attacks, some **75** individuals were detained, mostly comprising Muslims.[108] While the Bush administration was seeking "increased authority" from Congress to acquire the legal power to detain non-citizens–which was later granted–it detained hundreds of citizens suspected of engaging in terrorist activities, primarily on the basis of their religion and national origin.[109] Both citizens and non-citizens were subjected to these arbitrary detentions. On November 5, 2001, the Department of Justice announced that **1,182** individuals had been detained "as part of its

[106] *Ibid* at 4.

[107] Kampf, Lena, and Indra Sen. "History Does Not Repeat Itself, but Ignorance Does: Post-9/11 Treatment of Muslims and the Liberty-Security Dilemma." *Humanity in Action*, 9 Aug. 2019, https://www.humanityinaction.org/knowledge_detail/history-does-not-repeat-itself-but-ignorance-does-post-9-11-treatment-of-muslims-and-the-liberty-security-dilemma/.

[108] Martin, Kate. Preventive Detention of Immigrants and Non-Citizens in the United States since September 11th. 1 Aug. 2002, p.25. www.questia.com/library/journal/1G1-138002441/preventive-detention-of-immigrants-and-non-citizens.

[109] *Ibid*.

investigation" into the 9/11 terrorist attacks.[110] In the 11 months after the 9/11 attacks, **762** non-citizens were detained in connection with "the FBI terrorism men who were detained and questioned, not one has been publicly charged with terrorism.

Notably, the American Civil Liberties Union (ACLU) claims that many of those detained were arrested "indiscriminately and haphazardly," and of the thousands of individuals detained and questioned, no one has been publicly charged with terrorism.[111] As a result of the increased public questioning, the Department of Justice has refused to disclose any more information related to the number of individuals detained since then.[112] Subsequently, the US Justice Department's Inspector General released a report asserting that the detainees were "almost exclusively" men from South Asia and the Middle East.[113] The same report also concluded that many of those detained were "arrested by virtue of chance encounters or tenuous connections to a [possible terrorism] lead rather than by any genuine indications of a possible connection with or possession of information about terrorist activity."[114] Generally, the detained individuals were prohibited from contacting anyone else, including family, friends, the press, and even attorneys, as a result of a communication blackout that was imposed by the Federal Bureau of Prisons as a "national security" measure.[115] In another secretive act, the Attorney General instructed that all deportation hearings of immigration that were perceived to hold a "special interest" to the US

[110] *Ibid*.
[111] *Ibid*; *Supra note* 96 (Romero) at 5.
[112] Supra note 108 (Martin) at 25; "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks." *U.S. Department of Justice Office of the Inspector General*, 1 June 2003, Accessed June 16, 2022. (the number of detainees remains hidden, but Immigration advocacy groups estimate the number of detainees to be around 3,000 (Romero at 5). https://oig.justice.gov/reports/september-11-detainees-review-treatment-aliens-held-immigration-charges-connection
[113] ACLU. "Racial Profiling as a Violation of Human Rights." American Civil Liberties Union, 2005, p,3, www.aclu.org/legal-document/racial-profiling-violation-human-rights
[114] *Ibid*.
[115] Supra note 96 (Romero) at 4.

government to be closed to the public and the press, to conceal all immigration hearings of Arabs and Muslims.[116]

Individuals who come from Muslim, Arab, and South Asian backgrounds have been the foremost victims of the drastic flaws of the post-9/11 national security policies that were enacted by the United States.[117] These policies have consistently and substantially contravened the basic rights of these individuals as they directed an excessive portion of state violence towards them.[118] Essentially, the US policy of ethnic and racial profiling of "suspicious" individuals–who were in almost all cases, Muslims or of Arab descent–has considerably altered and shattered the public consensus that such profiling is morally wrong.[119] Consequently, the United States witnessed a substantial increase in hate crimes against these communities without providing protection to its Muslim citizens to counter these hate crimes or attempting to put an end to these hate crimes.[120] These policies created an environment where Muslim people were considered to be terrorists or enemies of the nation, which inevitably incentivized people to carry out attacks and discriminate against them.[121]

Moreover, it has been proven that the local enforcement authorities within the United States deliberately chose not to take the complaints of these citizens, despite being subjected to serious hate crimes in acts of "misplaced retaliation" following 9/11.[122] The combination of racial profiling, hate crimes, and neglect by law enforcement authorities has produced a greater sense

[116] *Supra note* 96 (Romero) at 4.
[117] Alimahomed-Wilson, Jake, and Dana Williams. "State Violence, Social Control, and Resistance." Journal of Social Justice, vol. 6, 2016, p.3.
[118] *Supra note 17* (NYAC).
[119] *Ibid*.
[120] *Ibid*.
[121] *Ibid*.
[122] *Ibid*.

of vulnerability felt among the Muslim, Arab, and South Asian communities, who have been severely affected by these derogatory and discriminatory practices.[123] Along with the greater sense of otherness experienced by many of the country's Muslim, Arab, and South Asian citizens and non-citizens, the United States has applied a disproportionate form of state violence against these communities by baselessly accusing some of their members of engaging in terrorist activities.[124] This is especially evident in the racial-profiling-like policies that the United States has further incorporated into its law, such as the USA Patriot Act, which was enacted one month after the 9/11 attacks, granting the federal government new intrusive and controversial powers to fight terrorism.

3.2.2. The USA Patriot Act

The USA Patriot Act was signed into law by US President George W. Bush on October 26, 2001, in order to strengthen national security by granting law enforcement agencies extended power that permits them to conduct certain acts that have been deemed as controversial and illegal.[125] Notably, this anti-terrorism bill was not exclusively drafted in response to the 9/11 terrorist attacks; rather, it contained a number of individual amendments to many different statutes, granting the US government "new authorities it had long been seeking," an idea that links back to Agamben's analysis on the state of exception.[126] In fact, many of the provisions included in this bill are unrelated to the issue of terrorism.[127] For example, the Act authorizes secret

[123] Ibid.
[124] Ibid.
[125] Podesta, John. "USA Patriot Act: The Good, the Bad, and the Sunset." Human Rights, vol. 29, no. 1, 2002, pp. 3–7. JSTOR, http://www.jstor.org/stable/27880293.
[126] Supra note 108 (Martin) at 23.
[127] Paye, Jean-Claude . A permanent State of Emergency. Monthly Review: An Independent Socialist Magazine, 58 (6), 29–37, 9p, 2006. monthlyreview.org/2006/11/01/a-permanent-state-of-emergency/.

executions of search warrants "in all criminal cases" without any exception.[128] In terms of its major provisions, the Act included; enhanced sentences for individuals sentenced for terrorist-related activity, abolishing the statute of limitation for certain terrorist crimes, allowing law enforcement to acquire a warrant "anywhere a terror-related incident occurs," and the use of "roving wiretaps" against suspected individuals.[129] This specific act was criticized for the inordinate damage it has inflicted on Muslim, Arab, and South Asian communities as it allowed for certain abusive acts, such as indefinite detentions and deportations of both immigrants and nonimmigrants suspected of being terrorists, based on racial profiling and surveillance policies against these communities.[130]

The Act also authorized law enforcement authorities to conduct a number of searching campaigns, under the pretext of national security, on different houses and businesses without the owners' consent or knowledge, constituting a clear breach of these individuals' basic rights.[131] Specifically, under Article 213 of the Patriot Act, investigators were allowed to access any person's property or belongings without informing[132] the resident of their intrusion.[133] Prior to the enactment of the Patriot Act, police search warrants for a specific location had two legal requirements they were compelled to meet, which consisted of "announcement and

[128] *Ibid*.
[129] U.S. Department of Justice. (2005, December 20). Civil liberties safeguards in the usa patriot act: Conference report. http://www.usdoj.gov/opa/ pr/2005/December/05_opa_682.html
[130] Ahmed, Arshad, and Farid Senzai. "The USA PATRIOT Act: Impact on the Arab and Muslim American Community: ISPU." Institute for Social Policy and Understanding, 5 Aug. 2017, https://www.ispu.org/the-usa-patriot-act-impact-on-the-arab-and-muslim-american-community/.
[131] Jones, Jesse. "The Birth of Big Brother: Privacy Rights in a Post-9/11 World." Texas A&M University Journal of Politics, Bureaucracy, and Justice, vol. 1, no. 1, 2009, p.17. https://www.wtamu.edu/webres/File/Academics/College of Education and Social Sciences/Department of Political Science and Criminal.
[132] Such an act is also referred to as "Sneak and Peek" Search Warrants
[133] Supra note 130 (Jones) at 19.

