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International Terrorism and Human Rights

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Abstract
Following the attacks of September 11, 2001, a line was crossed in the history of terrorism and political violence—many things we had until then taken for granted were lost. This paper analyzes the relationship between international terrorism and human rights and examines how these two concepts—which some suggest are antithetical—might appropriately be spoken of in the same breath even in the aftermath of those terrible attacks. The overarching thesis is that counter-terror efforts must be approached in a way that endeavours to achieve a positive relation to, and co-existence with, the system of human rights at both international and national levels. In this connection, Singapore's approach to counter-terrorism will be considered, providing food for thought on how far it achieves a balance between security and liberty.

On September 11, 2001, a line was crossed in the history of terrorism and political violence. The agents of an organization known as al-Qa'ida launched an attack on the US. Four American commercial flights were hijacked. Two of them were ploughed into the North and South towers of the World Trade Centre in New York City, a third was crashed into the Pentagon, and the fourth—through the heroics of the passengers on board—missed its target of the US Capitol in Washington DC. Thousands of lives were lost. Billions of dollars' worth of property was destroyed. The terrorists had struck at the very heart of America and identified that country and its people as their ideological nemesis and the epitome of all they were opposed to. Because that line was crossed, many things we had until then taken for granted, were lost; perhaps forever.

Shortly thereafter, President George W. Bush declared to the White House, the Pentagon, and the National Security Council that the "first wave of the war against terrorism … starts today". On 20 September 2011, President Bush addressed the American people, declaring that "[o]ur war on terror begins with al-Qaeda, but it

* Chief Justice, Supreme Court of Singapore. This paper is adapted from the Harish Chandra Memorial International Lecture that I delivered in New Delhi on 18 April 2013. The views and ideas contained here are personal. They are informed by my career in the law, which included a stint as the Attorney-General. I am deeply grateful to my colleague, Mr Justin Yeo, Assistant Registrar of the Supreme Court, for his considerable assistance in the research and preparation of this paper and for his very valuable contributions to the ideas contained here.

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does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated".[1]

The prevailing American sentiment at that time may well be summed up by a memorable quote from General Norman Schwarzkopf. When asked if there was room for forgiveness towards the people who abetted the September 11 attacks (9/11), the General reportedly said: "I believe that forgiving them is God's function. Our job is simply to arrange the meeting."[2]

The events of 9/11 have sparked off an important debate on how the world in general, and democracies in particular, should address security concerns in a new age of terror. Since 9/11, the world has witnessed the incidence of terrorist attacks or bombings in Bali in 2002, Madrid in 2004, London in 2005, Mumbai in 2008 and, at the time of writing this paper, apparently in Boston and in Bangalore. There have also been numerous foiled terrorist attempts. Singapore had its own close encounter in late 2001 when the Internal Security Department (ISD) uncovered the Jemaah Islamiyah (JI) terrorist group's plan to bomb several diplomatic establishments in Singapore.[3] In fact, since 9/11, there have been at least fifty known terror plots foiled in the US alone.[4]

Although some suggest that the threats posed by al-Qa'ida and related groups are now less severe than at the time of the 9/11 attacks, these threats have in some respects become more complex and amorphous: more citizens of democratic nations have been involved in planning and carrying out terrorist attacks,[5] and Internet sources have facilitated rapid radicalization in the privacy of homes and using mobile devices.[6]

International terrorism is a major challenge for the international community. But an even greater challenge is the controversial issue of how voice can be given to human rights in the face of responses to international terrorism. The title of this paper alludes precisely to these two distinct concepts, viz. international terrorism on the one hand and human rights on the other. Both are extremely important and contested concepts. While they certainly cannot be exhaustively discussed within the modest confines of this paper, the paper's aim is to explore the relationship between them—which some suggest are antithetical—and to examine how they might appropriately be spoken of in the same breath.

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1. See "George W Bush: Declaration of War on Terrorism", online: 〈http://www.britannica.com/presidents/article-9398253〉. See also "Transcript of President Bush's Address to a Joint Session of Congress on Thursday night, September 20, 2001" *CNN* (21 September 2001), online: CNN 〈http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/〉.
2. Walter W. MOORE Jr., *Wise Sayings: For Your Thoughtful Consideration* (Bloomington, IN: AuthorHouse, 2011) at 23. Also cited in John CARLSON, "Winning Souls and Minds: The Military's Religion Problem and the Global War on Terror" (2008) 7 Journal of Military Ethics 85.
3. White Paper, "The Jemaah Islamiyah Arrests and the Threat of Terrorism", online: 〈http://www.mha.gov.sg/get_blob.aspx?file_id=252_complete.pdf〉 [*White Paper on JI Arrests*].
4. James Jay CARAFANO et al., "Fifty Terror Plots Foiled Since 9/11: The Homegrown Threat and the Long War on Terrorism" *The Heritage Foundation* (25 April 2012), online: 〈http://www.heritage.org/research/reports/2012/04/fifty-terror-plots-foiled-since-9-11-the-homegrown-threat-and-the-long-war-on-terrorism〉.
5. William BANKS, "The United States a Decade After 9/11" in Benjamin J. GOOLD and Liora LAZARUS, eds., *Security and Human Rights* (Oxford: Hart Publishing, 2007), 449 at 449.
6. Maryam MOKHTAR, "Religious Rehab Group's Work Praised" *The Straits Times* (26 June 2013).

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This paper first discusses the notoriously contested definition of terrorism and the concept of international terrorism, followed by an analysis of the paradigmatic shifts in international responses to terrorism.

Attention is then shifted to the concept of human rights. The international discussion of the universality of human rights, and their particular manifestations in different societies, has heightened since the 9/11 attacks. It will be argued, first, that while there may be international consensus on human rights at a certain level of abstraction, there will be a need to recognize that the implementation of human rights must be done with due regard to the domestic ecosystem; and second, that in some circumstances, rights of equal ordinal priority will compete.

Against this backdrop, the discussion turns to how counter-terrorism efforts must be approached in a way that endeavours to achieve a positive relation to, and co-existence with, the system of human rights at both international and national levels. It will be argued that there is a fundamental contradiction in counter-terrorism approaches that simply call for "liberty" to be sacrificed at the altar of security. A "balance" of some form must be sought between the two, but this balance must be carefully structured lest it introduce, in disguised form, a crude utilitarian balancing exercise that relegates human rights to what Jeremy Bentham famously described, albeit in a different context, as "nonsense upon stilts". An assessment of how the various counter-terrorism paradigms give effect to such a balance, if at all, will follow. Finally, Singapore's approach to counter-terrorism, including the use of the Internal Security Act (ISA), will be considered. This can provide some food for thought as an approach that seeks to achieve a nuanced and calibrated balance between security and liberty, countering international terrorism on a human rights grounding.

I. INTERNATIONAL TERRORISM

A. *The Definition of Terrorism*

The term "terrorism" has been used liberally, especially since the 9/11 attacks, but most people only have a vague impression of what it entails.[7] Possibly encouraged by the modern media's endeavour to communicate complex and convoluted messages as quickly as possible, virtually any especially abhorrent act of violence perceived as being directed against society has been labelled as a "terrorist act".[8]

There is widespread concurrence that the absence of a definition of terrorism is a problem. The Director of the International Policy Institute for Counter-Terrorism, Boaz Ganor, has emphasized that a definition of terrorism is indispensable to any serious attempt to combat terrorism.[9] Similarly, former Lebanese President Emile

7. Bruce HOFFMAN, *Inside Terrorism* (New York: Columbia University Press, 2006) at 1.

8. *Ibid*.

9. Boaz GANOR, "Terrorism: No Prohibition Without Definition" *The Institute for Counter-Terrorism* (7 October 2001), online: ICT 〈http://212.150.54.123/articles/articledet.cfm?articleid=393〉, cited in Alex SCHMID, "Terrorism—The Definitional Problem" (2004) 36 Case Journal of International Law 375 at 375.

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Lahoud has noted: "It is not enough to declare war on what one deems terrorism without giving a precise and exact definition."[10]

To be sure, this is not a universally held view. In a post-9/11 speech, Sir Jeremy Greenstock, British Ambassador to the United Nations, memorably noted that: "Increasingly, questions are being raised about the problem of the definition of a terrorist. Let us be wise and focused about this: terrorism is terrorism … What looks, smells and kills like terrorism is terrorism."[11]

With all respect to the learned ambassador, the endeavour to define terrorism continues, as it ought to. Unfortunately, despite the best efforts of some of the brightest and the best in the international community,[12] the word "terrorism" still remains plagued by indeterminacy, subjectivity, and political disagreement.[13] International debates on this issue have been inconclusive.[14] One working definition that has emerged is that an action constitutes terrorism: "… if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing any act."[15]

As against this, some have argued that even the most brutal of attacks might not constitute terrorism if they are carried out for the purposes of national liberation and self-determination.[16] In the face of these difficulties, the 2005 World Summit Outcome avoided a definition of terrorism, merely condemning "terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security".[17]

In September 2006, the General Assembly approved a resolution entitled "UN Global Counter-terrorism Strategy". The preamble of this resolution reaffirmed that:

> [A]cts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy,

10. "Beirut wants 'Terrorism' Defined", *Aljazeera* (13 January 2004), cited in Schmid, *supra* note 9 at 375.

11. Schmid, *supra* note 9 at 375.

12. Katja L.H. SAMUEL and Nigel D. WHITE, "Introduction" in Katja L.H. SAMUEL and Nigel D WHITE, eds., *Counter-Terrorism and International Law* (Farnham: Ashgate Publishing Limited, 2012), xi at xii.

