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# UN IN COUNTERING TERRORISM

A Critical Analysis of the Right to a Fair Trial of Detainees in Guantanamo Bay



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Deadline for Submission: May 18, 2010

Number of words: 13,200 (18000)

May 18, 2010

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## **Abstract**

The United Nations being the international organization empowered with the mandate to ensure respect for fundamental human rights for everybody everywhere has an obligation to combat terrorism from the standpoint of international human rights. However the fight against terrorism cannot be won by the UN alone, there is however, the need for cooperation between states and the UN. Though, terrorism has existed since time immemorial the world has seen a paradigm shift in the fight against terrorism and states responds to it after 9/11. States are faced with the challenge of responding to the threat of terrorism on one hand and upholding international human rights standards on the other hand. One of the fundamental rights mostly affected in the fight against terrorism in due process rights. The fate of detainees held at the US naval base, Guantanamo Bay has generated a very heated debate in the international community. Decisions by the US supreme court and other revelations point to the fact that the legal rights of detainees held at Guantanamo Bay have been trampled upon. My studies will reveal whether detainees held at Guantanamo Bay have been given access to the due process of the law by the US government or whether they have been denied the due process of the law. This study is necessary because terrorism has become an issue of global concern. Moreover, it will be useful for scholars and policy makers alike in their analysis and assessment of countering terrorism while preserving the international human rights standards.

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## **Abbreviations**

<b>AUMF</b>	Authorization for Use of Military Force Against Terrorists
<b>CTC</b>	Counter-Terrorism Committee
<b>HRC</b>	Human Rights Committee
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>MCA</b>	Military Commissions Act
<b>NGO</b>	Non-Governmental Organization
<b>POW</b>	Prisoner Of War
<b>UN</b>	United Nations
<b>UDHR</b>	Universal Declaration of Human Rights

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## **Acknowledgements**

The success of this work has not been all by my strength. I am very grateful to God for the abundant grace and wisdom that he has bestowed in me.

Special thanks should also go to my parents for their support and encouragement on this journey.

I would also like to express my profound gratitude to my supervisor, Synnøve Ugelvik for her assistance. I am glad to acknowledge her comments and suggestions which have greatly improved the quality of this thesis.

A word of thanks should also go to the passionate lecturers at the law faculty (University of Oslo), and also the librarians at the Norwegian Centre for human Rights. I am most grateful for their wonderful work.

I am also grateful to several other people, including Mariam Kabia for their words of encouragement.

## **Dedication**

This work is dedicated to my father Mr. James Opoku Agyemag, my mother Madam Margaret Tweneboah and my brother Andrews Opoku Agyemang whose sacrifices and support have brought me this far.

# CHAPTER ONE

## 1.1. Background

Terrorism has a long history but suffers from a universally accepted definition. It has been identified by the UN as a threat to international peace and security. Terrorism has become one of the major scourges of the international community. "It endangers the life and limb of individuals, wherever they are located; in addition it affects most states and tends to condition their conduct in international dealings. Governments, used to tackling problems in interstate relations, are often at a loss to cope with actions coming from non-states entities that often are not controlled or controllable by other states."<sup>1</sup> Terrorism has been with us since time immemorial. Until recently, it mostly occurred under authoritarian regimes for political purposes such as nationalists or freedom fighters struggling for national liberation. This development mostly occurred after the two world wars especially, due to the redemarcation of states borders. These happenings incurred the displeasure of some nationalists who took arms in order to save their states. Another motivation for the earliest forms of terrorism was the preservation of religion. Particularly when people felt their religion was being sidelined by the power that be. The major devastating act of terrorism which has ever stunned the world is the September 11, 2001 attack on the world trade centre and Pentagon in US carried out by al-Qaeda. Other forms of international terrorism are the Indian Parliament attack (13 December, 2001), Madrid train bombing (11 march, 2004), London subway bombing (7 July, 2005), and the Mumbai bombing in a hotel, Jewish outreach centre and the train station (26-29 November, 2008). Serious acts of terrorism have also been occurring in Pakistan, Afghanistan and Iraq almost every day.

## 1.2. Who is a Terrorist?

There have been many attempts by states and international organizations to define terrorism. Even to date the United Nations still striving to fine a common definition of the term terrorism. None of the 13 and the 3 amendment instruments of the United Nations contain a universally accepted definition of terrorism. It has been described variously by states and other organizations.

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<sup>1</sup> Cassese (2005) pg. 463



Governments find it difficult to come to terms with the content of the various definitions of terrorism. Article 2 of the Draft Comprehensive Convention on International terrorism attempts a definition of terrorism as,

1. "Any person commits an offence within the meaning of the present convention if that person, by any means, unlawfully and intentionally, causes

a. Death or serious bodily injury to any person; or

b. Serious damage to public or private property , including a place of public use, a state or government facility, a public transportation system, an infrastructure facility or to the environment; or

c. Damage to property, places, facilities or systems referred to in paragraph 1(b) of the present article resulting or likely to result in major economic loss; where the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence set forth in the paragraph 1 of the present article.<sup>2</sup>

Be that as it may, states are still divided concerning the content of this definition. One of the bones of contention is the right to self determination especially, during the struggle by nationalists for self rule. Some scholars stipulate that the definition of terrorism should be clearly distinguished from the legitimate struggle of peoples for self determination as stipulated by the UN charter. There is a controversy as to whether freedom fighters who take up arms be considered as terrorist. However, the UN has entreated all member states to condemn all acts of terrorism whenever and by whomever committed it.

On the regional level the European Union defines terrorist acts as,

"Attacks upon a person's life which may cause death,

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<sup>2</sup> Draft Comprehensive Convention on International Terrorism

- a. Attacks upon the physical integrity of a person,
- b. Kidnapping or hostage taking,
- c. Causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss,
- d. Seizure of aircraft, ships or other means of public or goods transport,
- e. Manufacture, possession, acquisition, transport supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons,
- f. Release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life,
- g. Interfering with or disrupting the supply of water, or any other fundamental natural resource the effect of which is to endanger human life,
- h. Threatening to commit any of the acts listed in a to h.<sup>3</sup>

This is a very detailed set of offences which constitute acts of terrorism and it is not very much different from the UN Comprehensive Draft.

According to article 2 of the Inter-American Convention against Terrorism, terrorism “offences” include offences covered by the UN international instruments on terrorism.<sup>4</sup>

From the Islamic perspective the Arab Convention on the Suppression of Terrorism also defines terrorism in as,

<sup>5</sup> “Any act or threat of violence, whatever its motives or purposes, that occurs for the advancement of an individual or collective criminal agenda, causing terror among people, causing fear by harming them, or placing their lives, liberty or security in danger, or aiming to cause damage to the environment or to public or private installations or property or to occupy or to seize them, or aiming to jeopardize a national resource”.

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<sup>3</sup> The Council Framework Decision on Combating Terrorism (2002)

<sup>4</sup> Inter-American Convention Against Terrorism (2002)

<sup>5</sup> The Arab Convention on the Suppression of Terrorism (1999)

In Africa the 1999 O.A.U. Convention on the Prevention and Combating of terrorism also establishes offences which constitute acts of terrorism. It covers areas such as the physical integrity of a person, acts causing serious injury or death. It also touches on any damage to the environment, damage to public services and also the sponsoring of aiding any of such an act. The European Union and the U.N. Draft Comprehensive Convention place much emphasis on the desire to intimidate the population or to coax a government to stop any act as constituting an act of terrorism. The Arab Convention defines terrorism as a threat of violence but does not elaborate on what actually constitutes violence or the gravity of the violence.

Though, there are difficulties with regards to the content of the definition of terrorism or who a terrorist is, the various existing definitions prescribe detailed acts which constitute acts of terrorism.

On Sept 11, 2001, thousands of Americans were killed through terrorism. This has greatly caused a paradigm shift in the fight against terrorism because of its potential threat to international peace and security. Governments have an obligation to combat terrorism and protect international peace and security.<sup>6</sup> However, notwithstanding the effects of terrorism, states in their quest to fight it usually employ various measures some of which raise serious concerns about basic human rights. Among such basic human rights is the right to a fair trial such as the right to humane treatment of terrorist suspects. Moreover, the lack of a universally accepted definition of the term terrorism also undermines states efforts to counter it appropriately because there is the likelihood for states to over exercise their discretion in the determination of a terrorist or a terrorist group. Some states may target political opponents with the ostensible reason for combating terrorism.