notification."[134] These unannounced search warrants permit delaying "suspect notification," have the police deemed such information to have an "adverse effect" on the process of the investigation.[135] This change in law mirrors a significant alteration of the Fourth Amendment search warrant procedures, previously established by the courts.[136]

It has also been reported that the FBI, under the instruction of Attorney General John Ashcroft, on November 9, 2001, searched and interviewed around **5,000** individuals between the ages of 18 and 33, who had legally arrived in the United States on non-immigrant visas from countries "linked by the government to terrorism," which mainly tended to be Muslim-majority.[137] Although the FBI said these interviews were "voluntary," they were "inherently coercive" in nature, and thus, few individuals felt comfortable declining, especially because the FBI descended upon those individuals unannounced at their "workplaces, homes, universities, and mosques."[138] The suspects were asked several questions about personal and sensitive activities that are protected by the US Constitution, precisely in the First Amendment, such as religious practice, mosque attendance, and most absurdly, their feelings towards the United States.[139] Controversially, the US Department of Justice conceded that "it had no basis" for accusing any of the individuals questioned of having any knowledge relevant to a terrorism investigation.[140]

[134]Bloss, William. "Escalating U.S. Police Surveillance after 9/11: An Examination of Causes and Effects." Surveillance & Society, 2007, p.116. www.semanticscholar.org/paper/Escalating-U.S.-Police-Surveillance-after-9%2F11%3A-an-Bloss/b9c623882f8a300c0aff0115d291bbdc68d89aee.
[135] *Ibid*.
[136] *Ibid*.
[137] *Supra note 96* (Romero) at 5.
[138] *Ibid.*
[139] *Ibid.*
[140] *Ibid.*

3.2.3. The US No-Fly List

Another alarming form of racial profiling that has been extensively performed by the US government is the extensive use of the No-Fly list following the 9/11 attacks often against the aforementioned minority groups, as a counter-terrorism measure to protect "national security." The rationale behind the construction of this controversial list primarily revolves around tracking individuals, who have been prohibited from traveling to and from the territory of the United States.[141] It is essential to clarify that those individuals were denied travel/entry, as a result of being labeled as "security risks" by the FBI or CIA, based on "mysterious" and "ill-defined" criteria that mushroomed around 50,000 names, consisting of mostly Muslim individuals.[142] In terms of definition, the US No-Fly list is generally depicted as a "small subset" of the United States government Terrorist Screening Database (TSD)–also referred to as "the terrorist watchlist–" which comprises the identity information of certain individuals, who are known or "suspected" to be terrorists.[143] The list includes American citizens and non-citizens. This list has been subjected to intense criticism and accused of being considerably erroneous as it even contained and flagged several members of Congress, such as Senator Ted Kennedy.[144] Furthermore, the ACLU asserted that some individuals were even told that they would be taken off the list if they agreed to become "government informants," which is a clear manifestation of the United States' abuse of power and counter-terrorism policies to control its citizens.[145] The US government has constantly failed to offer a legal basis or constitutionally sufficient means of

[141] Cole, Jared P. Terrorist Databases and the No Fly List: Procedural Due Process and Hurdles to Litigation. Congressional Research Service, 2015.
[142] *Supra note* 48 (ACLU).
[143] *Supra note* 141 (Cole).
[144] *Supra note* 48 (ACLU).
[145] Shamsi, Hina. Until the No Fly List Is Fixed, It Shouldn't Be Used to Restrict People's Freedoms. 22 June 2016, www.aclu.org/blog/national-security/discriminatory-profiling/until-no-fly-list-fixed-it-shouldnt-be-used-restrict?redirect=blog%2Fspeak-freely%2Funtil-no-fly-list-fixed-it-shouldn't-be-used-restrict-people's-freedoms.

allowing the individuals listed to challenge or debunk such accusations, nor has it informed them that they were put on the list.[146]

Another crucial problem of the No-Fly list is that in the early stages of when the US government implemented this measure (this got amended later on), it has refused to disclose the reasons for putting certain individuals on the list in the first place, making it near impossible for them to rebut these accusations and prove otherwise.[147] In several cases, certain people have been prevented from boarding a plane because they were falsely believed to be on the No-Fly list, sometimes on the basis of having "a name similar to another person who was actually on the list."[148] In this sense, by being put on the controversial No-Fly list, individuals have their freedom of movement restricted and violated since the US government forbids them from traveling, as well as violating all forms of due process. Accordingly, the US government has violated Article 12 of the ICCPR, Article 13 of the Universal Declaration of Human Rights (UDHR), and the Privileges and Immunities Clause of the US Constitution.[149] Although the right to movement can be legally derogated under Article 4 (1) of the ICCPR when it comes to extreme cases of national security, such as a state of emergency declaration, the No-Fly list certainly does not abide by the set of regulations listed[150] in this clause.[151] This stems from the fact that this particular list has been excessively abused by the United States to restrict the movement of citizens and non-citizens, and has also proved to be inaccurate and discriminatory

[146] *Supra note* 48 (ACLU).
[147] *Supra note* 48 (ACLU).
[148] *Supra note* 141 (Cole).
[149] All of these instruments protect the right to freedom of movement.
[150] "[Derogation can only happen] to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin"
[151] *Supra note* 77 (ICCPR).

in nature on the basis of their religion, appearance, name, and national origin.[152] Essentially, the discriminatory nature of the list predominantly lies in the fact that individuals belonging to the aforementioned minority groups were the most affected and targeted, especially those with similar names to the ones suspected.[153] There have been several reports also proving that the FBI has put or kept American Muslims on the list in retaliation for refusing to spy on their communities, an issue that had been addressed by the Supreme Court in 2020, which decided that those affected could sue individual FBI agents for "interfering with their freedom to practice their religion."[154] In accordance with Article 4 (1), the No-Fly list is thus illegal as it is in direct conflict with the regulations set in the Article since it affirms that the derogation taken must be proportionate and not involve discrimination on the ground of "race, color, sex, language, religion or social origin."[155]

Not only were individuals provided with zero notice that they have been added to the list–in that they were not served notice of suit in court–there was practically a minimal to no chance for them to challenge this specific determination, resulting in zero due processes in this case.[156] These individuals were unable to challenge such accusations, specifically because the US government would not proceed their cases to court.[157] The US government justified its stance by claiming that this could allegedly divulge "national security secrets," which is a claim commonly

[152] *Supra note* 141 (Cole).
[153] "Supreme Court Unanimous: American Muslims Placed on No-Fly List for Refusing to Spy on Their Communities Can Sue FBI Agents for Damages." *Center for Constitutional Rights*, 10 Dec. 2020, https://ccrjustice.org/home/press-center/press-releases/supreme-court-unanimous-american-muslims-placed-no-fly-list.
[154] *Ibid.*
[155] *Supra note* 77 (ICCPR).
[156] *Supra note* 145 (Shamsi).
[157] Ibid.

used in most national security cases in order to not disclose information.[158] In this sense, national security measures infringe on human rights as they prevent any due process because, in the US government's view, any semblance of due process could pose a threat to national security interests during the litigation process.[159] All of this is deteriorated by the fact that these individuals were not even informed why they were put on the list in the first place, and because many innocent individuals with similar-sounding names, particularly Arabic names, have been baselessly suspected and subjected to these derogatory measures for no justifiable reason.[160] The former further bastardizes the aforementioned no-process point while the latter cannot be deemed a legit accusation since several individuals have had their freedom of movement restricted, merely on the basis of having an Arabic name.

3.2.4. US Material Witness Statute

Moreover, the US government has perpetrated certain acts that explicitly breach the US Material Witness Statute,[161] especially in the period following 9/11, as part of its 'national security' measures. Notably, this statute was little-used before the 9/11 terrorist attacks, mainly allowing the government to briefly detain and jail individuals considered "material witnesses" in a criminal case, in order to secure their testimony at trial.[162] To clarify, a "material witness" is defined as a certain individual who is suspected by the US government of having vital information about a specific crime.[163] The Material Witness Statute specifically compels the state

[158] Ibid.

[159] "Kashem, Et Al. v. Barr, Et Al. - ACLU Challenge to Government No Fly List." *American Civil Liberties Union*, 7 Apr. 2021, https://www.aclu.org/cases/kashem-et-al-v-barr-et-al-aclu-challenge-government-no-fly-list.