13. Ben SAUL, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006) at 1.

14. It has been observed that the draft Comprehensive Convention on International Terrorism has been laboured over since 1996, stymied by the inability to agree on a definition of terrorism: see Stephen MARKS, "Branding the 'War on Terrorism': Is there a 'New Paradigm' of International Law?" (2006) 14 Michigan State Journal of International Law 71 at 77, citing the Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996. Ninth session (28 March–1 April 2005), UN doc. A/60/37, Annex I, paras. 16–23.

15. Kofi ANNAN, *In Larger Freedom: Towards Development, Freedom and Human Rights for All* at para. 91, cited in Marks, *supra* note 14 at 79.

16. Marks, *supra* note 14 at 79.

17. General Assembly Resolution 60/1 (24 October 2005), *2005 World Summit Outcome*, at para. 81. See also Adam ROBERTS, "Countering Terrorism: A Historical Perspective" in Samuel and White, *supra* note 12, 3 at 8. It should also be noted that in Security Council Resolution 1566 (2004), a partial definition of terrorism was pushed forward, i.e. "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act".

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> threatening territorial integrity, security of States and destabilizing legitimately constituted Governments, and that the international community should take the necessary steps to enhance cooperation to prevent and combat terrorism.[18]

Although the September 2006 General Assembly promised to support a future legal definition of terrorism,[19] such a definition has not been arrived at. The latest resolution on 14 January 2013 reaffirmed the 8 September 2006 strategy, without providing any definition of terrorism.[20]

This definitional problem is also prevalent at the national level. Even within the US, practically every government agency with a counter-terrorism mission uses a different definition of terrorism.[21] In the academic realm, despite countless articles as well as entire chapters and monographs having been written about this notoriously difficult topic, no one is able to claim to have successfully, comprehensively, and authoritatively defined terrorism.[22]

In view of the repeated failures at arriving at a consensus on a conclusive definition of terrorism, some have thrown their arms up in despair, sceptical that an agreed definition will ever be reached. As one commentator noted, in an article in the *International Herald Tribune*, very aptly titled "'Terrorism': The Word Itself is Dangerous": "Perhaps the only honest and globally workable definition of terrorism is an explicitly subjective one—violence I don't support."[23]

To say that it is difficult to come to a consensus on the definition of terrorism is thus an understatement. After all, terrorism is such a diverse phenomenon that, in an attempt to come to a conclusive definition that commands consensus, the term either "disappears under a host of precise definitions or … is covered by too broad an umbrella".[24]

Indeed, the fact that terrorism is difficult to define should come as no surprise.

First, terrorism is a heavily contested concept, over which political, legal, social, and popular notions wildly diverge.[25] One need go no further than repeat the adage, "one man's terrorist is the other man's freedom fighter", to illustrate this point.[26]

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18. United Nations, "United Nations Action to Counter Terrorism", online, UN: 〈http://www.un.org/en/terrorism/strategy-counter-terrorism.shtml〉.
19. See *ibid*., the resolution states: "*Reaffirming further* Member States' determination to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism, including by resolving the outstanding issues related to the legal definition and scope of the acts covered by the convention, so that it can serve as an effective instrument to counter terrorism" (emphasis in original).
20. *Measures to Eliminate International Terrorism*, UN Doc. A/RES/67/99 (2012), online: 〈http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/67/99〉.
21. This was an observation made by the Subcommittee on Terrorism of the United States House of Representatives Permanent Select Committee on Intelligence. See Schmid, *supra* note 9 at 377, citing several news articles.
22. See, for instance, Saul, *supra* note 13. There are also many authors who have dedicated chapters to the issue of defining terrorism alone: see, for instance, Hoffman, *supra* note 7, Chapter 1. Articles written regarding the problems of defining terrorism include: Schmid, *supra* note 9, and Roberts, *supra* note 17.
23. John V. WHITBECK, "'Terrorism': The Word Itself is Dangerous" *International Herald Tribune* (18 February 2004), cited in Schmid, *supra* note 9 at 397.
24. Schmid, *supra* note 9 at 402.
25. *Ibid*., at 395.
26. *Ibid*., at 397.

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Terrorists use "terror"—whatever that means—while freedom fighters fight for "freedom"—whatever that means.[27] But what, then, is a person who uses terror in fighting his cause for freedom called? A theory of justified political violence will be necessary to distinguish between terrorists and freedom fighters.[28] But since the international community is unlikely to agree on such a theory, a conclusive definition of terrorism will probably remain elusive. The very process of definition is itself reflective of massive contestation in a myriad of perspectives.[29]

Second, and closely related to the point just made, the term "terrorism" implies a moral judgement. It is an indicator of the speaker's moral point of view.[30] To convince another to attach the "terrorist" label to one's opponent is to convince that other to adopt one's moral viewpoint.[31] It suggests that one's opponent is fanatical, irrational, and acting illegitimately, simultaneously elevating oneself to a moral zenith while relegating one's opponent to a moral nadir. As such, the term "terrorism" is sometimes expressly invoked for political reasons, for instance, to discredit another's cause.

Third, there are many types of terrorism, and the term has in fact undergone significant changes in meaning and connotation over more than two centuries.[32] A brief historical review of terrorism has continued relevance in seeking to define the concept of terrorism.[33] As this paper turns to briefly review the historical development of terrorism, the scholarly work of Professor Bruce Hoffman is gratefully acknowledged.

The term "terrorism" initially described an instrument of governance. From Professor Hoffman's seminal work *Inside Terrorism*, it appears that the word "terrorism" was first popularized during the French Revolution.[34] The system of *regime de la terreur* of 1793–94 was adopted as a means to establish order following the uprisings of 1789,[35] allowing the revolutionary state to consolidate its power and intimidate counter-revolutionaries.[36] Somewhat ironically, terrorism was at this time thought to be necessary to establish democracy. The French revolutionary leader

27. Michael FREEMAN, "Order, Rights and Threats: Terrorism and Global Justice" in Richard Ashby WILSON, ed., *Human Rights in the "War on Terror"* (Cambridge: Cambridge University Press, 2005), 37 at 45.
28. *Ibid*., at 45.
29. As argued by Philip Schlesinger, a British Sociologist, "… no commonly agreed definition can in principle be reached, because the very process of definition is in itself part of a wider contestation over ideologies or political objectives", cited in Schmid, *supra* note 9 at 396.
30. Daniel MOECKLI, *Human Rights and Non-discrimination in the "War on Terror"* (Oxford: Oxford University Press, 2008) at 24. See also Roberts, *supra* note 17 at 12, where the author notes that "the favoured form of argument is phrased in terms of morality—and a relatively simple morality at that, in which the adversary's actions are seen as such a serious threat as to create an overwhelming necessity for the use of counter-violence".
31. Hoffman, *supra* note 7 at 23.
32. Schmid, *supra* note 9 at 395.
33. Indeed, it has been noted that "the tendency to approach terrorism without the benefit of history has, itself, a long history", and that the international response to terrorism "needs to take account of the long history of terror and counter terror"; see Roberts, *supra* note 17 at 12 and 41.
34. Hoffman, *supra* note 7 at 3.
35. *Ibid.*
36. *Ibid.*

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Maximilien Robespierre believed that during the time of revolution, virtue must be allied with terror in order for democracy to triumph.[37]

The term thereafter evolved to connote an abuse of power. Robespierre was subsequently executed and the term "terrorism" became associated with the abuse of power.[38] Indeed, within a year of Robespierre's execution, Edmund Burke memorably described Robespierre and his followers as "Hell hounds called Terrorists".[39]

The wide-ranging changes wrought by the Industrial Revolution, coupled with the birth of universalist ideologies such as Communism and Marxism, resulted in terrorism coming to be associated with revolutionary anti-state measures.[40] Italian republican extremist Carlo Pisacane famously emphasized the didactic purpose of violence, arguing that violence was necessary not only to generate publicity for a cause, but also to inform, educate, and ultimately rally the masses behind the revolution.[41] In the same brand of violent revolutionary movements, in 1914, a group of disaffected Bosnian Serb intellectuals, university students, and schoolchildren (collectively known as *Mlada Bosna,* or "Young Bosnians") rose against the Hapsburg Empire, eventually resulting in the assassination of the Austrian Archduke Franz Ferdinand in Sarajevo, triggering World War I.[42]

In another swing of the pendulum, by the 1930s, terrorism returned to its former connotations of abuse of power by the government and came to be associated with practices of mass repression employed by totalitarian states against their own citizens (e.g. Fascist Italy, Nazi Germany, and Stalinist Russia).[43]

However, following World War II, terrorism regained its revolutionary anti-state connotations.[44] The term came to refer to violent revolts by various indigenous nationalist and anti-colonialist groups in Asia, Africa, and the Middle East in opposition to continued European rule.[45] The epithet "freedom fighters" was introduced to lend legitimacy to struggles for national liberation and self-determination.[46] Indeed, these struggles were expressly characterized by some, such as Yasser Arafat (chairman of the Palestine Liberation Organization), not as terrorism, but as justified "wars of liberation".[47]

The advent of contemporary international terrorism probably occurred on 22 July 1968. Palestinian terrorists hijacked an Israeli commercial flight and offered to trade

37. See "The Modern History Sourcebook: Maximilien Robespierre: On the Principles of Political Morality, February 1794", online: 〈http://www.fordham.edu/halsall/mod/1794robespierre.asp〉; and see Hoffman, *supra* note 7 at 3.