However, according to the UN states must ensure that any measure employed to combat terrorism comply with human rights. Terrorism suspects irrespective of the crime they have committed are entitled to due process rights including the right to fair trial. States are now faced with the challenge of responding to threat of terrorism while upholding the international

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<sup>6</sup> Charter of the United Nations. Chapter 1

human rights standards. The Universal Declaration of Human Rights (UDHR) spells out fair trial rights as one of international principles. The right to a fair trial is again detailed in the ICCPR under article 14. Even though the list of non-derogable rights under article 4 of CCPR does not include due process rights, the Human Rights Committee has stated that certain aspects of the article 14 are obligatory even in states of emergency.

There are many international arenas where the issue of terrorism is being addressed. However, I chose to research on the U.N. because in my opinion it is the world's most popular organization with strong political legitimacy. It provides the forum for solving the world's challenges such as terrorism from the stand point of international human rights.

### **1.3. Objective.**

Due process rights entail a lot. It includes equal protection of the law, the right to a counsel, the right to be present at a trial, the right to be informed about all charges and to be present at a trial. However, due to time constraint I will limit my work and focus on the right to a fair trial. My studies will assess the following questions.

- 1. To what extent does the UN adequately ensure states compliance with the right to a fair trial in countering terrorism?**
- 2. How does the United Nations handle terrorism?**
- 3. Is the United States of America in violation of these substantive human rights standards?**
- 4. Does the situation of detainees at Guantanamo Bay meet the international criteria for due process?**

### **1.4. Research Methodology and Sources.**

The work will be analyzed from various relevant sources such as books, articles and journals, internet articles and references, international law particularly international human rights law, cases and court rulings, conventions, general comments by the HRC, UN Security Council

resolutions etc by UN. The research will be analysed from legal legislations as well as from the political science perspective. I intend to use qualitative analyses. That is I will use secondary data collection and analyse them. The work will be concluded with recommendations.

### **1.5. Structure of the Thesis**

This paper is divided into four chapters. Chapter 1 is the introductory part of the paper. It presents some of the various attempted definitions of the term terrorism. It also points out the lack of a universally accepted definition of the term. The methodology and the source of information are presented under this chapter. Chapter 2 attempts to deal with fair trial guarantees accorded to criminal suspects and the duty of states to uphold such international principles. It also touches on how the U.N. ensures states compliance with such international values. This chapter also deals with how the U.N. responds to terrorism. Chapter 3 reviews the lease agreement between U.S. and Cuba concerning Guantanamo Bay vis a vis how the detainees held at Guantanamo Bay have been treated. It also reviews some high profile cases which challenged the legality of the executive decision to hold terrorist suspects at Guantanamo Bay. The legal status of combatants is also dealt with under this chapter as well as the Military Commissions established by the Bush administration to trial terrorist suspects. Chapter 4 is the concluding part of the thesis. It provides an analysis of the major loopholes in the U.N.'s strategy to combat terrorism. It ends with recommendations that could be considered to address the challenge of terrorism.

## CHAPTER TWO

### 2.1. Fair Trial Guarantees and States Obligations

The protection of criminal suspects requires among other things, respect for their basic human rights. According to article 2 of ICCPR, each state party to the ICCPR undertakes to respect and ensure the rights of individuals within its territory and subject to its jurisdiction. They are obliged to implement the laws and also take necessary measures to achieve this obligation. The state has a duty to protect the individual by ensuring that the individual enjoys those rights enshrined in the covenant. The state must also protect the individual against perpetrators of violence. For instance, if terrorist acts perpetrated by other private agents violate the individual's right to security, it is the duty of the state to carry out an investigation into the event and bring the perpetrator to book. The victim may be entitled to a remedy or compensation. The right to a fair trial is basic international human rights entitled to suspects of criminal acts. It is intended to protect persons from any illegitimate abuse of their fundamental human rights. The basic standard of fair trial rights must be applied in all times be it peace time or times of emergency. In view of this terrorist suspects irrespective of the crime they have committed must be entitled to these guarantees in the determination of any criminal charge against them. It is important to recognise the fact that widespread and persistent disregard for such international values can be one of the main factors contributing to international terrorism. Fair trial rights are essential in all judicial systems which purport to be founded on the rule of law.<sup>7</sup> The right to a fair trial is a non-derogable right according to the Human Rights Committee's general Comments 29.<sup>8</sup> The Human Rights Committee (HRC) is the U.N.'s body that monitors states implementation of the ICCPR. It usually passes general comments which are detailed interpretations on the content of the human rights provisions contained in the ICCPR. Article 14 of ICCPR which is legally binding on states and the major source of the right to a fair trial entitles everyone to a fair and public hearing by a competent, independent and impartial tribunal which is established by law. Impartial and independent tribunal means that the court or a tribunal, such as the military tribunals established by the United States to trial

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<sup>7</sup> Rhona K.M. (2007) pg 235

<sup>8</sup> Human Rights Committee. General comments 29 on states of emergency (art. 4). 31/08/2001

terrorist suspects, should not be influenced by any executive or legislative power. Moreover judges should be objective and not have any preconceived judgement or show favouritism when hearing a case. This explains why the judiciary is separated from the executive arm of government and the legislature. The idea is based on the principle of separation of powers propounded by the French political philosopher, Baron de Montesquieu. It is practiced by democratic states. It means that the government is divided into three branches. That is, the executive arm of government in charged of the administration of the state, the legislative arm which is designed to make laws for the state and finally, the judiciary arm of government which wields the power to interpret the laws and also adjudicate over disputes. Another principle of a fair trial is that the defendant is presumed innocent until proven guilty. Therefore, states have the obligation to prove guilt beyond any reasonable doubt with evidence against the defendant. However, the burden of proof can be shifted to the accused in special circumstances. For instance, in the event that a convict finds a fresh evidence which can prove his innocence of the criminal charge against him. The accused should also be entitled to a legal counsel and the trial should also be done in a reasonable period of time. Other principles of fair trial rights include the right to be notified of all charges against the individual, equality before the law and the right to a fair and public hearing. These fair trial guarantees are also recognised in many other international treaties and conventions such as the UDHR. States parties to the ICCPR have an obligation to observe these rights and also to promote them accordingly. All international and national instruments of fundamental rights respect the rights of terrorists.<sup>9</sup> This is guaranteed by the rule of law in democratic states. In the light of this all anti-terrorist measures must conform to the international human rights standards and the rule of law.

## **2.2. Derogation and Fair Trials**

Even though, human rights law applies at all times certain rights can be restricted in times of emergency. The U.N. human rights system provides flexibility in the fight against terrorism. The U.N. human rights system comprises all the U.N. human rights bodies such as the High Commissioner for Human Rights as well as the human rights instruments for the promotion and protection of human rights. It is possible to restrict or suspended some rights in order to

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<sup>9</sup> Fernandez-Sanchez, Pablo Antonio (2009) pg 423

protect public order or safeguard national security and the fundamental human rights of everybody in times of “public emergency.”<sup>10</sup> However, this is subject to the exigencies of the situation.

Derogation can simply be defined as the suspension of a state’s responsibility or obligation to ensure a particular right or some rights entitled to an individual during an emergency situation for a certain period of time. When a state party to a treaty is faced with a major problem which can constitute a threat to the national security it can take away or suspend some rights of criminal suspects for a certain period of time in order to safeguard national security. However, not all rights can be derogated from. Article 4 of ICCPR does not permit derogation from the right to life, freedom from torture, freedom from slavery, freedom from discrimination, freedom of thought, conscience and religion. A lawful derogation allows the state to suspend some rights for a particular period of time in which ordinarily such action would have been a violation of its obligation.

Before a state can take any step to derogate from a right “the situation must amount to a public emergency which threatens the life of the nation, and the state party must have officially proclaimed a state of emergency.”<sup>11</sup> Therefore, the situation should not be a mere threat but rather, it should be dangerous enough with the potential of destabilising the national security. According to the HRC’s general comment on state of emergency, the situation should be well examined and not be exaggerated. The derogation must be genuine and must not be indefinite. It must last until the end of the instability. In addition, the state in quest of derogation should declare the emergency in the state and inform the other state parties to the treaty officially about its intention to put on hold certain provisions of the instrument. The body that monitors the implementation of that particular instrument must also be notified, stating clearly those rights which the state intends to derogate from.