[160] Supra note 141 (Cole).

[161] 18 US Code § 3144

[162] Supra note 108 (Martin) at 27.

[163] *Supra note* 48 (ACLU).

to "make every effort" to secure the witnesses' testimony in some other way, "for example, by deposition," before detaining them.[164] In this regard, the U.S. government was accused of gathering and detaining many individuals, particularly Muslims, Arabs, and South Asians in the United States, through the abuse of a "narrow federal technicality."[165] The selection process of those suspected was based on vague criteria that predominantly relied on ethnic profiling as a primary method, which inevitably led to the specific targeting of these groups.[166] Essentially, the ACLU claims that most of the individuals that had been detained as material witnesses were not treated as witnesses to the 9/11 attacks, and that there was no effort by law enforcement authorities to secure the testimony of those individuals.[167] Although the US government detained at least 70 material witnesses, all but one were Muslims, it only apologized to 16 individuals for wrongfully detaining them, some of whom were imprisoned for more than six months, whereas one person was detained for a full year behind bars before getting released.[168] Accordingly, the racial profiling that the US government has applied, under the guise of combating terrorism, has caused significant state violence against its population specifically the aforementioned groups. The errors and high inaccuracy of these measures strongly cement the disproportionate nature of the policies, which cannot be justified under the claim that it was necessary for the US to protect its national security, especially when it could invoke other measures that could achieve both aims. The Department of Justice reported that between 2000 and 2002, the FBI increased the

[164] Supra note 108 (Martin) at 27.
[165] *Supra note* 48 (ACLU).
[166] *Ibid*.
[167] *Ibid*.
[168] "Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11." *Human Rights Watch*, 29 Apr. 2015, https://www.hrw.org/report/2005/06/26/witness-abuse/human-rights-abuses-under-material-witness-law-september-11.

number of material witness arrests by 80%.[169] However, it refused to disclose any details regarding witnesses or the reason for their arrests.

3.3. Assessment: The Legality of US Racial-Profiling Policy

Although two decades have passed since 9/11, the practice of discrimination against Muslims remains largely still.[170] The US government still implements some of the aforementioned counter-terrorism policies, with a particular focus on Muslims. There are countless reports revealing that Muslims, solely on the basis of their names, appearance, and faith, are still profiled at airports in the US.[171] The US government, in many instances, did not back down on its controversial policies that specifically target Muslims. Several current national security measures are underlined by racial profiling, such as the CVE program, whereby a Muslim who prays five times a day can be regarded as someone who is a potential risk for national security.[172] This is also manifested by the so-called "Muslim Bans," which are a series of discriminatory executive orders enacted by the Trump administration that ban people from several Muslim-majority countries from entering the US, and shut the door on refugees from these areas under the pretext of fighting terrorism.[173] Despite being blocked by federal courts in its first two versions, in a highly controversial move, the US Supreme Court allowed the third iteration of the ban to remain in place, until Biden revoked it when he took office.[174] Nonetheless, ending the Muslim Ban addresses a tiny aspect of a much larger problem; rather, than tackling the root

[169] *Compendium of Federal Justice Statistics 2000*; Bureau of Justice Statistics, U.S. Department of Justice, *Compendium of Federal Justice Statistics 2002*, *available at* http://www.ojp.usdoj.gov/bjs/abstract/cfjs02.htm
[170] The Chicago Reporter. "Blatant Racism against Muslims Is Still with US." *The Chicago Reporter*, 8 May 2021, https://www.chicagoreporter.com/blatant-racism-against-muslims-is-still-with-us/.
[171] *Ibid*.
[172] *Ibid*.
[173] "Understanding Trump's Muslim Bans." *National Immigration Law Center*, 8 Mar. 2019, https://www.nilc.org/issues/immigration-enforcement/understanding-the-muslim-bans/.
[174] *Ibid.*

cause of the issue. In the name of national security, the US government is still adopting a series of discriminatory legislation that substantially affect minority groups in the US.

Ultimately, by failing to effectively tackle the issue of racial profiling, the United States has directly violated its legal obligations under different human rights agreements to which the nation is a party.[175] In particular, the United States has ratified two treaties that are most directly related to its international obligations to abolish racial profiling: The International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[176] The controversial use of racial profiling policies by the United States to systematically target Muslim, Arab, and South Asian individuals fully abides by the definition of "racial discrimination" that Article 1[177] of the ICERD provides. Further to this, as a state party to the ICERD, the United States accepted the legal obligation not to engage in "racially discriminating acts or practices" or enact repressive laws that target specific ethnicities or races, under any circumstances.[178] Article 2 of the ICERD binds the United States to "take effective measures to review governmental, national, and local policies, and to amend, rescind, or nullify any laws and regulations, which have the effect of creating or perpetuating racial discrimination.[179]

Similarly, under the ICCPR, the United States is not only obliged to cease from racially profiling individuals on a national level, but also to actively monitor "the policing activities of law

[175] Threat and Humiliation - Amnesty International USA. Amnesty International, Sept. 2004, www.amnestyusa.org/pdfs/rp_report.pdf, p.32.
[176] *Supra note* 113 (ACLU) at 4.
[177] "[A]ny distinction, exclusion, restriction, or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life"
[178] *Supra note* 113 (ACLU) at 4.
[179] *Ibid*.

enforcement agencies at all levels" for the purposes of identifying racial profiling and effectively halting its practice.[180] Essentially, the ICCPR places hefty emphasis on the illegality of racial profiling as it explicitly affirms that the prohibition on discrimination "remains intact" under all circumstances, including cases of emergency, as stated by Article 4 (1).[181] Hence, the practice of racial profiling is illegal under international law and cannot be authorized by states for any purpose or reason since individuals are always protected from discrimination, which can never be derogated even during times of emergency.[182] Whereas different treatment might be allowed under states of emergency, the systematic and deliberate targeting by the US government against the aforementioned groups without necessarily having any evidence that proves their connection with any terror-related activity constitutes a form of racial profiling that is both unlawful and unconstitutional. This strongly rebuts the U.S. claims that it was necessary and legal to utilize such an intrusive method to protect its national security from "suspected individuals" after it had declared a state of emergency following the 9/11 terrorist attacks.[183] Moreover, in accordance with the Siracusa Principles, the United States is not permitted to utilize national security as a pretext for imposing "vague or arbitrary" limitations on rights, and it can only invoke national security, has the United States provided "adequate safeguards and effective remedies against abuse.[184]" However, the United States has failed to provide these safeguards and effective remedies, which further mirrors the illegality of racial profiling policies.[185] While all Americans

[180] *Ibid*.

[181] "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies –of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, color, sex, language, religion, and social origin."

[182] *Supra note* 175 (Amnesty International) at 32.

[183] *Ibid*.

[184] *Ibid*.

[185] *Supra note* 17 (NYAC).

are subjected to these laws, it is Muslims and Arabs that most often experience more extreme versions due to the stereotypes connected with Islam and terrorism. The Patriot Act especially is a clear manifestation of the discriminatory nature of the US counter-terrorism measures since the US government relied on it to systematically and specifically target Muslims and Arabs, even if the Act itself prohibited racial discrimination.

It is also worth mentioning that both of these conventions require the United States, as a state party, to not only refrain from committing discrimination against any individual through its policies, but also to undertake "affirmative steps" to abolish existing discrimination, as well.[186] In addition, racial profiling poses an explicit violation of the 14th Amendment of the U.S. Constitution, which affirms that "no state [shall] deny to any person within its jurisdiction the equal protection of the laws."[187] Since it failed to comply with its obligations under the ICERD and the ICCPR, it becomes clear that the United States has breached these two human rights conventions, and thus, violated international law as a whole, under the pretext of counter-terrorism. Consequently, the affected groups are already suing the US government for the damage they have experienced as a result of these different policies.[188]

[186] *Supra note* 113 (ACLU) at 4.

[187] *Ibid.*

[188] "Lawsuit Brought by Muslims Rounded up after 9/11 Gets Go-Ahead from Court." *The Guardian*, Guardian News and Media, 21 June 2015, https://www.theguardian.com/us-news/2015/jun/21/lawsuit-muslims-september-11-roundup-abuse; Farooq, Umar A. "Muslim Americans Sue US Government over Alleged Religious Targeting at Border." *Middle East Eye*, 24 Mar. 2022,https://www.middleeasteye.net/news/muslim-americans-sue-us-government-over-alleged-religious-targeting-border.