38. Hoffman, *supra* note 7 at 4.

39. *Ibid.*

40. *Ibid.*, at 5.

41. *Ibid.*

42. *Ibid.*, at 12.

43. *Ibid.*, at 14.

44. *Ibid.*, at 16.

45. *Ibid.*

46. *Ibid.*

47. This was perhaps most famously explained by Palestine Liberation Organization chairman Yasser Arafat, when he addressed the United Nations General Assembly in November 1974: "The difference between the revolutionary and the terrorist lies in the reason for which each fights. For whoever stands by a just cause and fights for the freedom and liberation of his land from the invaders, the settlers and the colonialists, cannot possibly be called terrorist"; cited in Hoffman, *supra* note 7 at 16.

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the passengers (who were being held hostage) for Palestinian terrorists imprisoned in Israel.[48] Four years later, Palestinian terrorists murdered eleven Israeli athletes at the 1972 Munich Olympic Games.[49] By the 1990s, the term "terrorism" was associated with religious extremists who used terror tactics to make their voices heard.[50] The 9/11 attacks were the most prominent of the terrorist actions by religious extremists, resulting in nearly 3,000 deaths.[51] To put that death toll in perspective, until 9/11 no terrorist operation had ever killed more than 500 people.[52] The contemporary terrorist threat often involves a combination of elements such as elaborate planning in places far removed from the targeted location, suicide missions, and the mass destruction of buildings and human life.[53]

It will thus be evident that terrorism is not only extremely difficult to define, but also that the very concept encapsulated by this term has been in flux for more than two centuries. Nonetheless, even without a comprehensive or universally accepted definition, meaningful points can be raised as long as it is clear that we are concerned with terrorism in its contemporary revolutionary anti-state form.

The essential concern of this paper is the issue of how international terrorism relates to human rights. In this regard, international terrorism generally refers to attacks carried out across international frontiers or against foreign targets in a terrorist's state of origin.[54] It may even be targeted against the actual or perceived policies of a foreign state. This is to be contrasted with internal or domestic terrorism, which is generally confined within a single state or region.[55]

B. *Paradigmatic Shifts in International Responses to Terrorism*

At the risk of some over-simplification, responses to international terrorism can be classified into three main paradigms. These shall be referred to, respectively, as the "traditional legal measures" paradigm, the "executive measures" paradigm, and the "war" or "armed conflict" paradigm.[56]

1. *The traditional legal measures paradigm*

The initial responses to contemporary international terrorism were characterized not by the use of military force, but rather by the application of criminal, humanitarian, and human rights law.[57]

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48. Hoffman, *supra* note 7 at 63.
49. *Ibid*., at 66.
50. Schmid, *supra* note 9 at 399.
51. Hoffman, *supra* note 7 at 18.
52. *Ibid*., at 19.
53. Roberts, *supra* note 17 at 13.
54. Moeckli, *supra* note 30 at 12.
55. *Ibid*.
56. There are other possible government responses to terrorism, for instance, a "political response" which views terrorism "as a form of armed rebellion to be resolved through negotiation and the political process". However, the "political" response is not covered in detail as it has rarely been used. See Helen FENWICK and Gavin PHILLIPSON, "UK Counter-Terror Law Post-9/11: Initial Acceptance of Extraordinary Measures and the Partial Return to Human Rights Norms" in Victor RAMRAJ *et al*., eds., *Global Anti-Terrorism Law and Policy*, 2nd ed. (New York: Cambridge University Press), 481 at 481.
57. Marks, *supra* note 14 at 80.

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There are many examples of such an approach, of which two will be highlighted. The first example is America's response to the 1988 Pan Am incident. On 21 December 1988, Pan Am 103 exploded over Lockerbie, Scotland, killing 270 people.[58] The US government decided to employ criminal prosecution to deal with these terrorists, and the accused perpetrators were eventually brought to trial.[59]

The second example is India's response to the 2008 Mumbai attacks. On 26 November 2008, a group of ten terrorists attacked Mumbai's railway station, a café, a Jewish outreach centre, and two hotels, killing a total of 166 persons and injuring 238 more.[60] Ajmal Kasab, the only attacker captured alive by police, was charged for committing multiple crimes, including, amongst other things, the conspiracy to wage war on India, murder, and causing explosions. The Special Sessions Court sentenced him to death on five counts, and an equal number of life imprisonment terms.[61] This decision was subsequently affirmed by the High Court of Bombay and, on 29 August 2012, the Supreme Court of India.[62] Kasab was hanged in prison on 21 November 2012.[63]

2. *The executive measures paradigm*

Following recent developments in international terrorism, in the last decade European countries—as guided by the European Union's Framework Decision—have adopted a counter-terrorism response that purports to treat terrorism akin to organized crime; the legislative frameworks enacted are aimed at defining offences, establishing jurisdiction, and determining penalties.[64]

At first blush, this approach may appear to be indistinguishable from the traditional legal measures paradigm; indeed, some commentators have said as much.[65] However, on closer examination, the European legislative amendments have introduced measures that are somewhat different from those available under the traditional legal measures paradigm.[66] These new measures involve, amongst other things, the creation of pre-emptive systems running parallel to the existing criminal justice framework. Examples of possible measures include executive detention, pre-emptive "control orders", and other measures that do not require proof of

58. Michael SCHARF and Amy MILLER, "Foreword: Terrorism on Trial" (2004) 36 Case Journal of International Law 287 at 287.

59. *Ibid*., at 288.

60. *Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid v. State of Maharashtra* Criminal Appeal No 1899–1900 of 2011, Supreme Court of India, online: 〈http://supremecourtofindia.nic.in/outtoday/39511.pdf〉 at 7 [*Amir Kasab v. State of Maharashtra*].

61. *Ibid*., at 1.

62. *Ibid*.

63. "Profile: Mohammad Ajmal Amir Qasab" *BBC News* (21 November 2012), online: BBC 〈http://www.bbc.co.uk/news/world-south-asia-12369352〉.

64. See the EU Council Framework Decision of 13 June 2002 on combating terrorism, online: 〈http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002F0475&model=guichett〉. See also Marks, *supra* note 14 at 86.

65. Marks, *supra* note 14 at 86, where the author notes that the EU response to 9/11 "remains resolutely within the 'traditional paradigm'".

66. Fenwick and Phillipson, *supra* note 56 at 481.

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criminal activity and hence operate outside ordinary criminal courts.[67] This executive measures paradigm[68] entails a modification of the traditional legal measures paradigm, with enhanced executive powers in recognition of the need for swifter and more efficient "preventive justice".[69]

3. *The war or armed conflict paradigm*

The American counter-terrorism response presents the largest and most significant departure from the traditional legal measures paradigm. As mentioned at the outset of this paper, post-9/11, the Bush Administration adopted a "war" paradigm in its counter-terrorism response. Rather than seeking to bring terrorists to justice through criminal trials, the Bush Administration resolved to "bring justice to the terrorists" by hunting them down or detaining them indefinitely as enemy combatants or prosecuting them in military commissions.[70]

President Bush's chosen slogan, "war on terror", was initially thought, at least by the international community, to be a rhetorical device.[71] Many thought the proclaimed "war on terror" was more akin to the "war on drugs" or the "war on poverty", than the kind of war declared by President Roosevelt after the attack on Pearl Harbour.[72] However, Professor Sir Michael Howard, a leading authority on strategy and military history, has observed that President Bush's slogan was intended to be taken literally.[73] Indeed, the Bush administration claimed that the global war on terror empowered the US to declare suspected terrorists "enemy combatants", to target and kill them wherever they might be, including by bombing campaigns, and to search ships and seize cargoes suspected of carrying weapons or material for terrorists.[74]

In 2005, the US Secretary of Defence Donald Rumsfeld proposed possible alternative expressions such as the "global struggle against violent extremism" (acronymized as "GSAVE")[75] or the "global struggle against the enemies of freedom, the enemies of civilization".[76] The Bush Administration decided to retain the term "war on terror".

Much debate has been had and ink been spilled on whether President Bush could or should have declared a war on terror in the literal sense. As a matter of international law, it is unclear whether a war, in the sense of an armed conflict, can be

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67. After widespread domestic and international criticism, and after the House of Lords in *A and Others v. Secretary of State for the Home Department* [2005] 3 All ER 169 declared the legislative provisions incompatible with the right to liberty guaranteed by the European Convention of Human Rights, the UK government abandoned the executive detention scheme and introduced the "Control Orders" under the Prevention of Terrorism Act 2005; see Fenwick and Phillipson, *supra* note 56 at 485.
68. Fenwick and Phillipson, *supra* note 56 at 482, citing Clive WALKER, "The Treatment of Foreign Terrorist Suspects" (2007) 70 Modern Law Review 427 at 430.
69. Fenwick and Phillipson, *supra* note 56 at 482.
70. Scharf and Miller, *supra* note 58 at 289.
71. Hoffman, *supra* note 7 at 19.
72. Schmid, *supra* note 9 at 376; and see Mary Ellen O'CONNELL, "The Legal Case Against the Global War on Terror" (2005) 36 Case Journal of International Law 349 at 349.
73. Hoffman, *supra* note 7 at 19.
74. O'Connell, *supra* note 72 at 351.
75. See, for instance, "Call it GWOT or GSAVE, it is still rather SIIC" *LA Times-Washington Post* (9 August 2007), online: 〈http://www.indianexpress.com/news/call-it-gwot-or-gsave-it-is-still-rather-siic/209662/0〉.
76. Marks, *supra* note 14 at 113.