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<sup>10</sup> Duffy Helen (2007) Pg 210

<sup>11</sup> Human Rights Committee: General Comment 29, State of Emergency (article 4)



Furthermore, according to article 4 of ICCPR, measures derogating from the covenant are restricted “to the extent strictly required by the exigencies of the situation.”<sup>12</sup> Such measures must be crucial and proportionate to the emergency. This means that the restriction should be justified according to the circumstances. It should not be too harsh than what is allowed and must be consistent with the situation. Also, the derogation must only in the area where there is the threat. This requirement is many essential to prevent any indiscriminate restriction of certain human rights.

### **2.3. UN Monitoring Mechanisms and States’ Obligations**

The United Nations has established a court-like committees which supervise the implementation of instruments assigned to them. They monitor states compliance with their human rights obligations under the instruments. The Human Rights Committee monitors states’ implementation and compliance with ICCPR. According to article 40 of ICCPR, states are obliged to submit periodic reports to the HRC on how the rights enshrined in the covenant are being implemented. The report should include measures undertaken by states in the implementation of the provisions in the covenant. The committee publishes its observations about the reports. These are made accessible to the public. The assumption for making it accessible to the public is that states will try to comply with their obligations since every state will always want to be in the good books of the world. Under article 41 of ICCPR states also have the liberty to lodge a complaint against another state which violates the provisions in the covenants. However, this hardly happens in the international community. This can be due to the fact that states try to maintain diplomatic relationships with other states. Furthermore, the first optional protocol to ICCPR mandates the Human Rights Committee to receive complaints from individuals who have allegedly been violated of their rights set forth in the covenant. These complaints are lodged at the HRC. However the victim must have exhausted all available local remedies. Again, the HRC does not accept a complaint which is being considered by another body.<sup>13</sup> The complaint mechanism is designed to make states comply with their human rights obligations. One major

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<sup>12</sup> Duffy Helen (2007) Pg 296-297

<sup>13</sup> The First Optional Protocol to the ICCPR. Art. 5

challenge with this UN system of keeping states in check of their human rights obligation is that the decisions of these committees are not binding and some states may disregard it. Some states also ratify instruments with derogations, reservation and even declaration of some provisions in the instrument. A reservation is whereby a state ratifies an instrument but identifies some articles that it will not comply with. Declaration on the other hand is where the state gives an explanation of the implication and range of the instrument it has ratified. For instance, the United States of America ratified the ICCPR in 1992 after 26 years of its passage, but then it has declared articles 1-27. These provisions range from the right to self determination to minority rights. The content of the instrument has been ignored.<sup>14</sup> Moreover, out of the 12 U.N. key treaty bodies the U.S. has only signed 3 but has not ratified them as of August 2002.<sup>15</sup> These are, the International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination Against Women, and lastly, the Convention on the Rights of the Child. In this case such provisions are not self executing, thus individuals do not have the liberty to invoke such provisions in any U.S. court of law. Such provisions are not incorporated into the domestic laws of the land. This is indeed not a good example for other states to follow.

#### **2.4. UN Special Rapporteurs**

One other mechanism employed by the UN in ensuring states' compliance with human rights is the use of special rapporteurs. These are experts who are normally assigned to carry out an investigation on a specific theme about human rights. They are appointed by the U.N. Secretary General and work on behalf of the U.N. They deal with broad thematic issues such as torture, inhuman and degrading treatment, as well as prolonged detention without trial. With regards to terrorism the former Commission on Human Rights which has been replaced by the U.N. Human Rights Council in April 2005, by Resolution 2005/80, decided to appoint for a period of three years a special rapporteur for the promotion and protection of human rights and

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<sup>14</sup> Martin, Schnably, Wilson, Simon, Tushnet. International Human Rights and Humanitarian Law Treaties, Cases, and Analyses. Pg 28

<sup>15</sup> Report on U.S. and Human Rights  
[www.globalissues.org](http://www.globalissues.org)

fundamental freedoms while countering terrorism. The special rapporteur offers advice to governments as to how to comply with human rights standards in their effort to combat terrorism. The special rapporteur can receive complains from individuals as well as Non-Governmental Organizations during on-site visits. They make recommendations in their concluding observations after a visit to a particular country. Such reports are submitted to the U.N. These reports can help strengthen states policy measures. That is, states can take such reports into consideration.

On 25 February 2008 the special rapporteur on the promotion and protection of human rights while countering terrorism, Mr. Martin Scheinin together with the special rapporteur on the independence of judges and lawyers and the special rapporteur on the question of torture, reported on a case regarding the situation of six non-US citizens. These people had been detained at Guantanamo Bay and were to be tried by the military commissions established under the MCA. Mr. Khalid Sheikh Mohammad, Mr. Mohammad al-Qahtani, Mr. Ramzi bin al-Shibh, Mr. Ali Abd al-Aziz Ali, Mr. Mustafa Ahmed al Hawsawi, and Mr. Walid bin Attash. They were accused by the U.S. government of conspiracy, murder in violation of the law of war and other terrorists' acts. However, in the opinion of the special rapporteur the commissions established under the MCA lacked the legal competence and procedural guarantees to conduct fair trials with regard to the international legal standards.<sup>16</sup> In 2006 a report was issued by the human rights experts concerning the situation of detainees held at Guantanamo Bay. The report concluded among other things that "the persons held at Guantanamo Bay are entitled to challenge the legality of their detention before a judicial body and to obtain release if detention is found to lack a proper legal basis." Prolonged detention of suspects held at Guantanamo Bay is an arbitrary detention. Again, "where criminal proceedings are initiated against detainees, the executive branch of government of the United States government operates as judge, prosecutor and defence council in violation various guarantees of the right to a fair trial." The action of the United States government contravenes many fair trial rights in an independent tribunal. The work of special rapporteurs is designed to check on states regarding their human

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<sup>16</sup> Report of the special rapporteur on human rights while countering terrorism: Communications with governments

rights efforts in the fight against terrorism. However, they sometimes face challenges. For instance, more often than not, they are not even welcomed by the host state which does not augur well for the outcome of their investigations. At present there is no centralised authority such as an international court of human rights to adjudicate over human rights abuses. The U.N. continues to rely on committees whose decisions are usually nonbinding on states. The HRC and other U.N. human rights bodies give non binding decisions. This means that, states can decide not to follow it or take it into consideration. Nonetheless, they could have moral force. Even Security Council Resolution 1373 (2001) which established the Counter Terrorism Committee to monitor states' compliance with its provisions did not touch on fair trial rights. This called for a proposal for further "guidance" for the submission of reports pursuant to paragraph 6 of the resolution. This is one of the reasons states continue to disregard the international human rights standards such as the provision of fair trial rights when dealing with terrorist suspects.

## **2.5. United Nations in Response to Terrorism**

The UN as an independent organization plays a very important role in the fight against terrorism. It is committed to promoting human rights while combating terrorism. The fight against terrorism has been on United Nations' agenda for many years and has declared terrorism as a threat to international peace and security.

The Security Council of the United Nations has passed a couple of resolutions dealing with terrorism. The Security Council has also declared terrorism as a threat to international peace and security. The Security Council reserves the power to bring pressure to bear on states or apply force in order to preserve international peace. Such measures could be in the form of sanctions such as economic, diplomatic or other sanctions. This is to compel states to comply with the Security Council's aims. That is, to maintain international peace and security. Security Council Resolution 1267 (1999) imposed strict sanctions on Al-Qaeda, Osama bin Laden and the Taliban. For instance, the resolution asked states to stop all financial aid or financial transactions with the Taliban. This power of the Security Council is derived from chapter 7 of

the UN charter and it is applied when international peace is under threat. The Sanctions Committee keeps a list of persons associated with the Taliban, al Qaeda and Osama bin Laden. Resolution 1267 obliges states to freeze the assets of designated individuals, prevent the entry into their territories and also to prevent the direct or indirect transactions of arms and other military equipments concerning the individuals and other entities on the list. Security Council Resolution 1368 (2001) in its preamble condemned the bloody terrorist attack on Washington DC, New York and Pennsylvania. The resolution also considers such acts and other acts of international terrorism as a threat to international peace and security. It affirms “its readiness to take all necessary measures to respond to the attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the charter of the United Nations.”<sup>17</sup>

Furthermore, according to Resolution 1373 (2001), acts of terrorism are in contravention of the very principle of the United Nations. That is to promote fundamental human rights of everyone. Incitement of terrorist acts and the financing and planning of terrorism also contravene the principles of UN. The resolution obliges state parties “to prevent and suppress the financing of terrorist acts.” it further obliges states to “refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts.” All member states are called to criminalise the financing of terrorist and other activities of terrorists. The ban against the financing of terrorism is mainly associated to the Taliban, Osama bin Laden the other organizations linked to Al-Qaeda. It is therefore difficult to criminalize other organizations which engage in terrorism activities but have not been considered as an international terrorist organization by the U.N.