Chapter 4

United States of Surveillance: Mass Surveillance after 9/11

4.1. Introduction: The Right to Privacy and Its Parameters.

Since the 9/11 terrorist attacks, the United States has been supplementing its security intelligence service with exceptional powers of surveillance, which include, but are not limited to: wiretapping and the use of sophisticated tracking device, in order to harvest data of certain individuals in an unlawful manner.[189] It has been observed that the evolution and expansion of the national security programs that were directly accelerated following the 9/11 events has been intrinsic to the gradual shrinking of individual privacy.[190] While the United States has constantly depicted the use of mass surveillance as a major necessity to national security, especially after 9/11, it has been evident that the US government has relied upon this incident as a pretext to abuse and expand its surveillance mechanisms to conduct mass surveillance.[191] The most affected target by this change was and still is the American Muslim population, which were forced to modify different aspects of their daily lives to avoid harassment or suspicion by the government, especially when using the internet.[192] It has been proven by the executive branch's Privacy and Civil Liberties Oversight Board that the US government's efforts in spying on its

[189] UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 32, Human Rights, Terrorism and Counter-terrorism, July 2008, No. 32, available at: https://www.refworld.org/docid/48733ebc2.html
[190] "Surveillance." *The Costs of War*, Watson Institute: Brown University, 2021. https://watson.brown.edu/costsofwar/costs/social/rights/surveillance.
[191] Thomson Reuters Foundation. "How 9/11 Shaped U.S. Mass Surveillance and Stifled Digital Rights." *News.trust.org*, 10 Sept. 2021, https://news.trust.org/item/20210910172408-lkgfd/.
[192] Dawinder S. Sidhu, The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans, 7 U. Md. L.J. Race Relig. Gender & Class 375 (2007). Available at: http://digitalcommons.law.umaryland.edu/rrgc/vol7/iss2/10

citizens and its bulk collection of Americans' call records had produced "little unique value" and "largely duplicated far more targeted techniques."[193] Even after almost two decades of when 9/11 had happened, there are countless reports showing that the US government is still conducting mass surveillance against citizens and non-citizens alike, which inevitably proves the normalizing process that the US government has pursued concerning surveillance.[194]

The right to privacy is enshrined in **Article 17** of the ICCPR and **Article 12** of the UDHR, which both require States to protect and uphold the right to privacy to all people without discrimination.[195] Notably, the prevalence of the right to privacy and its existence in many international human rights treaties, along with its acknowledged in many domestic laws and the "standardized international value of privacy," indicate that this right has sufficient state practice and *opinio juris* to have been cemented as customary international law.[196] In general, privacy includes information relevant to the private life and identity of the individual.[197] In terms of its parameters, states are not permitted under Article 17 to "interfere with the privacy of those within their jurisdiction" and are required to protect those individuals by law against "arbitrary or unlawful interference with their privacy."[198]

Although the right to privacy is not necessarily included among the list of rights that cannot be derogated in accordance with the provisions of Article 4 (2) of the Covenant, it is affirmed that "there are [still other] elements that [...] cannot be made subject to a lawful derogation under

[193] Toomey, Patrick, and Ashley Gorski. "The Privacy Lesson of 9/11: Mass Surveillance Is Not the Way Forward." *American Civil Liberties Union*, 29 Sept. 2021, https://www.aclu.org/news/national-security/the-privacy-lesson-of-9-11-mass-surveillance-is-not-the-way-forward.
[194] *Ibid.*
[195] *Supra note* 189 (OHCHR).
[196] Honan, Jessica. "Government Surveillance and the Right to Privacy in the 21st Century." *The Yale Review of International Studies*, 31 July 2021, http://yris.yira.org/comments/4810.
[197] *Supra note* 189 (OHCHR).
[198] *Ibid.*

Article 4."[199] Similar to other restrictions on ICCPR rights, any limitation imposed by the state under Article 4 (1) must be justified, legal, proportionate as well.[200] The extent to which this occurs shall not be arbitrary, which in turn requires the state legislation to be just, predictable, and reasonable.[201] Accordingly, any act that has a direct impact on an individual's right to privacy must be prescribed by law to make it legal.[202] This law must be comprehensive in nature, in the sense that it has to specify in-depth "the precise circumstances," in which the interference is authorized, and it must not be implemented in a "discriminatory manner."[203] This does not mean that states are provided with "unlimited discretion" through this law since any limitation placed on human rights must be necessary to achieve genuine objectives and not be exploited for other unrelated purposes.[204] The U.S. use of mass surveillance policies after the 9/11 attacks, through the justification of protecting national security, blatantly contradicts all of the above regulations, specifically because of its abuse of such policies to illegally harvest data and track individuals.[205]

4.2. Mass Surveillance after 9/11: AT&T and the National Security Agency

In January 2006, Mark Klein handed a bundle of legal papers to the Electronic Frontier Foundation, which offered "smoking-gun" evidence that the U.S. National Security Agency (NSA), with the cooperation of AT&T, was illegally tracking American citizens' internet usage

[199] Kkienerm. Counter-Terrorism Module 13 Key Issues: Freedom of Expression. July 2018, www.unodc.org/e4j/en/terrorism/module-13/key-issues/freedom-of-expression.html.
[200] *Ibid.*
[201] *Supra note* 189 (OHCHR).
[202] *Ibid.*
[203] *Ibid.*
[204] *Ibid.*
[205] Babu-Kurra. *How 9/11 Completely Changed Surveillance in U.S.* Wired.com, 9 Nov. 2011, www.wired.com/2011/09/911-surveillance/.

and "funneling it into a database."[206] It has also been reported that the National Security Agency was tapping into the telephone calls of U.S. citizens and had "direct access to the telecommunications infrastructure through some of America's largest companies," under the guise of protecting "national security" and "protection against terrorism."[207] It is stated that the NSA's metadata collection documents an extraordinary amount of information on U.S. citizens and non-citizens, particularly Muslim individuals.[208] This collection includes rigorous data regarding "whom nearly every person contacted, for what duration, and often the location of the parties involved."[209] Essentially, the U.S. government obtained the ability to pry into the lives of Americans and non-Americans throughout the world, without "court order, individual consent, or any popular oversight."[210]

In 2013, additional classified documents were leaked to the public by former government contractor Edward Snowden, which detail the extension of a "colossal surveillance state" that has seeped into the personal lives of millions of American citizens.[211] In the same year, the Washington Post obtained what it calls a "black budget" report from Snowden, describing the bureaucratic and operational landscape of around 16 spy U.S. agencies and more than **107,000** employees that formed the U.S. intelligence community (with the number having been increased since then).[212] Further audits divulge that the NSA has annually pried into as many as **56,000** emails and other communication outlets used by Americans with no connection to terrorism, and

[206] *Ibid.*
[207] *Supra note 117* (Alimahomed-Wilson) at 1.
[208] *Ibid.*
[209] *Ibid at 2.*
[210] *Ibid at 2.*
[211] *Supra note 1* (Green).
[212] *Ibid.*

in doing so, had "violat[ed] privacy law thousands of times per year."[213]Although this program breached "all precedent and the common understanding of the law" at that time, President Bush, along with other officials, blatantly opposed such claims and affirmed that it was legal, stating that "If al-Qaida is calling in to the United States, we want to know why they're calling." [214]

It was also found that the NSA was not only eavesdropping on the conversations of Americans without legal authorization and in a disproportionate manner, but also utilized "broad data mining" systems that enabled it to "analyze information" about the communications of millions of innocent people within the United States.[215] Because of the problematic and unlawful nature of this program, a federal judge in Detroit found "[the program] both unconstitutional and illegal" in August 2006.[216] However, the U.S. Court of Appeals for the 6th Circuit overturned the decision, on the basis that the plaintiffs were unable to prove with certainty they were wiretapped "but it did not rule on the legality of the program."[217] Undoubtedly, such practice explicitly violates different federal statutes, the U.S. Constitution, particularly the Fourth Amendment[218] as well as several international human rights documents, such as Article 12[219]of the Universal Declaration of Human Rights and Article 17 (1)[220] of the International Covenant on Civil and Political Rights, which both protect the individual's right to privacy.

213 *Ibid.*
214 *Supra note 48* (ACLU).
215 .*Ibid.*
216 *Ibid.*
217 *Ibid.*
218."The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
219."No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.
220."No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation."