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declared on terrorism.[77] Indeed, war is conducted against states, but not usually against a non-state actor.[78] Therefore, it may not be possible for one to be at war with a concept such as terrorism or even with an amorphous clutch of terrorist groups.[79] There is, of course, further controversy with the war paradigm, which will be discussed at Part III(C) below. It suffices for now to note that the war paradigm is perhaps the most extreme counter-terrorism paradigm of the three discussed in this paper.

C. *Summary on International Terrorism*

In the wake of a new wave of terrorism on an unprecedented international scale (which some have labelled "super terrorism" or "mega terrorism"), the international community will need to continue its search for the best response to such threats.

The international community has come some way in developing a corpus of counter-terrorism law and policy by elaborating fourteen major international instruments to prevent terrorist acts. Nonetheless, going forward, there remains a continuing need to debate and develop this corpus of counter-terrorism law and policy. In some respects, akin to international human rights law, trade law, space law, or environmental law, it would be fair to say that counter-terrorism law is already emerging as a distinct, albeit not yet a well-established, category of international law. This corpus of counter-terrorism wisdom must, for reasons that will become apparent later in this paper, have a positive relation to, and co-exist with, the system of human rights at both international and national levels.

It is plainly vital that this conversation must continue, because international law has to evolve in tandem with the manner in and degree to which international terrorism changes and develops and continues to present a threat to global peace, order, and security.

II. HUMAN RIGHTS

We turn now to the concept of human rights. The events of 9/11, and the subsequent American declaration of war on terror, have led some to predict the end of an "era of human rights". Michael Ignatieff, author of the well-known book *The Lesser Evil: Political Ethics in an Age of Terror* (2004), said in a 2002 *New York Times* article that: "Since the end of the cold war, human rights has [*sic*] become the dominant vocabulary in foreign affairs. The question after September 11 is whether the era of human rights has come and gone."[80]

Not everyone shares the same pessimistic views on the fate of human rights post-9/11. This author certainly does not think that events post-9/11 have condemned the international human rights project to failure. To develop on this, it is necessary first

77. At an international level, treaties relevant to war, such as the Geneva Conventions of 1949, have substituted the term "armed conflict" for "war"; O'Connell, *supra* note 72 at 353.

78. Marks, *supra* note 14 at 87.

79. Marks, *supra* note 14 at 87, citing Jordan PAUST, "Addendum: War and Responses to Terrorism" ASIL Insights.

80. Michael IGNATIEFF, "Is the Human Rights Era Ending?" *The New York Times* (5 February 2002), online: 〈http://www.nytimes.com/2002/02/05/opinion/is-the-human-rights-era-ending.html〉.

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to discuss the universality of human rights, and their particular manifestations in different societies. This will ultimately inform our counter-terrorism responses.

A. *The Difficulty of Universalizing Human Rights*

The starting point is the notion of the universality of human rights. In 1776, the US Declaration of Independence drafted by Thomas Jefferson proclaimed: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty and the pursuit of Happiness."

The self-evident nature of "certain unalienable Rights" was, at that time, held at the very least by the Americans. Slightly more than a decade later, the French National Declaration of the Rights of Man and of the Citizen proclaimed several "imprescriptible rights of man".[81] It may be noted that these universal and inalienable or imprescriptible rights were thought at that time to be compatible with slavery and colonialism.

Less than two centuries later, the peoples of the United Nations reaffirmed, in the Charter of the United Nations, their "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".[82]

They also agreed that the principles articulated in the Universal Declaration of Human Rights represent a "common standard of achievement for all peoples and all nations".[83] It should also be noted that the Human Rights Council, established in the 2005 UN reform process, has introduced the Universal Periodic Review (viz. a periodic review of the human rights records of all 193 UN Member States).[84] These are important steps in the direction of moving the international order towards a universal human rights framework.

Be that as it may, it will be easier to agree at an international level on the idea of human rights, in large part because the mere fact of agreement says very little about how the rights should be implemented at a more quotidian level, in the nitty-gritty of government policy and the administrative state. Indeed, the American legal scholar Cass Sunstein has described such arrangements as "incompletely theorized agreements". These agreements are not fully specified or worked through. They may therefore co-exist with deep disagreement on particular issues, even between those who are in strong and emphatic agreement on general principles.[85] As Sunstein has observed:[86]

> Incompletely specified agreements have distinctive social uses. They may permit acceptance of a general aspiration when people are unclear about what the aspiration

81. "Declaration of the Rights of Man and the Citizen" (August 1789), online: 〈http://www.historyguide.org/intellect/declaration.html〉.

82. UN Charter, Preamble, online: 〈http://www.un.org/en/documents/charter/preamble.shtml〉.

83. Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Preamble.

84. United Nations Office of the High Commissioner for Human Rights, "Basic Facts about the Universal Periodic Review", online: OHCHR 〈http://www.ohchr.org/EN/HRBodies/UPR/PAGES/BasicFacts.aspx〉.

85. Sundaresh MENON, "Euthanasia: A Matter of Life or Death?" Singapore Medical Association Annual Lecture 2013, 9 March 2013, (2013) 54 Singapore Medical Journal 116 at para. 20.

86. Cass SUNSTEIN, "Incompletely Theorized Agreements" 108 Harvard Law Review 1733 at 1739–40.

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means, and in this sense they can maintain a measure of both stability and flexibility over time. At the same time, they can conceal the fact of large-scale social disagreement about particular cases.

This is not just a matter of abstract theory. It is reflective of the simple fact that while people may agree on broad propositions at a certain level of abstraction, such agreement may give way to deep divisions in the concretization of the abstraction.[87]

The difficulty in trying to concretize abstract human rights should come as no surprise, for two reasons. First, human rights tend to be agreed upon (and subsequently drafted) in a broad manner that leaves much to discretion in interpretation and implementation.[88] In international human rights law, the widespread agreement that certain rights are fundamental exists alongside disagreements about their proper definition.[89] Disagreements may arise due to the varying differences in history, politics, religions, languages, and socio-legal cultures across countries and societies. Exceptions are carved out and modifications permitted.

Second, there are typically no "meta-principle[s] to guide rational choice", no substantive and practical guidelines in resolving particular conflicts between competing rights.[90] And even if there is some attempt to enunciate such "meta-principles", an example being the concept of human dignity in the German Basic Law, the open texture of the "meta-principles" inevitably remains.[91] This is an inherent limitation of human conceptual frameworks, language, and foresight.

The difficulties just mentioned are exacerbated by the increased complexity and the unprecedented institutionalization and legalization of international human rights protection. Just as a brief sampling, there are now nine core UN human rights treaties, and some of these have optional protocols that provide for individual communications procedures. Each of these treaties has an expert committee, which we know collectively as the UN human rights treaty bodies. There are ten human rights treaty bodies altogether and, since 2000, the UN human rights treaty body system has doubled in size.[92] Every year, the treaty bodies issue dozens of sets of concluding observations, for every State Party they review. To this should be added the three regional systems of human rights protection (viz. the Organization of American States, the Council of Europe, and the African Union)[93] as well as the two regional human rights bodies (viz. the League of Arab States and the ASEAN Intergovernmental Commission on Human Rights).[94]

87. Menon, *supra* note 85 at para. 20.
88. Andrew ASHWORTH, "Security, Terrorism and the Value of Human Rights" in Goold and Lazarus, *supra* note 5, 203 at 204.
89. Ashworth, *supra* note 88 at 205.
90. *Ibid*.
91. *Ibid*.
92. Navinathem PILLAY, "Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights" (June 2012), online: 〈http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf〉 at 17.
93. International Justice Resource Center, "Regional Systems", online: IJR Center 〈http://www.ijrcenter.org/ihr-reading-room/regional/〉.
94. *Ibid*.

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While it may seem obvious to some, it should be emphasized that rights are legal constructs.[95] They do not exist metaphysically, but are instead complicated molecular structures[96] contained within systems of law that prescribe rules[97] on the creation, application, and enforcement of these structures. The reality of a right cannot be separated from its realization.[98] Thus, while we may argue that at a high level of abstraction human rights are universal, the expression of such rights as a matter of concrete application must be national.

One of the great recent thinkers of the common law, the retired English Judge Leonard Hoffmann, made the same point in relation to the US Bill of Rights, saying:

> The important lesson which one draws from the American experience … is that, at the level of abstraction, human rights may be universal … At the level of application, however, the messy detail of concrete problems, the human rights which these abstractions have generated are national. Their application requires trade-offs and compromises, exercises of judgment which can be made only in the context of a given society and its legal system.[99]

B. *Realizing Rights in Context*

Against this background, the importance of *realizing rights in context* should be emphasized. This idea has two basic dimensions.