One of the major channels through which the UN reacts to terrorism is the Counter -Terrorism Committee (CTC).<sup>18</sup>The former UN General Secretary Kofi Annan contended that the CTC “plays a vital role in the global effort to fight terrorism.” This committee is a subsidiary body of the Security Council. This means, it is connected with the Security Council. It was established by

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<sup>17</sup> Security Council Resolution 1368 (2001)

<sup>18</sup> Report on the Special Meeting of the Security Council’s Counter-Terrorism Committee: Statement by the Secretary –general, Kofi Annan, 7 March 2003.

Security Council Resolution 1373 (2001) and consist of the fifteen member states of the Security Council. It is mandated to monitor the implementation of Resolution 1373 and to ensure that member states comply with the terrorism conventions and the protocols. The CTC works in cooperation with other international and regional organizations. It does so especially to find ways of providing states with technical, financial and legislative assistance to help build states' capacities. This is very important since many states are handicapped and unable to implement their international obligations effectively. States are obliged to submit reports to the CTC regarding their progress in the fight against terrorism and the steps they have adopted to do so. The work of the CTC has been constrained by some challenges. Some states simply fail to submit their reports to the committee and since the CTC heavily rely on states reports it becomes difficult for it to determine very well if states are really fulfilling their obligations to implement their anti-terrorism measures effectively.

Again, the UN has over the years adopted a host of special international legal instruments in its bid to combat terrorism. This gives a legal basis to the international community in combating terrorism and to bring perpetrators to justice. <sup>19</sup>These conventions criminalizes acts of terrorism in areas such as hostage-taking, indiscriminate use of nuclear material, piracy, bombings, financial assistance to terrorists, offences against aircraft and airports, attacks on internationally protected persons such as diplomats. State parties are obliged to incorporate the provisions of these international conventions into their domestic legislation. The adoption of these conventions is a major contribution of the UN in the fight against terrorism.

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<sup>19</sup> United Nations Treaties Against International terrorism.  
[www.un.org](http://www.un.org)

## CHAPTER THREE

### 3.1. Guantanamo Bay and the Lease Agreement

The Guantanamo Bay detention camp is situated on the south eastern part of Cuba, Oriente Province. The area constitutes approximately 45 square miles. It was leased by the United States in December 1903 to be used as a coaling station. Guantanamo bay detention camp comprises “Camp delta”, “Camp Iguana” and “Camp X.Ray”. The naval base used to camp refugees who fled from Haiti. As of October, 2009 221 individual from 28 different countries were being detained at Guantanamo Bay as unlawful enemy combatants by the U.S. government.<sup>20</sup> President Obama of the United States promised to close the detention camp by January 2010 and ordered that cases of the detainees be reviewed. But the deadline for the closure of the detention camp has been missed since January 2010 and the detention camp is still open and keeping prisoners.<sup>21</sup> Therefore, the future of detainees therefore hangs in the balance. Historically Guantanamo bay is a land reservation which was leased to the United States by the new Republic of Cuba purposely for coaling and naval station. It was a negotiated agreement on 23 February 1903 between the then presidents Estrada Palma and Theodore Roosevelt of Republic of Cuba and United States of America respectively. However, under the agreement the United States would have “complete jurisdiction and control” over the leased areas which constitutes about 45 square miles. Cuba would continue to exercise “ultimate sovereignty over the area. This means that in case United States’ possession of the area is over or terminated the area will be reverted back to Cuba. The February 1903 agreement was confirmed later by the Treaty 1934 between US and Cuba. The naval reservation is American’s territory. Even though, Cuba ultimately owns the area the United States has exercised and continue e to exercise sovereignty over the area.

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<sup>20</sup> International Committee of the Red Cross. Report on persons detained by U.S. in relation to arm conflict and the fight against terrorism.

[www.icrc.org](http://www.icrc.org)

<sup>21</sup> Obama admits Guantanamo won’t close by January deadline

[www.washingtonpost.com](http://www.washingtonpost.com)

The lease agreement between Cuba and US has been the bone of contention of the U.S. role in Guantanamo Bay and its alleged violation of international human rights standards such as the right to a fair trial. Several legal battles have ensued between some detainees and the government of the United States. Some detainees have challenged the legality of their detention and filed a writ of Habeas in the federal courts of the U.S. These cases were first ruled by the U.S. district and finally by the Supreme court of the land. The districts have jurisdiction to hear almost all types of cases at the federal level. For example, when a detainee files a suit against the government it will first be heard by the district court. If a party to the case is dissatisfied with the court's ruling, he can appeal in the appellate courts. The Court of Appeal has jurisdiction to hear appeals from the district courts. Aside the district and the appeal courts is the Supreme Court which is the highest court of the land. It comprises the chief justice of the U.S. and 8 associated justices. The Supreme Court hears cases that begun in the district courts or the Court of Appeals.<sup>22</sup> On the other hand, the Military Commissions are like military tribunals which are established to deal with military offenses. Some of the important cases concerning Guantanamo Bay detainees that were finally heard by the U.S. Supreme Court are analysed below.

### **3.2. Rasul v. Bush**

In *Rasul versus Bush* the United States government was challenged as to whether aliens who had been held at Guantanamo bay without trial had the right to bring a petition on Habeas corpus to the Federal courts of the United States. Habeas corpus is a legal action to challenge an unlawful detention. This involves 12 Kuwaitis together with 2 Australians were accused for having committed acts of terrorism. These men were arrested when U.S. invaded Afghanistan, and had been detained at the United States naval base which is under the jurisdiction and control of the United States. The accused sued the government in the District court of Columbia challenging the legality of their detention under U.S. federal law. They complained that they had been denied access to counsel and courts. They further argued that they were not involved in hostilities against the United States. And again they had been denied access to courts,

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<sup>22</sup> The Federal Courts of U.S.  
[www.uscourts.gov](http://www.uscourts.gov)



tribunals and counsels. The United States government based its argument on the fact that the Guantanamo Bay detention camp is outside the territory of the U.S. The court held that foreigners detained outside the jurisdiction of the United States could not invoke Habeas Corpus in the Federal Courts of the United States. The court followed the example of the Supreme Court's decision in the *Johnson v Eisentrager* in 1950 which held that aliens who had been detained outside the United States territory could not invoke habeas corpus in the U.S. Federal Courts. This was further confirmed by the Court of Appeals.<sup>23</sup> The *Eisentrager* case involved some Germans who during the Second World War disobeyed Germany's surrender and fought the allies. The accused were tried by a Military Commission imprisoned in a military base in Germany that was owed by the United States.<sup>24</sup> The Supreme Court emphasised that the circumstances surrounding the case of *Eisentrager* were not the same as the *Rasul* case. With regards to *Eisentrager* the court made it clear that the petitioners were,

- (1) Enemy aliens,
- (2) They were not residents of the United States
- (3) They had been arrested and detained in a military custody as prisoners of war outside the United states
- (4) Had been tried and charged by a Military Commission outside the United States
- (5) Had been charged of crimes against the laws of war outside the United states
- (6) Had been detained outside the United States all the time.

However, in *Rasul* the petitioners are not

- (1) Nationals of countries which are at war against the United States

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<sup>23</sup> *Rasul et al v. Bush, President of the United States, et al*  
<http://www.cdi.org/news/law/rasul-decision.pdf>

<sup>24</sup> U.S. Supreme Court. *Johnson v Eisentrager*, 339 U.S. 763 (1950)  
[http://www.haguejusticeportal.net/Docs/NLP/US/Johnson\\_v\\_Eisentrager\\_US\\_Supreme\\_Court\\_Decision\\_5-6-1950.pdf](http://www.haguejusticeportal.net/Docs/NLP/US/Johnson_v_Eisentrager_US_Supreme_Court_Decision_5-6-1950.pdf)

(2) They reject the allegation that they had committed acts of terrorism against the United States

(3) They contend that they had been denied access to tribunals and even counsels and had not been convicted of any wrongdoing

(4) They had been detained for over two years in an area which under the jurisdiction and control of the United States.

The Guantanamo bay detainees had been kept for a very long time without trial. But nevertheless, the United States Supreme Court overturned the decisions of the District and the Appeal courts. The lower courts decisions were that the judiciary had no authority to hear the case of non US citizens held in Guantanamo Bay. But the Supreme Court argued that the degree of control exercised by the US over Guantanamo Bay is sufficient enough to warrant habeas corpus rights. Moreover, the right to habeas corpus is not dependent on citizenship status. US exercises complete control and jurisdiction over the U.S. naval base and the fact that ultimate sovereignty remains with Cuba is irrelevant.