In response, several different HROs launched lawsuits against the government and AT&T (after the latter was providing the government with the private data of many people), accusing them of infringing upon the people's right to privacy.[221] Despite this, Congress voted in July 2008 to override the rights of American citizens to petition for "a redress of grievances" and proceeded to pass a law that exonerated AT&T of any legal liability for its warrantless spying on citizens.[222] This specific law also legalized the U.S. government's secret national wiretapping program, so that it would be able to "legally" use and examine the data harvested.[223] This controversial practice was not stopped or reformed under the Obama Administration, but has rather carried on the Bush-era policy of utilizing "high-level classification" and the "state secrets privilege" to block court challenges to the unsavory aspects of the War on Terror."[224] In this regard, the U.S. government has claimed that litigating anything related to these programs might expose national secrets and pose a threat to national security generally.[225]

In addition, several U.S. government agencies, including the FBI and the Department of Defense, have been accused of political spying on "innocent and law-abiding" Americans.[226] According to the ACLU, the FBI's act of espionage was not only done on individuals, but rather included other peaceful members of civil society, such as several different NGOs, including Quakers, People for the Ethical Treatment of Animals, Greenpeace, the Arab American Anti-Defamation Committee, and even the ACLU itself.[227] After this information was leaked to the public, the

[221] *Supra note 205* (Babu-Kurra).
[222] *Ibid*
[223] *Ibid*
[224] *Ibid*
[225] *Supra note 48* (ACLU).
[226] *Supra note 48* (ACLU).
[227] *Ibid.*

Pentagon, in August 2007, announced that it would shut down its TALON[228] database program, which "illegally gathered information on anti-war activists across the country."[229] The ACLU labels these controversial acts of surveillance as "the greatest assault on the privacy" of Americans, claiming that the United States is currently undergoing a rapid growth of "data collection, storage, tracking, and mining," reflected by the FBI's Investigative Data Warehouse, which has expanded to contain over 560 million records.[230] This has led to the emergence of a new "surveillance society," which revolves around a "combination of new technologies, expanded government powers, and expanded private-sector data collection efforts" targeting American citizens.[231]

4.3. The Role of the Patriot Act in Expanding the State of Surveillance

In passing the Patriot Act, Congress believed that it had enacted a solution to preventing another 9/11-like event, despite not having any evidence that proves that the lack of surveillance powers was what enabled Al-Qaeda to succeed in conducting the terrorist attacks.[232] Almost one year after this law had been passed, an investigation report, known as the Congressional Joint Inquiry Report, revealed the exact opposite to be the case. The CIA, FBI, and NSA all had sufficient data to have successfully identified the attackers and stop them; however, they failed to share the data amongst them and act on this information.[233]

[228] "Threat and Local Observation Notice" Program.
[229] *Ibid* (ACLU).
[230] *Ibid*
[231] *Ibid*
[232] Eddington, Patrick G. "The PATRIOT Act Has Threatened Freedom for 20 Years." *Cato.org*, 21 Oct. 2021, https://www.cato.org/commentary/patriot-act-has-threatened-freedom-20-years.
[233] *Ibid.*

The U.S. government abused the Patriot Act and its authorization of the surveillance of American citizens by considerably expanding the use of National Security Letters (NSLs) into the tens of thousands each year.[234] These so-called National Security Letters are generally regarded as "self-issued subpoenas that FBI agents can use to get phone and other transaction records."[235] According to the ACLU, the Justice Department's Inspector General found that "the FBI has issued hundreds of thousands of national security letters, a majority against U.S. persons, and many without any connection to terrorism at all."[236] The controversy of NSLs inevitably arose after the Justice Department's Inspector General issued a series of withering reports that revealed that the FBI, along with the U.S. government, has abused them to achieve certain objectives, which revolve around collecting data and spying on civil society and influential media publications. In this regard, FBI agents have been accused of using fake emergency requests, in order to collect specific data on the reporters of the Washington Post and New York Times.[237] Another report reveals that AT&T and Verizon were both paid by the U.S. government to open offices inside the FBI, which granted FBI agents the authority to search phone records of millions of individuals without the need to do any paperwork.[238] Despite the seemingly illegal nature of such acts, these violations were, in fact, effectively legalized by a ruling issued by the Obama administration's Office of Legal Counsel.[239] Hence, the Patriot Act has been depicted as a law that is specifically designed to provide the government with a "venue"

[234] *Supra note 205* (Babu-Kurra).
[235] *Ibid*
[236] *Supra note 48* (ACLU).
[237] *Supra note 205* (Babu-Kurra).
[238] *Ibid.*
[239] *Ibid*

to monitor individuals' personal lives and infringe on their civil liberties and rights, particularly the right to privacy.[240]

According to Jean-Claude Paye, one central objective of the Patriot Act was to integrate the rules of gathering data on foreign intelligence into "the realm of criminal investigation."[241] This is another piece of evidence that manifests that the United States has abused its counter-terrorism policies and laws to achieve specific exceptional powers it had long been seeking. To further explain, Article 216 of the Patriot Act granted federal judges the ability to issue a warrant to obtain all incoming and outgoing electronic data of any individual without the need to specify the IP number concerned, making the judge's warrant valid anywhere in the U.S. territory.[242] Similarly, under Article 213, FBI investigators were authorized to enter the houses or offices of suspected individuals, and attempt to gather various pieces of evidence from there by taking photos, examining computer hard drives, as well as by installing the "Magic Lantern Program."[243] Once installed, the program documents all online and offline computer activity conducted by the user, not only restricted to activity transmitted over the internet.[244] Moreover, under the Act, both "probable cause" and "reasonable suspicion" have been replaced by a "certification"[245] requirement, which only obliges the police to state that the information gathered in the wiretap warrant is "related to a law enforcement purpose."[246] This reduced warrant standard placed a lesser burden upon the police to manifest specific facts to support and

[240] *Ibid*
[241] Supra note 140 (Jones) at 19.
[242] *Supra note 127 (Paye).*
[243] *Supra note* 140 (Jones) at 19.
[244] *Supra note 127 (Paye).*
[245] Certification is a "reduced legal standard needed to obtain a court-ordered wiretap under the Patriot Act legislation. It is the least rigorous legal standard for police wiretaps and replaces the original probable cause and particularity requirements for warrant requests."
[246] *Ibid.*

be able to conduct their wiretap warrant request.[247] Given this, it can be observed that the Patriot Act is in direct conflict with the OHCHR's guidelines on state practice that affects the right to privacy of individuals, particularly in its requirement that the extent to which this can occur shall not be arbitrary and should be both proportionate and just.

4.4. Assessment: The Legality of Post-9/11 Surveillance

The disproportionate[248] use of surveillance policies by the United States to allegedly counter terrorism has directly infringed upon the right to privacy of citizens and non-citizens in various ways. The most chief result of escalating surveillance authorities is the substantial diminution of civil privacy protection, reflecting an inverse relationship between the two; whereby, as U.S. surveillance power widens, individual privacy is deemed to decline.[249] Several legal and procedural modifications adopted after 9/11 have inevitably led to expanded use of police surveillance and search, which enabled the U.S. government to spy on its citizens and collect data relevant to their physical and electronic selves, including "expression, personal data, virtual identity, and biometric identity."[250] Consequently, individuals have had their personal information–identities, transactions, and movements–exposed and become fully accessible to police through burgeoning databases that illegally obtain such personal information.[251] While some reforms have been made, the US government is still abusing most of its post-9/11

[247] *Supra note* 134 (Bloss) at 216.

[248] Specifically disproportionate to the ICCPR and its Article 4 (1). "In determining whether a derogation is proportionate, the question to be asked is whether there are other means, less restrictive of the rights in question, which would provide a similarly effective means of responding to the exigencies of the situation;" Kkienerm. (n.d.). *Counter-terrorism module 7 key issues: Derogation during public emergency*. Counter-Terrorism Module 7 Key Issues: Derogation during Public Emergency. Retrieved June 18, 2022, from https://www.unodc.org/e4j/en/terrorism/module-7/key-issues/derogation-during-public-emergency.html

[249] *Supra note* 134 (Bloss) at 222.