The first dimension is that the implementation of human rights must be done with due regard to the domestic ecosystem. In this regard, "ecosystem" refers to the local sociopolitical culture and legal infrastructure. There are, of course, instances when attempting to give effect to international human rights will clearly require that changes be made to that ecosystem. However, there will be many other cases where we can validly say that certain solutions will make sense in some societies, but not in others. Ultimately, different jurisdictions will have to adopt methods of safeguarding human rights that are most likely to be effective in their jurisdictions. They have the leeway, and indeed, the responsibility, to use the policy space created by international treaties in the most effective way possible, taking into consideration their respective unique local socio-politico-legal ecosystems. This may, at first blush, appear similar to the EU concept of a margin of appreciation. However, it should be emphasized that the approach proposed here is broader—beyond considering cultural and political differences, the proposed approach also takes account of structural differences, among other things. Two examples, one general and the other more specific, will be useful to illustrate this:

(1) As a very general example, civil law jurisdictions may favour more legislation to give effect to international human rights at the domestic level, whereas

95. Menon, *supra* note 85 at para. 20.

96. Wesley HOHFELD, "Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays" (1913) 23 Yale Law Journal 16 at 28–59.

97. H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012) at 79–99.

98. As Jeremy Bentham wrote in "The Anarchical Fallacies"—"*Right*, the substantive *right*, is the child of law: from *real* laws come *real* rights": in *The Works of Jeremy Bentham,* Vol. 2 (Edinburgh: William Tait, 1843) at 523 (emphasis in original).

99. Leonard HOFFMAN, "The Universality of Human Rights", Judicial Studies Board Annual Lecture, 19 March 2009, online: 〈http://www.judiciary.gov.uk/media/speeches/2009/speech-lord-hoffman-19032009〉 at para. 15

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jurisdictions of common law heritage may adopt other non-legislative methods of doing the same. The fact that a common law jurisdiction does not have legislative protection of a particular human right does not necessarily mean that human right is not safeguarded.[100]

(2) A more specific example illustrates the point from the Singapore experience. Although this example is not directly relevant to this paper, it illustrates how different jurisdictions may adopt different methods of implementing international treaty obligations within the policy space accorded to them. The Singapore legal framework provides for the operation of Islamic religious courts within a secular legal infrastructure. In the perceived conflict between the right to freedom of religion (in this case, Islamic sharia) and the rights relating to family life in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Singapore government allowed certain autonomy to the Islamic religious authorities to formulate and develop the rules of sharia from the ground up. The Islamic religious authorities actively consulted with the local Muslim community, local women's groups, and Islamic law scholars from other countries, and, in 2011, the Singapore government partially withdrew its reservation against Articles 2 and 16 of CEDAW.

The second dimension is that we must understand that, in some circumstances, rights of equal ordinal priority will compete. A commitment to human rights means that governments must articulate their policy choices in terms of the shared vocabulary of international human rights, as opposed to simply asserting that some rights are unjustified or may be compromised. Equally, however, international human rights actors should avoid asserting prescriptions to national governments based on indivisibility, and seek instead to engage national governments in genuine dialogue about policy choices among competing rights in the shared vocabulary of international human rights. National governments should also be transparent and honest about the choices they make at the national level when dealing with policy problems involving competing rights.

An example of an international law approach which may promote this type of transparency is the "reservations dialogue" proposed by Professor Alain Pellet, in his capacity as the International Law Commission's Special Rapporteur on reservations to treaties.[101] There is something to be said for the overall approach to reservations to treaties that the Commission's Guide to Practice seeks to encourage, and in particular the greater process transparency which it seeks to achieve. The Commission has observed that "pragmatic dialogue" with the author of a reservation serves a useful

100. In this context, it is observed that there is a certain institutional bias within the UN system that appears to favour ever more legislation as the only appropriate means by which international human rights law can be implemented at the domestic level. We must, however, consider that there is a distinction to be made between *implementation* (e.g. adopting a new piece of legislation) and *compliance* (e.g. substantively complying with the underlying obligation).

101. Alain PELLET, "Seventeenth Report on Reservations to Treaties", Sixty-third Session of the International Law Commission, Geneva (26 April to 3 June 2011, 4 July to 12 August 2011), online: 〈http://untreaty.un.org/ilc/documentation/english/a_cn4_647.pdf〉 [*Seventeenth Report on Reservations to Treaties*].

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purpose, and that all actors involved in the so-called "reservations dialogue" should articulate their reasons.[102] As against this, the current practice of the UN human rights treaty bodies to include pro forma requests to States Parties to withdraw their reservations simply does not promote the same degree of transparency or engagement.

At the end of the day, if human rights are of international significance, which they must be, both the international community and the domestic polity should be clear about the weights being assigned to competing rights, and for that matter about whether policy-makers are calculating final outcomes based on a weighing-out of other interests, values, and preferences as well (which may not carry the juridical quality of a right). Giving effect to human rights in the sense of "realizing the rights" will require national governments to consider a host of factors, including the range of competing rights, social considerations, the institutional design of its justice system, and so forth. This call for contextualism and openness has an important bearing on how our counter-terrorism efforts should be designed, an issue to which this paper now turns.

III. COUNTERING INTERNATIONAL TERRORISM ON A HUMAN RIGHTS GROUNDING

In order to effectively and robustly uphold human rights (both of suspected terrorists as well as potential victims) in counter-terrorism responses, we need to develop an understanding of the particular dilemmas faced by governments when their societies are threatened by terrorism.[103] One of the reasons that international terrorism has raised so many controversial issues from the perspective of human rights is that the language and concepts in international law and human rights have not developed sufficiently to deal with the unique problems posed by international terrorism.

In an area wrought with controversy, it will be helpful to first analyze, briefly, the philosophical considerations that are brought into play with regard to countering international terrorism on a human rights grounding. Thereafter, this paper shall briefly revisit the three counter-terrorism paradigms and consider how Singapore's ISA can provide some food for thought as an approach that seeks to balance the right to security of a member of the public and the liberty interest of a suspected terrorist.

A. *Philosophical Foundations*

1. *The fundamental difficulty*

Since 9/11, it has been suggested that security and human rights (or liberty) are in "insuperable opposition".[104] Politicians have called for a "new balance" between the two, while many have called for a "retreat" from human rights.[105] In the largest demonstration of the tension between security and human rights, the US government

102. *Ibid.*, at 32.

103. Liora LAZARUS and Benjamin GOOLD, "Security and Human Rights: The Search for a Language of Reconciliation" in Goold and Lazarus, *supra* note 5 at 12.

104. *Ibid.*, at 1.

105. *Ibid.*

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declared a war on terror and detained terror suspects in Guantánamo Bay and Abu Ghraib prison, in the interest of preserving national security.[106]

This has spawned widespread concern regarding the manner in which counter-terrorism efforts appear to have disregarded human rights. Some have noted the "fundamental contradiction" (or even "hypocrisy") inherent in counter-terrorist efforts which perpetuate trampling on human rights.[107] As Professor Andrew Ashworth powerfully states:

> [I]f, *per contra*, states argue that the ends (preserving freedom and democratic institutions) justify the means (curtailing human rights), then their reasoning is no more acceptable than that of terrorists who maintain that the means (causing death, injury, fear, disruption) are justified by the ends that they are pursuing.[108]

Indeed, there is, encouragingly, increasing consensus that compromising human rights may ultimately prove counter-productive in the struggle against terrorism.[109] For instance, such counter-terrorism efforts may facilitate the achievement of the terrorist's objective by "ceding to him the moral high ground, provoking tension, hatred and mistrust of government".[110] A former interrogator described the impact of Guantánamo Bay as follows: "If you don't have a terrorist now, you will by the time he leaves."[111]

It follows that respecting human rights is an *essential* element in counter-terrorism responses.[112] Recognizing this, UN Secretary General Kofi Annan set out an alternative vision of the complementarity of human rights and counter-terrorism, stating:

> Our responses to terrorism, as well as our efforts to thwart it and prevent it, should uphold the human rights that terrorists aim to destroy. Respect for human rights, fundamental freedoms, and the rule of law are essential tools in the effort to combat terrorism—not privileges to be sacrificed at a time of tension.[113]

2. *The need for "balance"*

But is it the case, as some have argued, that all human rights are indivisible and of equal weight?[114] On this basis, any counter-terrorism response would have to ensure

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106. Richard Ashby WILSON, "Human Rights in the 'War on *Terror*'" in Richard Ashby WILSON, ed., *Human Rights in the "War on Terror"* (Cambridge: Cambridge University Press, 2005) at 14–15; see generally Aryeh NEIER, "How Not to Promote Democracy and Human Rights" in Richard Ashby WILSON, ed., *Human Rights in the "War on Terror"* (Cambridge: Cambridge University Press, 2005), 137. In Roberts, *supra* note 17 at 40, the author notes that "… the torture and ill-treatment of detainees, of which there has been much evidence in the war on terror, is, to quote Talleyrand, worse than a crime: it is a mistake. Guantanamo and Abu Ghraib have provided propaganda gifts to adversaries."

107. Ashworth, *supra* note 88 at 206.

108. *Ibid.*, at 207.

109. Kofi ANNAN, "A Global Strategy for Fighting Terrorism", Keynote address at the Closing Plenary of the International Summit on Democracy, Terrorism and Security (10 March 2005), online: 〈http://english.safe-democracy.org/keynotes/a-global-strategy-for-fighting-terrorism.html〉.

110. *Ibid.*

111. Marks, *supra* note 14 at 118.

112. *Ibid.*, at 101, citing Kofi Annan.

113. Neil HICKS, "The Impact of Counter Terror on the Promotion and Protection of Human Rights: A Global Perspective" in Wilson, *supra* note 106, 37 at 221, citing Kofi Annan's statement to a special meeting of the Security Council's Counter-Terrorism Committee with International, Regional and Sub-Regional Organizations, New York.

114. Ashworth, *supra* note 88 at 224.

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that no human rights are derogated from. This absolutist view may be an attractive proposition at first blush. But, on closer examination, as with most absolutist propositions, it has difficulties.