The jurisdiction of a state could extend beyond its geographical borders. In this case the U.S.'s jurisdiction extends to Guantanamo Bay where it exercises absolute control. Every individual everywhere has an inalienable rights and the government under whose control that individual happens to find himself should give respect to such basic rights of the individual.

### **3.3. Hamdan v. Rumsfeld**

This is another case in which the Supreme Court of the United States attested to the fact that the Military Commissions established by the government to try Guantanamo Bay prisoners violated common article 3 of the Geneva Conventions.<sup>25</sup>

Salim Ahmed Hamdan who originates from Yemen and a driver in the agricultural plantation of Osama bin Laden was arrested and detained in Guantanamo Bay and accused of conspiracy to commit terrorism. He was arrested and transferred to the United States' naval Base, Guantanamo Bay. Hamdan filed a writ of habeas corpus to challenge the decision to have him

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<sup>25</sup> Geneva Conventions, 1949. Common Art 3

tried before the Military Commission. He argued that the Military Commission violated the Geneva Conventions and the United States uniform code of military justice. The Military Commissions did not fulfil the protections under the third Geneva Conventions such as the principle that the accused should have access to the evidence against him. The United States District Court for the District of Columbia ruled in favour of Hamdan. It held that the United States government should determine that the accused was not a prisoner of war or else he could not be tried by the Military Commission. However, the court of appeals for the District of Columbia overturned the District court's decision arguing that the Military Commissions have a legitimate power to try enemy combatants because congress had approved them and that the Geneva conventions deal with states and not non-state entities so the provisions in the convention do not cover al Qaeda and its members.

In the middle of 2006 the Supreme Court reversed the decision of the Court of Appeals and argued that the then president of the United States, George W. Bush had no authority to establish the war crime tribunal and that under military justice law and the Geneva Conventions, the Military Commissions are illegal.<sup>26</sup> Article 3 of the Geneva Convention does apply to both state entities and non-states entities such as al Qaeda.

According to the two cases, the U.S. government has acted in contradiction of international human rights standards. Guantanamo Bay detainees have been held for a long time without trial or access to tribunals. The new Military Commissions Act 2009 which was signed by President Obama with the view to correcting the wrongs of the previous Military Commissions does not necessarily add much improvement to them. Somehow, there are some improvements but this is insignificant as compared to the provisions of the Geneva Conventions.

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<sup>26</sup> Hamdan v. Rumsfeld, Secretary of Defense, et al  
<http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>

### 3.4. Presumptive POW Status

On September 18, 2001 the United States Congress passed a resolution named "Authorization For Use of Military Force Against Terrorists." (AUMF) This resolution gave the president much power to fight terrorism. Per the war powers wielded by the president he could passed out "The Military Order-"Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorists" individuals detained under the Presidential Military Order have been branded "enemy combatants by the United States. The United States' Military Commissions Act 2006 defines a Lawful Combatant as a person who is,

- a. "A member of the regular armed forces of a state party engaged in hostilities against the U.S.A., a member of the militia, volunteer corps, or organized resistance movement belonging to a state party engaged in such hostilities, which are under responsible command, wear a fixed distinctive, sign recognizable at a distance, carry their arms openly, and abide by the law of war, or
- b. A member of the regular armed forces who professes allegiance to a government engaged in such hostilities, but not recognizable by the United States."

On the other hand an Unlawful enemy combatant is,

- a. "A person who has engaged in hostilities or who has purposefully and materially supported hostilities against the U.S. or its co-belligerents who is not a lawful enemy combatant including a person who is part of the Taliban, al-Qaeda, or associated forces, or
- b. A person who, before, on, or after the date of the enactment of the Military Commissions Act 2006, has been determined to be an unlawful enemy combatant by a Combatant status Review Tribunal or another competent tribunal established under the authority of the president or the secretary of Defense."<sup>27</sup>

According to article 4 of the Geneva Convention of August 12, 1949 a prisoner of war is a person who possesses the following characteristics.

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<sup>27</sup> United States Military Commissions Act 200

1. "Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements belonging to a party to the conflict and operating in or outside their own territory, even if this is occupied , provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
  - a. That of being commanded by a person responsible for subordinates;
  - b. That of having a fixed distinctive sign recognizable at a distance;
  - c. That of carrying arms openly;
  - d. That of conducting their operations in accordance with the laws and customs of war.<sup>28</sup>

From the above definition, any combatant or a belligerent who falls under the category provided by article 4 of the Geneva Convention is entitled to POW status. Such an individual should be treated fairly by the captor state. This qualification determines the treatment of a person captured during an international hostility.

Again, there is also a distinction between combatant and non-combatants by the rules governing armed conflicts. Combatants are members who take part directly in the hostilities. Non-combatants could be referred to as civilians who do not participate in the hostilities. Such civilians enjoy the right to protection against the hostilities.

### **3.5. Lawful versus Unlawful Combatants**

Combatants who operate within the principles of international armed conflict are considered 'lawful combatants'. Among such principles are that, in the course of hostility non military objects must be protected. Again, civilians as well as their properties and fundamental human rights must be protected against.<sup>29</sup> In view of that they enjoy the right to wound or even kill or destroy the enemy's object. Primarily such actions are considered to be serious criminal acts. But once such actions are carried out within the rules governing international armed conflicts

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<sup>28</sup> Geneva Convention, August 12, 1949 Art. 4

<sup>29</sup> The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War. Art 27

they are legal acts. When such a person is captured by the enemy he/she has the right to protection against unfair treatment by the captor. Such an individual cannot be prosecuted for his participation in the conflict and such rights should be respected.<sup>30</sup>

An individual who takes part in hostility directly without the license to do so is considered an 'unlawful combatant'. For instance, if such an individual takes up arms and wound or kill the enemy combatant he/she commits criminal offense. In some circumstances even a lawful combatant can lose his belligerent privileges as a lawful combatant. For instance, a lawful combatant who disguises himself as a civilian or hides his identification signs and attack or confront the enemy loses his entitlement as a lawful combatant and will then be considered as an unlawful combatant. Such an individual can no longer possess the POW status and can be prosecuted.

However, should an individual who has committed a belligerent act be captured by the enemy and any doubt arises regarding his/her status, such a captive is presumed a prisoner of war until a competent tribunal has determined his/her status. Until such time his status has been determined by a competent tribunal the captive still enjoys POW status.<sup>31</sup> Article 5 of the Third Geneva Convention does not spell out characteristics of a competent tribunal. In the absence of such a description the state in question would have to exercise its discretion in accordance with its domestic laws.<sup>32</sup> In any event that a competent tribunal has determined an individual's status and found him/her as an unlawful combatant such an individual should still be treated humanely. Again, if a captive fails to qualify for POW status he/she is entitled to the basic minimum of international human rights standards including due process rights such as the right to a fair trial. In addition such an individual enjoys the fundamental guarantees under article 75 of the Additional protocol 1 to the Geneva Convention.

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<sup>30</sup> Dinstein Yoram. *The Conduct of Hostilities under the Law of International Armed Conflict*. (2004)

<sup>31</sup> Geneva Convention/Third Geneva Convention. Art. 5

<sup>32</sup> Gill Terry and Sliedregt Elies V. *Guantanamo Bay: A reflection on the legal status and rights of 'unlawful enemy combatants'* Volume 1, issue 1 (September)2005. [www.utrechtlawreview.org](http://www.utrechtlawreview.org)

### **3.6. Military Commissions and the Rule of Law**

According to the third Geneva Convention which the United States is a signatory when a suspect is captured on the battle field and his status is not known, the captive is entitled to Prisoner Of War (POW) provisions until a competent tribunal determines his status. Military commissions as option for trying captured combatants have a long history. They were used in the 1945 trial of some Nazi leaders in Nuremberg against offences such as war crimes and crimes against humanity. These trials took place in military tribunals under the rules which govern armed conflicts. Military tribunals primarily operate as military courts to try combatants who have committed war crimes in times of armed conflict. Military commissions are quite distinct from civilian courts. For instance, a military officer performs the functions of jurors who render the verdict.