[250] *Ibid.*

[251] *Ibid.*

surveillance powers, thus violating the privacy rights of many individuals.[252] In fact, it has been revealed that most recently, the US government was utilizing the exceptional surveillance powers it acquired after 9/11 in a non-counter-terrorism context, such as in monitoring Black Lives Matter protestors' social media posts and protest activity, as well as opening intelligence files on journalists covering racial justice protests.[253]

These legal modifications, which were adopted by post-9/11 federal statutory provisions and different court decisions, significantly diluted established U.S. constitutional privacy protections.[254] Essentially, most of the once-considered "strict" requirements that were designed to effectively constrain police surveillance, such as "mandatory judicial review, warrant and probable cause requirements, and the primacy of citizen privacy" have been replaced.[255] Specifically, these requirements were supplanted by "non-judicial intervention, warrant exceptions, and relaxed legal standards, inevitably allowing the police to engage in surveillance search with fewer restrictions," which substantially facilitated the controversial act of surveillance, under the pretext of protecting national security.[256] This has created a new "privacy paradigm" whereby the fear of increased public safety threat has pushed the balance away from previously established citizen protections, resulting in a "reinterpretation" of the concept of individual privacy in the post-9/11 context.[257]

Notably, the fact that the U.S. government had included several provisions that are irrelevant to terrorism in its anti-terrorism legislation, as found in the Patriot Act, and rushed Congress to pass

[252] Goitein, Elizabeh. "Rolling Back the Post-9/11 Surveillance State." *Brennan Center for Justice*, 19 Aug. 2021, https://www.brennancenter.org/our-work/analysis-opinion/rolling-back-post-911-surveillance-state.
[253] *Ibid.*
[254] *Ibid.*
[255] *Ibid.*
[256] *Ibid.*
[257] *Ibid.*

them immediately, reveals that the United States wanted to acquire new authorities it had been seeking, under the guise of counter-terrorism.[258] Based on Agamben's analysis, the United States sought to normalize the new authorities it had acquired from these counter-terrorism policies and permanently install them in its legislation to sustain these powers and expand its rule.[259] This implies that the United States has weaponized terrorism in a way that provides it with a pretext to adopt a set of repressive laws and gain new authorities to "legally" infringe upon individuals' rights, such as spying on its citizens and non-citizens for the purpose of harvesting data and collecting their information.[260] To expand, the United States has abused the notion of counter-terrorism to be able to spy on individuals and certain civil society members, including anti-war NGOs and HROs that question the legitimacy of these policies, in order to investigate their work, collect data, and possibly silence them.[261]

In general, the use of surveillance policies, specifically the Patriot Act, has proven to be in direct conflict with the principle of proportionality that is enshrined in the aforementioned instruments, inevitably affecting individuals' rights on an enormous scale.[262] Not only do these policies violate the U.S. Constitution, but they also breach international human rights agreements to which the United States is a state party, specifically the ICCPR. To elaborate, these policies violate Article 17 (1) of the ICCPR as they reflect an unlawful and disproportionate use of surveillance against law-abiding and innocent individuals, targeting Muslims most often.[263] As explained by the

[258] *Supra note* 108 (Martin) at 24.
[259] Meyer, Eric. "Philosophy in the Contemporary World: After September 11th, A Permanent State of Exception?" *Blog of the APA*, 7 Oct. 2019, blog.apaonline.org/2018/02/01/philosophy-in-the-contemporary-world-after-september-11th-a-permanent-state-of-exception
[260] *Supra note* 48 (ACLU).
[261] *Ibid.*
[262] *Supra note 188 (OHCHR).*
[263] Patel, Faiza. "The Costs of 9/11's Suspicionless Surveillance: Suppressing Communities of Color and Political Dissent." *Brennan Center for Justice*, 29 Apr. 2022, https://www.brennancenter.org/our-work/analysis-opinion/costs-911s-suspicionless-surveillance-suppressing-communities-color-and.

aforementioned analysis, although Article 4 (1) permits the U.S. to derogate from certain obligations under the ICCPR, it has to be non-discriminatory, justified, and applied to the extent strictly required by the exigencies of the case of emergency.[264] In this regard, the US government could have adopted other means that were less restrictive and damaging to the right to privacy in order to address the exigency of the situation in an efficient manner, without subjecting millions of Americans to mass surveillance. As stated, even prior to the existence of this disproportionate US surveillance apparatus, the US government had enough data to have identified the attackers, which further reveals that the United States is not necessarily in need of surveilling on millions of citizens to be able to know whether an attack will occur.

The surveillance policies implemented by the United States failed to abide by these regulations, on the basis that they have been abused to excessively harvest an extraordinary amount of data on U.S. citizens and non-citizens, including innocent individuals, who are not suspected of any related crime.[265] The US government's misuse of its surveillance powers to achieve certain goals and its continued practice of secretly collecting records about "virtually every American's phone calls–"all done under the pretext of counter-terrorism–proves that the act of suspecting of many law-abiding and innocent individuals has been deliberate and not based on tangible evidence. This strongly debunks the claim that these victims were just a "collatoral damage."[266] In addition, the fact that these policies have systematically targeted Muslim[267] individuals constitutes an explicit form of discrimination that is not permitted by Article 4 (1), which further affirms the illegality of these policies. Similarly, the United States has also violated the Siracusa

[264] *Supra note 199* (Kkienerm).
[265] *Supra note 117* (Alimahomed-Wilson) at 1.
[266] *Supra note 193 (*Toomey and Gorski).
[267] "Impact of Government Surveillance on Muslim Americans and Communities of Color." *Friends Committee On National Legislation*, 4 Oct. 2016, https://www.fcnl.org/updates/2016-10/impact-government-surveillance-muslim-americans-and-communities-color.

Principles as it failed to provide "adequate safeguards and effective remedies" when it had derogated from the fundamental rights of its citizens, particularly the right to privacy, which is another reason that manifests the illegality of such policies.[268]

[268] *Supra note* 119 (ACLU) at 4.

Conclusion

Michael Ignatieff asked: "Is the Human Rights era ending?" after witnessing the U.S. counter-terrorism approach adopted after the September 11, 2001 terrorist attacks.[269] Ignatieff asserted that for human rights to remain relevant, advocates have "to challenge directly the claim that national security trumps human rights."[270] It is undeniable that states have a pivotal responsibility and legal obligation to prevent terrorist attacks and protect their national security from external threats. At the same time, it has to be acknowledged that such a responsibility is not to be supplemented with the violation of individual human rights. The problematic notion that there is a necessary sacrifice of human rights, civil liberties, and lawful procedures for the purpose of protecting national security is inherently incorrect and can be abused to justify the grave human rights infringements that states perpetrate. Instead, it is essential that states review their counter-terrorism policies and find an adequate approach that effectively protects both national security and human rights. The analyzed case of the United States reveals that it has violated human rights in the name of national security, especially targeting Muslims, Arabs, and South Asians. While it was necessary for the US to protect its national security, it could be observed that the US government has exploited this necessity, through the state of emergency, in order to enact different illegal and abusive measures and laws that are inconsistent with international law.

The state of emergency can be considered an effective tool that allowed the US government to get away with its disproportionate state violence and unlawful measures against its citizens and non-citizens. In violation of Article 4 (1) of the ICCPR and the Siracusa Principles, the state of

[269] *Supra note 20* (Burke-White) at 279.
[270] *Ibid.*

emergency declared by the United States after the 9/11 terrorist attacks was abused and utilized to normalize and permanently install different emergency powers that led to severe costs and damage. In connection with the implementation of the U.S. anti-terrorism laws that were drafted in response to 9/11, a number of individual amendments to different statutes provided the United States government with new authorities it had long been seeking, implying that the motive behind this state of emergency was to achieve other political objectives. Even if it was necessary for the US to take measures to counter terrorism, the state of emergency, in accordance with international legal standards, cannot be abused to implement measures that are arbitrary, disproportionate, and used in a discriminatory manner against a certain group of people. The post-9/11 state of emergency is increasingly being utilized as a core basis of contemporary American governance and policies. It can be observed from the aforementioned analysis that the U.S. government is progressively distancing itself from the general rule of law as it adopts several laws and policies that are in direct conflict with the U.S. Constitution and international law. One would argue that the state of exception that emerged in the United States "no longer resembles the exception to the rule but increasingly resembles the rule itself.[271]"

It is thus difficult to escape the conclusion that the US counter-terrorism policies have been problematic on many different levels. Essentially, these policies have resulted in enormous and lasting human, political, social, and material costs to many individuals, especially to Muslims, Arabs, and South Asians. Further, they effectively constructed an atmosphere, in which the aforementioned groups feel unsafe and vulnerable, The acute effects of these policies have been felt after two decades and would be felt for generations to come. Given this, a more efficient U.S. counter-terrorism approach would consider human rights and national security as correlated

[271] *Supra note* 43 (Sherwood) at 19.

and complementary objectives, resulting in better protection of human rights in the world, while also protecting national security.