Such an approach ignores the fact that there is necessarily indeterminacy in the trade-off of rights within any human rights framework.[115] After all, as already observed, rights compete. In any counter-terrorism effort, the right of a member of the public to security will be pitted against the right of the suspected terrorist to liberty. It is admittedly difficult to design a system that does not involve some form of trade-off between the two. This is precisely the competing rights paradigm that is the central point of this paper: that there will inevitably be a need for a balance (although, as will be apparent from Part III(B) below, this is not a reference to the traditional understanding of "balance").

Security is the precondition for liberty, whereas human rights are the constituents of liberty.[116] Both are inherent parts of democracy. The central dilemma may be phrased thus: How do we protect freedom (through security) without denying its essence (by circumscribing liberty)?[117] This dilemma has always existed at the centre of the democratic enterprise, albeit in different forms.[118]

The recent reactions to terrorism, such as declaring a state of exceptionalism or even a war on terror, expose, in intensified form, the fundamental tensions inherent in modern democracies.[119] In attempting to balance security with liberty, we are effectively seeking to "balance between the individual and the collective, between the political and the legal, and between political sovereignty and the rule of law".[120] After all, democratic societies always have to strike a balance between liberty and security: for instance, the right to a fair trial correspondingly introduces the risk that a dangerous criminal may walk free.[121]

The issue at hand does not merely concern human rights in the context of counter-terrorism responses. It is much wider than that, and compels us to think about the essential institutional, procedural, and substantive principles a legitimate democracy ought to have.[122]

B. *Balancing Security and Liberty*

In this regard, the UN has consistently exhorted the seeking of a balance in counter-terrorism responses.[123] The term "balance" is also widely used by US politicians, European policy-makers, and international scholars.[124] It also features

115. *Ibid.*
116. Lazarus and Goold, *supra* note 103 at 2, citing the National Commission on Terrorists Attacks upon the United States (9/11 Commission), Report (2004).
117. Lazarus and Goold, *supra* note 103 at 1.
118. *Ibid.*
119. *Ibid.*, at 7.
120. *Ibid.*
121. Freeman, *supra* note 27 at 47.
122. Lazarus and Goold, *supra* note 103 at 7.
123. Marks, *supra* note 14 at 102.
124. For instance, in the aftermath of the 9/11 attacks, US Congressman Richard Gephardt said "We're in a new world where we have to rebalance freedom and security": Moeckli, *supra* note 30 at 1, citing E. PIANIN and T.B. EDSALL, "Civil Liberties Debate Revived Amid Efforts to Fight Terrorism", *Washington Post* (14 September 2001).

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prominently in the jurisprudence of the US Supreme Court on the First Amendment right to free speech.

1. *The difficulties with "balance"*

Of course, one needs to be very careful about what is meant by "balance". The term is deceptively convincing because, presumably, nobody could seriously argue that "imbalance" is better.[125] Plainly, the term "balance" should not be used as a carte blanche for the government of the day to do whatever it wishes in the name of security.

There is a critical need to guard against a brusque and blunt balance in an area as important as security and human rights, for four reasons.

First, the idea of balance overlooks the distribution of freedom or liberty within a community.[126] Depriving minorities of freedom through oppressive counter-terrorism measures may have a negligible impact on the notional "total amount of freedom" in society. Indeed, these measures might be seen to increase the overall amount of freedom by allowing the majority to live without fear of interference by the minority. There is thus reason to believe that an approach which fails to take into consideration the distribution of freedom is potentially one that could legitimize the disregard of minorities' rights. As one scholar puts it: "*whose* liberties are put on the scales?"[127] The term "balance" in and of itself does not tell us about precisely what, or whose rights, are being balanced.

Second, there is a need for empirical support for the counter-terrorist actions taken in the name of balance. In attempting to balance security and human rights, it is often assumed that there is a "hydraulic relationship" between human rights safeguards and the promotion of security.[128] However, there may not always be empirical support for what is essentially an empirical proposition.[129] If harsh measures are to be taken against a minority, there should be some evidence that such measures are proportional and necessary for the purposes of security. Relying on the idea of balance may unwittingly obscure the need for a properly considered and empirically justifiable trade-off between the liberty of the minority and the security of the majority.

Third, the balance must be sufficiently nuanced to take into consideration the fact that the curtailment of liberty for the purposes of security may also result in unintended effects, such as unjustified or excessive expansion in the powers of the state.[130] In this regard, while the "national security" model of security dominates much of the debate and policy-making, there is a risk that states may themselves become a major source of threat to their own citizens.[131] Here, the history of terrorism sends a chilling reminder: it should not be forgotten that the concept of terrorism first evolved from the abuse of governmental power in the French *regime de la terreur*. Simply put, an

125. Ashworth, *supra* note 88 at 208.
126. Moeckli, *supra* note 30 at 3.
127. *Ibid*. (emphasis in original).
128. Ashworth, *supra* note 88 at 208.
129. *Ibid*.
130. *Ibid*., at 209.
131. Moeckli, *supra* note 30 at 7.

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increase in the threat from terrorists should not give way to an increase in the threat of state oppression.

Fourth, we cannot hope to achieve a balance simply by undertaking an unsophisticated utilitarian cost-benefit exercise. Post-9/11, utilitarian reasoning has come to the fore, with some arguing that the need for collective security means that human rights are "a luxury we can no longer endure".[132] However, and especially in the context of human rights, we must be very careful when raising utilitarian arguments. An unsophisticated utilitarian approach in "balancing" tends to favour an arrangement that restricts the rights of a minority in the hope of enhancing the security of the majority. The liberty of the few is sacrificed for that of the many. This discriminatory effect often goes unacknowledged,[133] and may be the very antithesis of human rights.

The balancing process is undoubtedly a very difficult one. It involves assigning weights to different rights, as well as the very difficult task of calculating or predicting the consequences of actions.[134] It also requires a comparison of the weight of certain rights against the weight of certain consequences.[135] All of these are highly contestable. To make matters worse, even beyond this, the decision-maker has to make a decision on how the balance should be struck. This is even more contestable than the very concept of balance, because there is the extra element of determining exactly where the desired equilibrium is to be found, and reasonable minds can certainly disagree on this.[136] Inevitably, a decision-maker acting in good faith must be afforded a margin of appreciation in this endeavour.

Perhaps, some may dismiss the foregoing as purely the stuff of theory without much (for want of a better word) utility in reality, as it is very difficult to balance dispassionately where the "ticking bomb" scenario is not a hypothetical for classroom discussion but a tragic fact of life.[137] Some would find a balance in favour of torture in such situations: a scholar—building on his experience in Israel—stated that in the ticking bomb scenario: "[I]t is better to inflict non-lethal pain on one guilty terrorist who is illegally withholding information needed to prevent an act of terrorism than to permit a large number of innocent victims to die."[138]

There are many ways to analyze the ticking bomb scenario, and scholars have argued no end over this. However, it may be interesting to note that the statement just cited uses the value-laden and judgmental terms "guilty", "terrorist", "illegally withholding information", "act of terrorism", and "innocent victims". This brings to

132. Wilson, *supra* note 106 at 17.

133. Ashworth, *supra* note 88 at 209.

134. See Walter SINNOTT-ARMSTRONG, "Consequentialism", *Stanford Encyclopedia of Philosophy* (2006), where the author recognizes that classic utilitarianism requires agents to calculate all consequences for each act for every person for all time, which is an impossible task. The author subsequently points out that the principle of utility is not supposed to be used as a decision procedure or guide, but merely provide the criterion or standard of what is morally right or morally ought to be done; online: 〈http://plato.stanford.edu/entries/consequentialism/〉.

135. Ashworth, *supra* note 88 at 210.

136. *Ibid.*

137. Marks, *supra* note 14 at 106.

138. *Ibid.*, citing Alan M. DERSHOWITZ, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven/London: Yale University Press, 2002).

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mind Professor Michael Sandel's observation that the moral intuitions at work in the ticking bomb scenario may perhaps not only simply be about utilitarian costs and benefits, but in fact also about the non-utilitarian idea that someone labelled as a "terrorist" is a bad person who deserves to be punished.[139]

2. *A calibrated "balancing" approach*

While the difficulties in balancing should not be underestimated, the balancing process has value as long as it is neither brusque nor blunt nor premised on an unsophisticated utilitarian calculus. On the other hand, it is clear that in situations of competing rights, not every right can always be paramount.

Rather, the best approach will entail carefully calibrated balancing that—having taken all possible factors into consideration (including empirical evidence on the necessity, effectiveness, and correctness of any trade-off)—recognizes that some rights may be curtailed, but only in exceptional circumstances, and with real safeguards to prevent an undue sacrifice of liberty in the name of increased security. It must be emphasized that this is not to suggest the traditional proposition that a compromise or derogation from human rights be countenanced in times of emergency, or that a zero-sum approach between liberty and security be taken. Rather, the endeavour is to balance—creatively, sensitively, and judiciously—the substance of the rights at stake, keeping in mind that at bottom it is the substance, not form, of the rights that is of crucial importance. Therefore, even if the needs of increased security may require a curtailment of certain rights or certain aspects of the same, we must avoid simply trading off an individual's rights in favour of the collective's right to security. Rather, we should endeavour to carefully design systems which, while possibly curtailing the rights of the suspected terrorist, simultaneously avail to him—within a systemic or institutional framework—other aspects of the curtailed rights or indeed even rights which may not otherwise have been available to him.