Military commissions were used again after the American civil war (1861-1865). The conflicts that occurred between the native Americans and the federal government commonly referred to as the "Indian war" military tribunals were used to rule and sentenced about 38 people who had been executed in the aftermath of the Dakota war of 1862.<sup>33</sup>

On October 17, 2006 the United States Congress enacted the Military Commission Act 2006 which was signed by the president to try foreign unlawful enemy combatants who were alleged to have breached the law of wars against the United States. During the fight in Afghanistan hundreds of men were captured by the United States and sent to the U.S. naval base Guantanamo Bay to be detained. These detainees were branded "Unlawful enemy combatants and denied POW status. These detainees were allegedly members of the al-Qaeda who have been fighting alongside the Talibans. Per the military order of 13 November 2001 the then president of the United States George Bush ordered the secretary of defence to establish military commissions to try those foreigners who had been captured during the fight in Afghanistan.

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<sup>33</sup> Linder O. Douglas. The Dakota Conflict Trials.  
[http://www.law.umkc.edu/faculty/projects/ftrials/dakota/Dak\\_account.html](http://www.law.umkc.edu/faculty/projects/ftrials/dakota/Dak_account.html)

Under section 948d of the Act alien enemy combatants who commit offenses punishable under the terms of the Act before, on, or after September 11 2001 would be tried by military commissions. However, these commissions do not have jurisdiction over lawful enemy combatants. Lawful enemy combatants are subject to courts-martial. These are military courts constituted to render punishments against military offenses.

Some contents of the military tribunals established to try the Guantanamo Bay detainees have raised serious concerns about due process rights even though the idea of establishing it does not breach international law. For instance, in the criminal proceedings the accused or his counsel may not be present in the court room. This is a contradiction of an important due process standard that is denial of the right to be present in the court room prosecutions.

Another critical aspect of the military tribunal is that the presiding officer may keep evidential information from the accused. But under international human rights standards the accused has the right to examine any evidence against him or her in the criminal proceedings. Again, contrary to international standards the detainees have been kept indefinitely, thus violating their right to be tried within a reasonable period of time. The executive branch of the government could influence the decision of the military commission. For instance, the executive had the power to even continue to detain prisoners indefinitely after they had been acquitted by the military tribunal. The commissions could consider evidence obtained through coercive means. However, this practice happened before the promulgation of the Detainee Treatment Act. Moreover, the accused could be denied choice of a legal counsel and also access to the evidence against him. In 2006 human rights experts issued a report concerning the situation of detainees held at Guantanamo Bay. The report concluded among other things that “the persons held at Guantanamo Bay are entitled to challenge the legality of their detention before a judicial body and to obtain release if detention is found to lack a proper legal basis.” Prolonged detention of suspects held at Guantanamo Bay is an arbitrary detention. Again, “where criminal proceedings are initiated against detainees the executive branch of government of the United States government operates as judge, prosecutor and defence council in violation of various guarantees of the right to a fair trial. The action of the United States



government contravenes many fair trial rights in an independent tribunal. The report also adds that the conditions of detention especially prolonged detention and the uncertainty surrounding the duration of the detention as well as prolonged solitary confinement are tantamount to inhuman treatment which violate<sup>34</sup>

As part of part of his counter-terrorism reforms the United States president Barack Obama signed the 2010 National Defence Authorization. This includes the Military Commissions act 2010 and provides some amendments to the procedures of the Military commissions as a way of improving the system. The president had long opposed the Military Commissions Act 2006 and even voted against it as a senator. The new legislation replaces the term “unlawful enemy combatant” with “Unprivileged enemy belligerent” Section 948a (7) defines an alien “unprivileged enemy belligerent” as an individual who,

“(A) has engaged in hostilities against the United States or its coalition partners;

(B) has purposefully and materially supported hostilities against the United States or its coalition partners; or

(C) is a member of al-Qaeda”

According to this act the threshold under which an individual could be brought before the military commissions are that first, such an individual should have participated in hostility.

Second, the individual has “purposefully and materially supported hostilities against the United States”

And lastly, the individual could be tried by virtue of his membership of the al-Qaeda.<sup>35</sup> In this case, by mere membership of al-Qaeda is appropriate to try an individual before military

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<sup>34</sup> The Situation of detainees at Guantanamo Bay” - Report of the Chairman Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment and punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt. 2006

<sup>35</sup> United states Military Commissions Act of 2009

commissions regardless of the fact that he has participated in a hostility or not. To treat a person who merely supports hostility equally as the one who actually takes part in the hostility does not argue well for the rule of law.<sup>36</sup> Even supporting terrorism by means of say providing material assistance qualifies a person to be tried by Military Commissions even though this does not constitute a war crime. The legislation still discriminates against aliens. To try only aliens other than United States citizens is an unfair practice. It seems there is no much difference between the new legislation and the previous one. However, one major improvement in the new act is the fact that evidential reports which could be obtained by means of coercion before December 30, 2005 has been abolished entirely. The detainee Treatment Act was introduced on December 30, 2005 to abolish inhumane treatment of detainees. It also restricts hearsay evidence and improves resources of defense counsels. Again, it goes the extra mile to take care of terrorists suspects captured outside an armed conflict. The new Military Commissions act 2009 was believed to improve on the shortcomings of the previous military commissions. However, the new Military Commissions legislation does not right the wrongs of the old military commissions.

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<sup>36</sup> Human Rights watch. Revise Military Commissions Remain Substandard.  
[www.hrw.org](http://www.hrw.org)

## CHAPTER FOUR

### **4.1. Efficacy of Anti-Terrorism Measures Implementation.**

The U.N. continues to play a leading role in the fight against international terrorism. It remains committed to combating terrorism whilst protecting human rights. It is fair to recognize the fact that the organization has achieved some successes. However, the fact remains that the U.N. is faced with numerous challenges which limit its ability to keep states on track in fighting terrorism whilst ensuring the fundamental human rights of individuals. For example the protection of fundamental human rights of terrorists who do not even care about other people's human rights.

One major contribution of the U.N. to suppress terrorism is the establishment of anti-terrorism instruments. A number of anti-terrorism conventions and resolutions have been adopted by U.N. These conventions condemn specific acts of terrorism and constitute international norms which define terrorism as a crime. The U.N has considered terrorism as a threat to international peace and security. To date, 16 anti-terrorism conventions including 3 amendments have been adopted to deal with various acts of terrorism. When such conventions or instruments are adopted by the U.N., they are open for ratification by states. This means that they are incorporated into states' domestic legislation. These anti-terrorism conventions criminalize specific acts of terrorism and make them punishable by law. Some of the terrorism acts covered by the anti-terrorism instruments are bombings, financial assistance to terrorism organizations, hostage-takings, hijackings, acts against diplomatic agents, and transaction of nuclear materials.

The adoption of anti-terrorism resolutions by the U.N. Security Council helps in the fight against terrorism. They oblige states to take the necessary measures in responding to terrorism. One major resolution worth mentioning here is Security Council Resolution 1373 (2001). This resolution makes it enforceable to issue sanctions against individuals or other entities involved in terrorism. It urges all member states to dissuade from harboring terrorists and prevent any financial assistance to terrorist groups. The resolution also calls for the suppressing of terrorism financing and to improve international cooperation in the fight against terrorism. Resolution 1373 established the Counter-Terrorism Committee which monitors states' compliance with

their implementation of the resolution. It could be argued that the increase in ratification of anti-terrorism instruments by states as evident by the increase in states reports submitted to the C.T.C. could mean that more states are embracing the anti-terrorism campaign. Since 2001 the C.T.C. has received more than 600 states' reports with concerning the implementation of Resolution 1373.<sup>37</sup> Even though member states are obliged to implement Security Council's resolutions, this is to some extent dependent on the willingness of states as well as their capacity to do so. Some states embrace international instruments just to have a good image in the international community. This means that they ratify international instruments in order to be seen as conforming to the International standards.<sup>38</sup> It is one thing to sign or ratify an instrument and another to fully enforce it. According to a report by the chair of the C.T.C. on problems faced by the committee in the implementation of Resolution 1373(2001), many states ratify international instruments but fail to implement them. In that case the instrument will have no practical effect. This was manifested by states reports submitted to the C.T.C. The report further revealed that the Committee's work to effectively curtail terrorism financing is hampered by international financial transactions. This is because, it is difficult to detect or seize any monetary transaction or transfer of money which belongs to a terrorist organization. Once again, some states have weak domestic legislations to check and avoid the inflows of criminal money into their countries. As a consequence it is very difficult to actually recognize criminals and their resources.<sup>39</sup> Furthermore, the C.T.C. relies heavily on reports submitted by states on their implementation of the counter-terrorism measures. It is quite difficult to actually ascertain whether such reports reflect the reality on the ground. It is therefore obvious that the implementation of U.N Security Council Resolution 1373 (2001) on counter-terrorism measures is met with some difficult challenges. In the light of such difficulties the efficacy of anti-terrorism instruments as a mechanism for countering terrorism becomes minimal. This means that anti-terrorism measures such as the reporting system and the enactment of resolutions

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<sup>37</sup> Report on UN's fight against terrorism: 5 years after 9/11. By Javier Ruperez.  
<http://www.un.org/terrorism/ruperez-article.html>

<sup>38</sup> Smith, Rhona K.M. International Human Rights. Pg146

<sup>39</sup> Report by the chair of the Counter-terrorism Committee on problems encountered in the implementation of Security Council resolution 1373 (2001)  
<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/219/97/PDF/N0421997.pdf?OpenElement>

which normally call on states to take appropriate measures to deal with terrorism is less effective.