Bibliography

ACLU. "Racial Profiling as a Violation of Human Rights." American Civil Liberties Union, 2005, p,3, www.aclu.org/legal-document/racial-profiling-violation-human-rights

ACLU. "Top Ten Abuses of Power Since 9/11." American Civil Liberties Union, 2007, www.aclu.org/other/top-ten-abuses-power-911.

Agamben, Giorgio. A Brief History of the State of Exception, An Excerpt from an State of Exception, Translated from Kevin Attel, University of Chicago Press. 2004, p. Available at: https://press.uchicago.edu/Misc/Chicago/009254.html.

Ahmed, Arshad, and Farid Senzai. "The USA PATRIOT Act: Impact on the Arab and Muslim American Community: ISPU." Institute for Social Policy and Understanding, 5 Aug. 2017, https://www.ispu.org/the-usa-patriot-act-impact-on-the-arab-and-muslim-american-community/.

Alimahomed-Wilson, Jake, and Dana Williams. "State Violence, Social Control, and Resistance." Journal of Social Justice, vol. 6, 2016, p.3.

Aoláin, Fionnuala Ní. *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism on the Role of Measures to Address Terrorism and Violent Extremism on Closing Civic Space and Violating the Rights of Civil Society Actors and Human Rights Defenders*. Human Rights Council, 1 Mar. 2019, A/HRC/40/52 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/057/59/PDF/G1905759.pdf?OpenElement.

Aoláin, Fionnuala Ní. "Human Rights Advocacy and the Institutionalization of U.S. 'Counterterrorism' Policies since 9/11." *Just Security*, Reiss Center on Law and Security, 9 Sept. 2021, https://www.justsecurity.org/78160/human-rights-advocacy-and-the-institutionalization-of-u-s-counterterrorism-policies-since-9-11/.

Babu-Kurra. *How 9/11 Completely Changed Surveillance in U.S.* Wired.com, 9 Nov. 2011, www.wired.com/2011/09/911-surveillance/.

Bantekas, Ilias and Lutz Oette, *International Human Rights: Law and Practice*, (Cambridge: CUP, 3rd edition, 2020), p. 80.

Becker, Michael D. The Espionage Act & An Evolving News Media: Why Newspapers That Publish Classified Information May Face Criminal Charges as They Enter the Digtial Age. American University Washington College of Law, 2014, https://mtsu.edu/first-amendment/article/1045/espionage-act-of-1917.

Bornstein, Avram. "Antiterrorist Policing in New York City after 9/11: Comparing Perspectives on a Complex Process." *Human Organization*, vol. 64, no. 1, 2005, pp. 52–53. *JSTOR*, http://www.jstor.org/stable/44127004.

Brysk, Alison. "Human Rights and National Insecurity." National Insecurity and Human Rights: Democracies Debate Counterterrorism, edited by ALISON BRYSK and GERSHON SHAFIR, 1st ed., University of California Press, 2007, pp. 1–2. JSTOR, http://www.jstor.org/stable/10.1525/j.ctt1ppbw5.4.

Burke-White, William W., "Human Rights and National Security: The Strategic Correlation" . Faculty Scholarship at Penn Law. 960. 201, p. 249 https://scholarship.law.upenn.edu/faculty_scholarship/960,

Choukroune, Leïla. "When the State of Exception Becomes the Norm, Democracy Is on a Tightrope." The Conversation, 11 Nov. 2020, theconversation.com/when-the-state-of-exception-becomes-the-norm-democracy-is-on-a-tightrope-135369.

Cole, Jared P. Terrorist Databases and the No Fly List: Procedural Due Process and Hurdles to Litigation. Congressional Research Service, 2015.

Compendium of Federal Justice Statistics 2000; Bureau of Justice Statistics, U.S. Department of Justice, *Compendium of Federal Justice Statistics 2002*, *available at* http://www.ojp.usdoj.gov/bjs/abstract/cfjs02.htm

Criddle J. Evan. "Protecting Human Rights During Emergencies: Delegation, Derogation, and Deference." *Faculty Publications*. 1840, 2014, p.199. https://scholarship.law.wm.edu/facpubs/1840

Dawinder S. Sidhu, The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans, 7 U. Md. L.J. Race Relig. Gender & Class 375 (2007). Available at: http://digitalcommons.law.umaryland.edu/rrgc/vol7/iss2/10

Eddington, Patrick G. "The PATRIOT Act Has Threatened Freedom for 20 Years." *Cato.org*, 21 Oct. 2021, https://www.cato.org/commentary/patriot-act-has-threatened-freedom-20-years.

F. Ní Aoláin and O. Gross, 'A Skeptical View of Deference to the Executive in Times of Crisis' 41 Israel Law Review 545, 2008; REDRESS, Extraordinary Measures, Predictable Outcomes: Security Legislation and the Prohibition of Torture, 2012.

Fitzpatrick M, Joan. *Protection Against Abuse of the Concept of "Emergency*," *in* Human Rights: An Agenda For The Next Century. American Society of International Law, 1994, p. 203.

Galston, William A. "Twenty Years Later, How Americans Assess the Effects of the 9/11 Attacks." *Brookings*, Brookings, 9 Sept. 2021, https://www.brookings.edu/blog/fixgov/2021/09/09/twenty-years-later-how-americans-assess-the-effects-of-the-9-11-attacks/.

Gearty, Conor. "Terrorism and Human Rights." *Government and Opposition*, vol. 42, no. 3, 2007, pp. 340–62. *JSTOR*, http://www.jstor.org/stable/44483201.

Goitein, Elizabeh. "Rolling Back the Post-9/11 Surveillance State." *Brennan Center for Justice*, 19 Aug. 2021, https://www.brennancenter.org/our-work/analysis-opinion/rolling-back-post-911-surveillance-state.

Green, Matthew. *How 9/11 Changed America: Four Major Lasting Impacts (with Lesson Plan) - The Lowdown*. 8 Sept. 2017, www.kqed.org/lowdown/14066/13-years-later-four-major-lasting-impacts-of-911.

Guidance Regarding the Use of Race by Federal Law Enforcement Agencies. June 2003, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/guidance_on_race.pdf.

Honan, Jessica. "Government Surveillance and the Right to Privacy in the 21st Century." *The Yale Review of International Studies*, 31 July 2021, http://yris.yira.org/comments/4810.

Jones, Jesse. “The Birth of Big Brother: Privacy Rights in a Post-9/11 World.” Texas A&M University Journal of Politics, Bureaucracy, and Justice, vol. 1, no. 1, 2009, p.17. https://www.wtamu.edu/webres/File/Academics/College of Education and Social Sciences/Department of Political Science and Criminal.

Kampf, Lena, and Indra Sen. “History Does Not Repeat Itself, but Ignorance Does: Post-9/11 Treatment of Muslims and the Liberty-Security Dilemma.” *Humanity in Action*, 9 Aug. 2019, https://www.humanityinaction.org/knowledge_detail/history-does-not-repeat-itself-but-ignorance-does-post-9-11-treatment-of-muslims-and-the-liberty-security-dilemma/.

Kkienerm. Counter-Terrorism Module 13 Key Issues: Freedom of Expression. July 2018, www.unodc.org/e4j/en/terrorism/module-13/key-issues/freedom-of-expression.html.

Kleiner, Yevgenia S. Racial Profiling in the Name of National Security: Protecting Minority Travlers' Civil Liberties in the Age of Terrorism. 2010, lawdigitalcommons.bc.edu/twlj/vol30/iss1/5/.

L. Doswald-Beck, Human Rights in Times of Conflict and Terrorism. Oxford University Press, 2011.

Martin Scheinin and Mathias Vermeulen, “Unilateral exceptions to international law: systematic legal analysis and critique of doctrines that seek to deny or reduce the applicability of human rights norms in the fight against terrorism”, European University Institute Law Working Paper (2010).

Martin, Kate. Preventive Detention of Immigrants and Non-Citizens in the United States since September 11th. 1 Aug. 2002, p.25. www.questia.com/library/journal/1G1-138002441/preventive-detention-of-immigrants-and-non-citizens.