The calibrated approach that I have in mind may find some resonance in Professor Andrew Ashworth's call for the development of patterns of reasoning that allow security considerations to play a different role in respect of rights of different weights.[140] As Professor Ashworth observes, a carefully calibrated balancing approach can be developed, allowing security considerations to be weighed against the different rights at stake. For example, citing the decision of *Rowe and Davis*, Professor Ashworth has noted that the Strasbourg Court had adopted compensating procedures in a calibrated balancing approach. In that case, the Strasbourg Court held that the prosecution may not have to disclose documents on the grounds of "public interest immunity", but noted that any difficulties caused to the defence by a limitation of its rights must be "sufficiently counterbalanced" by the procedures followed by the judicial authorities.[141]

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139. Michael SANDEL, *Justice: What's the Right Thing to Do* (New York: Farrar, Straus, and Giroux, 2010) at 39–40.

140. Ashworth, *supra* note 88 at 225.

141. *Ibid.*, at 216 (Discussion of *Rowe and Davis v. United Kingdom* (2000) 30 European Human Rights Report 1).

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I highlight some key concepts that should be incorporated into any framework that implements the calibrated balancing approach.

First, there is the principle of non-discrimination. The concept of balancing lends itself to the suggestion that, where circumstances demand, it is acceptable to limit some rights. This is not and should not be treated as a ticket to ignore the disproportionate effects that such balancing can have on a minority. It is ultimately not acceptable to justify sacrificing the rights of a few for the perceived greater good of the majority.

Second, it must be recalled that rights serve as a check on a state's power. While the calibrated balancing approach seeks to resolve tensions between two competing sets of rights, the consequences of applying this approach is not limited to shifting the weight between these two sets of rights. There must be recognition that the consequence of limiting liberty on the basis of a competing right to security may increase a state's powers, sometimes unnecessarily and disproportionately. Therefore, a meaningful calibrated balancing approach will need to consider the consequences and dangers, if any, of an increase in a state's power.

Third, consideration must be given to the likelihood of securing real and tangible outcomes from a security perspective. At times of great threats, gestures of symbolism and perceived action on the part of a state often provide comfort to its people. But the calibrated balancing approach should involve scrutiny of the potential consequences and benefits, rather than be based solely on an unfounded belief that any state action, or sometimes overreaction, is automatically justified because of the heinous nature of the relevant acts.

Ultimately, a calibrated balancing approach must be developed to avoid one of the greatest contradictions that arises when a state feels threatened—the needless sacrifice of rights in the name of achieving the end goal of protecting human rights. Admittedly, at the end of the day, much will still depend on a judgement call of the decision-making body. A priori reasoning is unlikely to be useful here. However, developing patterns of reasoning will go towards ensuring that there are identifiable standards by which counter-terrorist responses can be judged. This improves the chances of there being a meaningful discussion between different sides of the liberty-security debate. It also encourages us to think creatively, sensitively, and judiciously about substantively *compensating* individuals for rights curtailment, should such curtailment be absolutely necessary in the circumstances.

C. *Which Counter-Terrorism Paradigm Achieves the Best Balance?*

It is now appropriate to return to the three counter-terrorism paradigms outlined earlier.

The main difficulty with the traditional legal measures paradigm is its possible lack of efficacy in pre-empting terrorist acts, potentially resulting in the massive loss of innocent lives. The traditional paradigm may be the most ideal in the eyes of the human rights absolutist, but this ignores the important fact that it is not merely the human rights of the suspected terrorists at stake—the public at large has a competing right to security. Indeed, post-9/11, there has, and rightly so, been greater emphasis

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on the need for "preventive justice". Governments have seen the need to focus more on intelligence-based and proactive pre-emptive responses, rather than responding to events after they occur.[142] The stakes may be too high for us to only rely on the retributive or deterrent *ex post facto* punishment of terrorists, some of whom fear neither punishment nor even death.

There are also difficulties with the war or armed conflict paradigm. First, a declaration of war on terror does not sit comfortably with existing international law norms and the rule of law. One line of thought, adopted by the Americans, is that the entitlement to self-defence should embrace the concepts of pre-emptive and preventive wars in response to terrorism.[143] The rationale for this is that there must be a right to anticipatory self-defence, and that it cannot be that a country must wait to be attacked before it can address existential threats.[144] While there may be some merit in this argument, experience shows that this paradigm gives rise to difficulties concerning the proper legal treatment of the terrorists against whom a war has been declared. While the terrorists are declared enemy combatants, those at war against them remain ambivalent about the extent to which *jus in bello* applies. The continuing war against terror has been termed in some quarters as "the long war", hinting at yet another difficulty—it remains to be seen how or in what circumstances anyone can declare the war to be "over". There are clear problems for the international legal order if the war on terror persists ad infinitum.

Second, waging a literal war on terror may also have wide-ranging adverse implications on human rights. In the wake of the American war on terror, some governments have declared that the American departure from international human rights norms in its counter-terrorism effort justifies their own methods of addressing security threats.[145] A prominent Egyptian human rights activist noted that:

> Every dictator in the world is using what the United States has done under the Patriot Act and other derivative measures to justify their past violations of human rights, as well as declaring a license to continue to abuse human rights at present and in the future.[146]

Third, waging a war on terror may ultimately be counter-productive to the counter-terrorism effort. Waging a war on terror grants legitimacy to the actions of terrorists, elevating them from criminals to enemy combatants.[147] Furthermore, the declaration of war greatly inflates the executive power that may be exercised by a government, and correspondingly justifies like retaliation by terrorist groups. American forces have used war-like military forces in hunting down terrorist organizations, launching cluster munitions, air strikes,[148] and unmanned drones equipped with Hellfire

142. Fenwick and Phillipson, *supra* note 56 at 482.
143. Marks, *supra* note 14 at 92.
144. *Ibid.*
145. Hicks, *supra* note 113 at 216.
146. This observation is made by prominent Egyptian human rights activist Saad Eddin Ibrahim in 2003: see Hicks, *supra* note 113 at 219, citing the remarks by Professor Saad Eddin Ibrahim at the "Human Rights Defenders on the Frontlines of Freedom" Conference (11–12 November 2003).
147. O'Connell, *supra* note 72 at 357.
148. Marks, *supra* note 14 at 95–6.

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missiles to hunt down terrorists.[149] In like vein, terrorists feel justified in retaliating violently against those who pose a threat to their "fight for freedom";[150] the bomb in the rubbish bin is simply a "poor man's air force".[151] Finally, the range of combatant's privileges which flow from a declaration of war may have a counter-productive effect on bringing terrorists to justice. Terrorists, as combatants, are arguably immune from prosecution for certain common crimes such as kidnapping their opponents, taking prisoners, and targeting government installations.[152] If captured, they may have legitimate claims of being entitled to treatment as prisoners of war, rather than suffering the fate of common criminals.[153] They may also be able to rely on the "obedience to orders" defence, thus rendering it more difficult to obtain any conviction against them.[154]

The war or armed conflict paradigm had its genesis at a time where there was an urgent need for declaring an immediate and resolute counter-terrorism response. However, this paradigm may eventually serve to weaken the fundamental frameworks on which international law and human rights are built.[155] There is therefore good reason to believe that the balance suggested by the war or armed conflict paradigm is not an ideal one.

By way of a footnote, it should be noted that the term "war on terror" has rarely been used by President Barack Obama,[156] and that the US Department of Defence appears to have changed the name of these operations from the "Global War on Terror" to "Overseas Contingency Operation".[157] However, the Obama administration continues to rely on military force, including "drone strikes in numbers far outstripping the prior administration".[158] In late 2012, Jeh Johnson, the Pentagon's general counsel, suggested that the policy-makers had to look to a time when the US is no longer at war with al-Qa'ida, and that taking on the remnants of that terrorist group might more appropriately be a matter for law enforcement and intelligence agencies rather than the military.[159] However, the leakage of the US Department of Justice's White Paper on drone strikes in February 2013 raises some further questions on whether the war or armed conflict paradigm is still being adopted in the US.[160]

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149. Michael SCHARF, "Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects" (2004) 36 Case Journal of International Law 359 at 372.
150. *Ibid.,* at 372.
151. Hoffman, *supra* note 7 at 26.
152. Scharf, *supra* note 149 at 371.
153. *Ibid.*, at 373.
154. *Ibid.*
155. Marks, *supra* note 14 at 119.
156. Although in his inaugural address on 20 January 2009, he stated "Our nation is at war, against a far-reaching network of violence and hatred".
157. Scott WILSON and Al KAMEN, "'Global War on Terror' is Given New Name" *Washington Post* (25 March 2009), online: Washington Post 〈http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html〉.
158. Banks, *supra* note 5 at 450.
159. Julian BARNES, "Pentagon Lawyer Looks Post-Terror" *The Wall Street Journal* (30 November 2012), online: WSJ 〈http://online.wsj.com/article/SB10001424127887324205404578151181874456280.html〉.
160. "Department of Justice White Paper" *NBC News* (4 February 2013), online: NBC News 〈http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf〉.

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This leaves us with the executive measures paradigm. It would probably be oversimplifying matters to state that this paradigm necessarily provides the best balance just by virtue of the fact that it falls between the traditional and war paradigms. Much depends on the detailed mechanics and actual workings of the executive measures in question. Many countries have implemented executive counter-terrorism measures. This paper here outlines Singapore's executive measures counter-terrorism response, focusing on Singapore's ISA.