The effectiveness of international legal instruments for combating international terrorism will require adequate resources. Many countries, in particular the developing ones, lack adequate resources such as adequate funds and well trained security personnel to effectively put into practice their international obligations. They are more often than not constrained by managerial capacity. There is a pressing need for legal personnel, well trained and equipped police and military forces among other things. The C.T.C in response to these challenges facilitates assistance to such countries to help upgrade their capacities to implement Resolution 1373 (2001). The C.T.C. analyses states reports in which the major difficulties encountered by states in meeting their international obligations are identified. In addressing such issues the C.T.C. receives funding from states and other donor organizations and makes them available for states with limited capacity. According to U.N. plan of action the C.T.C, usually encourages states to make voluntary contributions for its technical assistance project.<sup>40</sup> Considering the fact that many countries are in dire need of resources to meet their international obligations the mobilization of assistance by the C.T.C. is indispensable. However the C.T.C. itself is constrained by inadequate financial and human resources. It depends on donor organizations and states.<sup>41</sup> How reliable these donor states or organizations are in fulfilling their commitments is a question is questionable. Lack of adequate resources is a major challenge for the C.T.C. to perform effectively. On one occasion, the C.T.C. was unable to translate the reports it received due to inadequate resources.<sup>42</sup> According to information submitted by the C.T.C. in 2003 over 160 countries are in need of assistance such as adequate funds and skilled personnel to fight terrorism.<sup>43</sup> The growing need of resources to counter terrorism does not

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<sup>40</sup> U.N. Plan of Action:

<http://www.un.org/terrorism/strategy-counter-terrorism.shtml>

<sup>41</sup> Nesi Giuseppe. International Cooperation in Counter-Terrorism: The U.N. and regional organizations in the Fight against Terrorism

<sup>42</sup> Donell Therese and Eden Paul. A Turning point in International and Domestic Law? Pg 777

<sup>43</sup> U.N. Counter Terrorism Committee Technical assistance Program.

[www.unodc.org/.../terrorism/working-closely-with-ctc-of-the-security-council-and-cted.ht](http://www.unodc.org/.../terrorism/working-closely-with-ctc-of-the-security-council-and-cted.ht)

necessarily correspond with the available resources which the C.T.C. raises. In view of this many states will still not be able to act in response to terrorism effectively.

The C.T.C. has devised a strategy to closely monitor states progress in the fight against terrorism especially their implementation of Resolution 1373 (2001). This is done through on-site visits to member states by the C.T.C. This is particularly done by deploying a team of experts who work on behalf of the U.N. to member states to ascertain states progress in the fight against terrorism. Thorough assessments are made about the states development in combating terrorism, and the major obstacles they encounter in fighting against terrorism and the best ways they can manage to overcome them. An assessment is also made concerning the technical assistance needed by that country to implement Resolution 1373 (2001). This activity can increase states capacity in countering terrorism. It helps strengthen policy measures by C.T.C. and its continued assistance efforts. Through this exercise the major challenges of states are made known and it becomes easier to discover the appropriate remedy to revitalize the situation. However, in order to respect the territorial integrity of a state, permission is needed from the host state to enter the country. Sometimes states refuse to grant such permission. Furthermore, considering the fact that many countries need assistance to fight terrorism it is not easy for the U.N. or the C.T.C in particular to mobilize such resources to meet the needs of member states to ensure best practices in countering terrorism. The C.T.C. has become the U.N. leading body to promote the U.N. effort in fighting against international terrorism. It continues to encourage states to become parties to the international anti-terrorism instruments. It has helped increase states ratification of the anti-terrorism instruments. As of 2001, only Botswana and the United Kingdom had ratified all 12 anti-terrorism instruments. Just after three years the number increased to over 40.<sup>44</sup>

## **4.2. International Terrorism Undefined**

There exists no generally accepted definition of terrorism, and this may be seen as a major obstacle placed in the path of best counter-terrorism practices. States can adopt their own definitions which may not conform to the international human rights norms. Even though,

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<sup>44</sup> Donell Therese and Eden Paul. A Turning point in International and Domestic Law? Pg 775

several attempts have been made by U.N. in defining terrorism, to date all the U.N. member states have not been able to agree on a common definition of terrorism. One major factor that is hindering a common accepted definition of terrorism is whether to include violent acts committed by nationalists in their struggle against foreign domination as acts of terrorism that must be criminalized. At times in the struggle for self rule some nationalists, or freedom fighter as they may be called, resort to violence to address their grievances. Some acts of such violence may be considered as acts of terrorism. Scholars and governments have different opinions as to whether such acts must be included in the definition of terrorism. Some scholars are of the opinion that such acts must be considered as a crime whilst others think otherwise. For instance, many intellectuals do not consider the hostility between Palestine and Israel as constituting acts of terrorism whilst others think otherwise. According to the Convention of the organization of the Islamic Conference for Combating Terrorism “peoples struggle including armed struggle against foreign occupation, aggression, colonialism and hegemony, aimed at liberation and self determination in accordance with the principles of international law shall not be considered a terrorist crime.”<sup>45</sup> Some states such as the U.S. do regard national liberation movements as terrorist groups.<sup>46</sup> The U.S. considers Hamas, a Palestinian Islamic resistance movement as a terrorist organization even though Hamas assumed political power through a democratic general election in Palestine.<sup>47</sup> Other states such as Australia and the United Kingdom categorize only the military branch of Hamas (Izz ad-Din al-Qassam Brigades) as a terrorist organization. The U.S. considers Hamas as well as Hezbollah as terrorist organizations.<sup>48</sup> At the same time as many western governments brand Al Qaeda as a terrorist organization many people in the Muslim community recognize Osama Bin Laden, A Qaeda as freedom fighters to liberate the Islamic community from the west.<sup>49</sup> Whilst they consider their actions as a justifiable way of resistance, the West also regards them as terrorist offenses. Lack

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<sup>45</sup> Convention of the Organization of the Islamic Conference on Combating International Terrorism.  
[www.unhcr.org/refworld/publicer/oic.html](http://www.unhcr.org/refworld/publicer/oic.html)

<sup>46</sup> Fernandez Pablo and Sanchez Pablo Antonio. International Legal Dimension of Terrorism. Pg 21-22

<sup>47</sup> U.S. Department of state: Terrorist organizations.  
<http://www.states.gov/s/ct/rls/crt/2006/82738.htm>

<sup>48</sup> The wall street journal: U.S. adds two firms in Gaza to terror list.  
[www.online.wsj.com](http://www.online.wsj.com)

<sup>49</sup> Donell Therese and Eden Paul. A Turning point in International and Domestic Law? Pg 189

of a common accepted definition of terrorism also makes it difficult to draw the line between a terrorist group and other forms of political resistance. Some governments tend to support national liberation movements whilst at the same time condemning acts of terrorism. This could mean that such governments do not consider acts of violence employed by nationalists as terrorist offenses. In his speech addressed to the participants at the 21<sup>st</sup> Conference of Syria Labor Union, the late former president of Syria Hafez al-Assad contended that Syria is opposed to terrorism but rather supports national liberation movements. He further states that “we have always opposed terrorism but terrorism is one thing and national liberation struggle against occupation is another. We are against terrorism. We do not exercise it nor do we allow anyone to exercise it from our territory. We do however support the struggle against occupation, carried out by the national liberation movement. This is our fundamental and uncompromising position.”<sup>50</sup> Resolution 1269 (1999) on the responsibility of the Security Council in the maintenance of international peace and security “unequivocally condemns all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, whenever and by whomever committed”<sup>51</sup> Even though, the resolution condemns all acts of terrorism it does not actually describe what comprises these acts. Resolution 1373 states that all states shall “deny safe haven to those who finance, plan, support, or commit terrorist act, or provide safe havens as well.” The resolution is silent on how one will determine such people who support terrorism, who plan or who provide safe havens. In this event states can necessarily exercise their own discretion to suit their own political interest or provide vague definitions. Per Title 18 section 2331(1) of the U.S. code, international terrorism “involves acts or acts dangerous to human life.” It does not make any reference to the consequences intended by such acts.<sup>52</sup> One contributing factor to this problem is that the state parties to the U.N. remain politically and ideologically divided.