Meyer, Eric. “Philosophy in the Contemporary World: After September 11th, A Permanent State of Exception?” *Blog of the APA*, 7 Oct. 2019, blog.apaonline.org/2018/02/01/philosophy-in-the-contemporary-world-after-september-11th-a-permanent-state-of-exception

New York Advisory Committee (NYAC). Civil Rights Implications of Post: September 11 Law Enforcement Practices in New York. Bibliogov, 2004.

O’Donnell, Daniel. “Commentary by the Rapporteur on Derogation.” *Human Rights Quarterly*, vol. 7, no. 1, 1985, pp. 23–34. *JSTOR*, https://doi.org/10.2307/762037. Accessed 16 Jun. 2022.

Passavant, Paul A. “The Contradictory State of Giorgio Agamben.” Political Theory, vol. 35, no. 2, 2007, pp. 147–74. JSTOR, http://www.jstor.org/stable/20452544. Accessed 16 Jun. 2022.

Patel, Faiza. “Ending the 'National Security' Excuse for Racial and Religious Profiling.” Brennan Center for Justice, 22 July 2021,

Patel, Faiza. “The Costs of 9/11's Suspicionless Surveillance: Suppressing Communities of Color and Political Dissent.” *Brennan Center for Justice*, 29 Apr. 2022, https://www.brennancenter.org/our-work/analysis-opinion/costs-911s-suspicionless-surveillance-suppressing-communities-color-and.

Paye, Jean-Claude . A permanent State of Emergency. Monthly Review: An Independent Socialist Magazine, 58 (6), 29–37, 9p, 2006. monthlyreview.org/2006/11/01/a-permanent-state-of-emergency/.

Podesta, John. “USA Patriot Act: The Good, the Bad, and the Sunset.” Human Rights, vol. 29, no. 1, 2002, pp. 3–7. JSTOR, http://www.jstor.org/stable/27880293.

Prewitt, Kenneth, et al. “The Politics of Fear after 9/11.” Social Research, vol. 71, no. 4, 2004, p. 1136. JSTOR, http://www.jstor.org/stable/40971995.

Romero, Anthony D. Sanctioned Bias: Racial Profiling since 9/11. ACLU, 2004

Schaper, David. “It Was Shoes on, No Boarding Pass or ID. but Airport Security Forever Changed on 9/11.” *NPR*, NPR, 10 Sept. 2021, https://www.npr.org/2021/09/10/1035131619/911-travel-timeline-tsa.

Shamsi, Hina. Until the No Fly List Is Fixed, It Shouldn't Be Used to Restrict People's Freedoms. 22 June 2016, www.aclu.org/blog/national-security/discriminatory-profiling/until-no-fly-list-fixed-it-shouldnt-be-used-restrict?redirect=blog%2Fspeak-freely%2Funtil-no-fly-list-fixed-it-shouldn't-be-used-restrict-people's-freedoms.

Sherwood, Percy. Tracing the American State of Exception from the George W ... Western Journal of Legal Studies, 2017, p.5, ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1286&context=uwojls.

The Chicago Reporter. “Blatant Racism against Muslims Is Still with US.” *The Chicago Reporter*, 8 May 2021, https://www.chicagoreporter.com/blatant-racism-against-muslims-is-still-with-us/.

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4, Annex (1985). Available at: https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf.

Thomson Reuters Foundation. “How 9/11 Shaped U.S. Mass Surveillance and Stifled Digital Rights.” *News.trust.org*, 10 Sept. 2021, https://news.trust.org/item/20210910172408-lkgfd/.

Threat and Humiliation - Amnesty International USA. Amnesty International, Sept. 2004, www.amnestyusa.org/pdfs/rp_report.pdf, p.32.

Toomey, Patrick, and Ashley Gorski. “The Privacy Lesson of 9/11: Mass Surveillance Is Not the Way Forward.” *American Civil Liberties Union*, 29 Sept. 2021, https://www.aclu.org/news/national-security/the-privacy-lesson-of-9-11-mass-surveillance-is-not-the-way-forward.

U.S. Department of Justice. (2005, December 20). Civil liberties safeguards in the usa patriot act: Conference report. http://www.usdoj.gov/opa/ pr/2005/December/05_opa_682.html

UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html

UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 32, Human Rights, Terrorism and Counter-terrorism, July 2008, No. 32, available at: https://www.refworld.org/docid/48733ebc2.html

United States of America: Constitution [United States of America], Article IV, Section 4. 17 September 1787, available at: https://www.refworld.org/docid/3ae6b54d1c.html [accessed 16 June 2022]

“Kashem, Et Al. v. Barr, Et Al. - ACLU Challenge to Government No Fly List.” *American Civil Liberties Union*, 7 Apr. 2021, https://www.aclu.org/cases/kashem-et-al-v-barr-et-al-aclu-challenge-government-no-fly-list.

“National Security & Human Rights.” *Amnesty International USA*, Amnesty International, 2020, https://www.amnestyusa.org/issues/national-

security/#:~:text=On%20multiple%20fronts%2C%20the%20United,U.S.%20law%20and%20international%20law.&text=The%20U.S.%20has%20used%20lethal,countries%2C%20leading%20to%20civilian%20deaths. Accessed, June 15, 2022.

"Supreme Court Unanimous: American Muslims Placed on No-Fly List for Refusing to Spy on Their Communities Can Sue FBI Agents for Damages." *Center for Constitutional Rights*, 10 Dec. 2020, https://ccrjustice.org/home/press-center/press-releases/supreme-court-unanimous-american-muslims-placed-no-fly-list.

"Surveillance." *The Costs of War*, Watson Institute: Brown University, 2021. https://watson.brown.edu/costsofwar/costs/social/rights/surveillance.

"Understanding Trump's Muslim Bans." *National Immigration Law Center*, 8 Mar. 2019, https://www.nilc.org/issues/immigration-enforcement/understanding-the-muslim-bans/.

Bloss, William. "Escalating U.S. Police Surveillance after 9/11: An Examination of Causes and Effects." Surveillance & Society, 2007, p.116. www.semanticscholar.org/paper/Escalating-U.S.-Police-Surveillance-after-9%2F11%3A-an-Bloss/b9c623882f8a300c0aff0115d291bbdc68d89aee.

Farooq, Umar A. "Muslim Americans Sue US Government over Alleged Religious Targeting at Border." *Middle East Eye*, 24 Mar. 2022,https://www.middleeasteye.net/news/muslim-americans-sue-us-government-over-alleged-religious-targeting-border.

Huddy, Leonie, et al. "The Consequences of Terrorism: Disentangling the Effects of Personal and National Threat." Political Psychology, vol. 23, no. 3, 2002, pp. 485–486. JSTOR, http://www.jstor.org/stable/3792589.

Kkienerm. (n.d.). *Counter-terrorism module 7 key issues: Derogation during public emergency*.Counter-Terrorism Module 7 Key Issues: Derogation during Public Emergency. Retrieved June 18, 2022, from https://www.unodc.org/e4j/en/terrorism/module-7/key-issues/derogation-during-public-emergency.html

Sharaf, Nabil. "Twenty Years after 9/11: A Reckoning for Anti-Muslim Hostility in the United States." *Arab Center Washington DC*, 10 Dec. 2021, https://arabcenterdc.org/resource/twenty-years-after-9-11-a-reckoning-for-anti-muslim-hostility-in-the-united-states/.

The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks." *U.S. Department of Justice Office of the Inspector General*, 1 June 2003, Accessed June 16, 2022.

UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 32, Human Rights, Terrorism and Counter-terrorism*, July 2008, No. 32, available at: https://www.refworld.org/docid/48733ebc2.html

"Impact of Government Surveillance on Muslim Americans and Communities of Color." *Friends Committee On National Legislation*, 4 Oct. 2016, https://www.fcnl.org/updates/2016-10/impact-government-surveillance-muslim-americans-and-communities-color.

"Lawsuit Brought by Muslims Rounded up after 9/11 Gets Go-Ahead from Court." *The Guardian*, Guardian News and Media, 21 June 2015, https://www.theguardian.com/us-news/2015/jun/21/lawsuit-muslims-september-11-roundup-abuse

"Racial Profiling: Definition." *American Civil Liberties Union*, https://www.aclu.org/other/racial-profiling-definition.

"Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11." *Human Rights Watch*, 29 Apr. 2015, https://www.hrw.org/report/2005/06/26/witness-abuse/human-rights-abuses-under-material-witness-law-september-11.