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<sup>50</sup> Ganor Boaz. Syria and Terrorism: Jerusalem Centre of public affairs  
<http://jcpa.org/jl/saa26.htm>

<sup>51</sup> Security Council Resolution 1269  
<http://www.un.org/Docs/scres/1999/sc99.htm>

<sup>52</sup> Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Mission to the United States of America.  
<http://www2.ohchr.org/english/issues/terrorism/rapporteur/reports.htm>



Therefore, it becomes difficult for member states to reach a consensus on decisions. There is a dire need for a clear definition of international terrorism which is generally accepted by member states else states are fighting something they do not know. Governments need to know what they are fighting against and its specificities.

The U.N. for the past decades has intensified its effort to fighting international terrorism and to restore peace and security. It has established legal framework to combat terrorism. Anti-terrorism conventions and a host of resolutions have been created obliging states to approach the situation with respect to fundamental human rights. However, how these international initiatives reflect effectively on the ground is questionable. The U.N. enforcement power is limited especially due to non cooperation of some member states.

#### **4.3. Terrorist Detention: The case of Guantanamo Bay Detainees.**

In the following I will discuss whether the Guantanamo Bay detention centre has been run in accordance with requirements set out in the relevant international legal frameworks.

It is an established fact that many terrorist suspects continue to languish in detention camps. The Special Rapporteur on torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak once told journalist that, about 10 million detainees worldwide still live in terrible conditions. This statement was again repeated during the 12<sup>th</sup> U.N. Congress on Crime Prevention and Criminal Justice hosted by the government of Brazil on 12-19, April 2010.<sup>53</sup>

Guantanamo Bay detention camp is one of the detention centres which have received much international attention. Much concern has been raised particularly about the fundamental human rights of those terrorists suspects detained. Whatever crime these suspects may have committed they nevertheless, should enjoy some basic human rights. The U.S. government, who has the legal responsibility of the detention camp, is obliged to promote and ensure international fair trial guarantees enshrined in the ICCPR which the U.S. is a party. In addition to this the U.S. is bound by other international standards which due to their long usage and

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<sup>53</sup> Report on Detention Conditions for Majority of Prisoners by U.N. Human Rights Expert, Manfred Nowak  
[www.un.org](http://www.un.org)

practice, they have become part of international customary law. A case in point is Additional protocol 1 of the Geneva Convention relating to the Protection of Victims of International Armed Conflicts.

One of the core tenets of the right to a fair trial is the right to be tried before a competent, independent and impartial tribunal. It is questioned if the Military Commissions established by the U.S. government to try Guantanamo bay detainees could be described as independent. In reference to the U.N. Human Rights reports on the situation of detainees at Guantanamo Bay in chapter 3, the executive branch of government could influence criminal proceedings of suspects. In addition, the detainees have been held in the camp for far too long without trial. This situation is in contradiction of the right to be tried within a reasonable period of time. This is stipulated by article 9 paragraph 3 of the ICCPR. It states that "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial"

U.S. president, Barrack Obama is committed to closing the camp. This is a step in the right direction. The detainees should be tried before U.S federal courts. The U.N. Human rights Committee contends that the jurisdiction of Military Tribunals should be limited to trying military persons charged with military offences. Referring to my earlier discussion on prisoner of war status in chapter, the Guantanamo Bay detainees have not been given the prisoner of war status. However, according to article 5 of the Third Geneva Convention such detainees should be entitled to prisoner of war status until such time as their status has been determined by a competent tribunal. In addition, the detainees are still entitled to fundamental quarantines stipulated by article 75 of Additional Protocol 1 to the Geneva Conventions and should be treated humanely.

Any measure to combat terrorism should always respect the right to a fair trial especially in all criminal proceedings.

## **4.4. Recommendations for combating terrorism while protecting human rights**

### **4.4. a. Urgent need for a clear and universally accepted definition of terrorism**

I don't think anyone can deny the fact that reaching a universally accepted definition of terrorism is not an easy task. Lack of an internationally accepted definition of terrorism is a major hurdle the international community is still grappling with. However, this problem is not an insurmountable one. A consensus can be reached on a common definition. The U.N. should consider this as a matter of urgency and should convene for special sessions as often as possible in order to arrest this challenge. A common definition of terrorism must be legally binding and accepted by at least the majority of states. It must be clear enough to avoid any vagueness and imprecision. Again, the definition should deal with the issue of self-determination or resistance movement. A universally accepted definition of terrorism will clear any doubts about domestic definitions and legislations on acts of terrorism. In this case states will have at least a common definition and interpretation about terrorism and what exactly they are fighting against.

### **4.4. b. Improving the reporting system**

According to paragraph 6 of resolution 1373(2001) all states are mandated to submit reports on their compliance to the implementation of the resolution to the C.T.C. within 90 days from the date of adoption. The report also should highlight on all measures taken to implement the resolution and the progress made. Upon submission a report by states it is assessed by a panel of experts. An official from the states is invited to sit in the discussion. There should be a follow up after the submission of the report to monitor closely the state's new development. Renowned human rights non-governmental organizations (NGO) should be given observer status and invited to attend meeting sessions of the U.N. or the C.T.C. in particular. NGOs also provide useful and quality information about human rights abuses by uncovering states human rights track records. There are many renowned NGOs at the global, regional and national levels which contribute to defending human rights. It is a possibility that NGOs can help to defend human rights with their resources especially in areas when governments are unable to deal

with. They are independent organizations and work voluntarily without expecting anything in return. They should be encouraged to continue putting pressure to bear on governments to adopt the best practices in countering terrorism. The UN as well as states governments should be more open to NGOs and involve them in the decision making process.

#### **4.4. c. Strong regional and sub regional blocks**

Regional and sub regional organizations could be strengthened to cooperate more with their member states in dealing with terrorism at the regional levels. Strong contact should be maintained with the U.N. or the C.T.C. to be precise. Such organizations know very well their regional specificities since because they share things in common such as culture, and have similar political interest. They may have similar problems and it is quite easier to find a common solutions. They can work more closely with each other and assist each other by pulling their resources together. They can also share their experiences and knowledge among each other in order to adopt the best practices to combat terrorism.

#### **4.5. Conclusion**

The signing of the U.N. charter on 26<sup>th</sup> June 1945 was a major progress in ending human rights abuses around the globe. The U.N. has chalked some successes since its establishment especially in promoting human rights. But this has been accompanied by major challenges such as lack of political will by some member states, limited resources, limited enforcement power and many more. These have been limiting the organization's work to saving the world from the agony of terrorism. Nonetheless, there is more room for improvement. It is the best avenue to combat international terrorism because the UN commands great international legitimacy. It is recognized by states and also serves as a source of international authority.

It is important that the fight against terrorism must always be carried out within the confines of international human rights standards and respect for democratic principles such as the rule of law. As the former Secretary-General to the U.N. Security Council put it, "we should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that in the long term we shall find that human rights,

along with democracy and social justice, are one of the best prophylactics against terrorism. While we certainly need vigilance to prevent acts of terrorism, and firmness in condemning and punishing them, it will be self defeating if we sacrifice other key priorities such as human rights in the process.<sup>54</sup>

Notwithstanding the brutality and the gruesome murder unleashed by acts of terrorism, we should not sacrifice the rule of law in dealing with this menace. In all criminal proceedings suspects must be accorded their due human rights such as the right to be tried before a competent court of jurisdiction, the right to be presumed innocent until proven guilty, the right to be informed of charges, the right to be tried within a reasonable period of time, equality before the court, the right to public hearing, and the right to humane treatment and humane conditions of detention. I believe this is very important to ensure that individuals are not arbitrarily deprived of their basic human rights.

It is an undeniable fact that terrorists must not go scot free. They must face the full rigors of the law within the rule of law which is the foundation of every democratic state.

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<sup>54</sup> Statement of the Secretary-General to the U.N. Security Council. [www.un.org](http://www.un.org)

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