D. *Singapore's Internal Security Act*

The ISA has been criticized by commentators both within and outside Singapore. There may well be room for improving the framework. But the ISA should be assessed for the balance it has sought to achieve between the right to security and the right to liberty.

1. *Evidence of the ISA's efficacy in countering terrorism*

It is not often disputed that the ISA has been effective in countering terrorism. The arrest of JI members in Singapore is a case in point. The arrest of thirteen JI members in December 2001 enabled Singapore to thwart the al-Qa'ida-JI plot to mount suicide attacks in Singapore against several foreign establishments, including the US embassy.[161] In addition, the intelligence gathered was quickly shared with relevant regional security partners such as Malaysia, the Philippines, Indonesia, and Australia, who until then had not known of the existence of the JI in their own countries.[162] Sharing the intelligence gathered during the investigations led to the arrests of JI members in the region, as well as the Canadian al-Qa'ida operative Mohd Mansour Jabarah @ Sammy (in Oman), who was involved in the terrorist plot targeted at foreign establishments in Singapore.[163]

These arrests thwarted several imminent suicide bombings. For example, information from those arrested under the ISA also assisted in the arrest of the JI bomb-maker Fathur Rohman Al-Ghozi in Manila in January 2002.[164] He had already

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161. *White Paper on JI Arrests*, online: 〈http://www.mha.gov.sg/publication_details.aspx?pageid=35&cid=354〉 at 13.

162. "Foreign Hit Men (not Singapore Terrorists) Picked To Pull Trigger" *The New Paper* (20 January 2002) (Singapore tipped off the Philippines about Mike @ Al Ghozi); "Singapore Ready to Help Prove Terror Links" *The Straits Times* (23 February 2002) (Singapore prepared to facilitate direct investigations by Indonesian counterparts to confirm links existed between two Indonesian suspects and JI because the Indonesians denied such links); Singapore *Parliamentary Debates*, 2 March 2006, p. 10, online: 〈http://sprs.parl.gov.sg/search/topic.jsp?currentTopicID=00071382-ZZ&currentPubID=00075191〉 (2 March 2006 report) and 〈http://sprs.parl.gov.sg/search/report.jsp?currentPubID=00004760-WA〉 (21 April 2008 report); 21 April 2008, p. 36 (Information sharing with Australia, the Philippines, and Thailand); and "Going After Mike and Sammy" *The Straits Times* (16 April 2008) (mentioned that "Mike" (Al-Ghozi) and "Sammy" (Mohd Mansour Jabarah) were preparing to stage suicide attacks against several embassies in Singapore using truck bombs and that ISD identified them and shared findings with foreign intelligences leading to Jabarah's arrest in Oman and Al-Ghozi's arrest in the Philippines in early 2002).

163. Speech by Prime Minister Lee Hsien Loong at the International Conference on Terrorist Rehabilitation and Community Resilience, online: 〈http://www.pmo.gov.sg/content/pmosite/mediacentre/speechesninterviews/primeminister/2013/March/speech_by_prime_ministerleehsienloongattheinternationalconferenc.html〉 at para. 25 [*Speech by PM Lee 2013*]. See also *White Paper on JI Arrests*, *supra* note 161 at 9 and 17.

164. Deputy Prime Minister Teo's Parliamentary Speech on the Internal Security Act (19 October 2011) [*DPM Teo's Parliamentary Speech 2011*]; and "ISA is Needed Now More Than Ever" *The Straits Times* (20 October 2011).

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amassed 1.2 tonnes of TNT and 2.4 kilometres of detonator cord, and was on the way to Bangkok to obtain funds to complete the purchase of explosives for the attack in Singapore.[165] As another example, JI's master bomb-maker Dr Azahari Husin gave up trying to stage an attack against Singapore after failing to connect with the local JI network which had been disrupted by the ISD.[166]

The counter-terrorism efficacy of the ISA has rarely been questioned. Rather, commentators have instead focused on the ISA's commitment to giving effect to the rights of the suspected terrorists who are arrested and/or subsequently detained. It is to this aspect of the ISA that this paper now turns.

2. *Security and liberty under the ISA*

(a) *A brief overview of the ISA:* The ISA allows for a legally stipulated preventive detention process. A person arrested for investigation under the ISA can be held for an initial twenty-four hours, followed by another twenty-four hours.[167] If more time is needed for investigation, the person can be held for a further period of up to twenty-eight days, on the approval of an officer holding at least the rank of Superintendent of Police, who must report this to the Commissioner of Police.[168] Where the period exceeds fourteen days, the Commissioner of Police must report this to the Minister.[169]

In all, a person cannot be held for more than thirty days for initial investigations.[170] If it is assessed during that period that the arrested person does not pose an imminent security threat, he must be released unconditionally.[171] However, if it is assessed that he has undertaken some activities of security concern, he may be served with a Restriction Order.[172] The Restriction Order imposes conditions such as the denial of overseas travel to prevent him from engaging in activities that could pose a security threat.[173] The Restriction Order cannot exceed two years at a time, though it can be renewed.[174] If it is assessed that the person poses a security threat, he can be held in preventive detention.[175]

Detaining a person under the ISA requires the approval of the Cabinet, as well as the assent of the President.[176] The Order of Detention does not exceed two years in each instance, and can be extended only with the assent of the President.[177]

Unlike criminals who are prosecuted in court and serve long-term sentences, once an ISA detainee has been rehabilitated and no longer poses a security threat, he will

165. *DPM Teo's Parliamentary Speech 2011, supra* note 164.
166. *Ibid.*
167. Internal Security Act, s.74(3).
168. *Ibid.*, ss.74(4) and 74(5).
169. *Ibid.*, s.74(5).
170. *Ibid.*, s.74(4).
171. "Ministry of Home Affairs Press Statement on ISA" (16 September 2011), online: 〈http://www.mha.gov.sg/news_details.aspx?nid=MjA4NQ%3D%3D-Dmf5jullzOA%3D〉.
172. Internal Security Act, s.8(1)(b).
173. *Ibid.*, s.8(1)(b)(v).
174. *Ibid.*, s.8(2).
175. *Ibid.*, s.8(1)(a).
176. *Ibid.*, ss.8(1)(a) and 8(2).
177. *Ibid.*, s.8(2).

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be released.[178] More than two-thirds of persons who have been detained since 2001 for terrorism-related offences have been released.[179] The public is kept informed of such releases through press releases.[180]

(b) *Whether utilizing the conventional criminal law would have been sufficient:* It might reasonably be asked whether the suspected terrorists could instead have been successfully prosecuted under the conventional criminal law, and, if so, whether utilizing the criminal law approach would have been advantageous to adopting the ISA scheme. There are at least three considerations that might point towards the conclusion that the traditional criminal law framework is not ideal for responding to the challenges that these cases pose.

First, as already noted above, while the conventional criminal law is adept at addressing conventional criminal behaviour, its approach of *ex post facto* punishment may not be well designed to deal with the unique nature of the terrorist threat. Moreover, traditional criminal deterrent models may not always be effective for ideological offenders.

Second, the open and public nature that characterizes the conventional criminal process may be counter-productive in the context of counter-terrorism. This point is illustrated by the Deputy Prime Minister's observations in a recent parliamentary debate. Responding to queries about the continued relevance of Singapore's ISA, the Deputy Prime Minister explained that ISA detainees are not tried in court, as this might expose information which terrorists could use, or disclose sources of security intelligence.[181] He emphasized that, in some instances, the information that helps uncover security threats comes from pains-taking and dangerous efforts undertaken by security personnel; in other instances, highly secretive information may come from foreign security agencies, on the understanding that the sources and details will not be disclosed. The disclosure of such information could compromise ongoing or future counter-terrorism operations.[182] Other commentators have also noted that a public trial can sometimes inflame the situation and pander to the detainee's desire to publicize his cause, as was evident in the case of Bali bombing terrorists such as Imam Samudra, and the trial of Jemaah Islamiah leader Abu Bakar Bashir.[183]

Third, for philosophical, doctrinal, and practical reasons, there may be value in ensuring that issues of national security are not overlaid on the conventional criminal law.

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178. Speech by Deputy Prime Minister, Coordinating Minister for National Security, and Minister for Home Affairs, Mr Teo Chee Hean, "Working Together to Keep Singapore Safe and Secure" (Ministry of Home Affairs Committee of Supply Debate 2013), online: 〈http://www.mha.gov.sg/news_details.aspx?nid=Mjc4Mg%3D%3D-CJPkCAKXpRc%3D〉; at para. 31 [*DPM Teo's Parliamentary Speech 2013*].

179. *Ibid.*, at para. 31. See the Press Releases detailing the release of JI Detainees on the Ministry of Home Affairs website, online: 〈http://www.mha.gov.sg〉. See also e.g. "Two Senior JI Members Detained under ISA" *AsiaOne News* (11 October 2012), online: AsiaOne News 〈http://www.asiaone.com/News/Latest%2BNews/Singapore/Story/A1Story20121011-377048.html〉.

180. See the press releases detailing the release of JI detainees on the Ministry of Home Affairs website, online: 〈http://www.mha.gov.sg〉.

181. *DPM Teo's Parliamentary Speech 2011*, *supra* note 164, and "ISA Is Needed Now More Than Ever" *The Straits Times* (20 October 2011), and "DPM Teo: Terrorism Act Lacks Pre-emptive Powers of ISA" *The Straits Times* (20 October 2011).

182. *DPM Teo's Parliamentary Speech 2011*, *supra* note 164; and "ISA Is Needed Now More Than Ever" *The Straits Times* (20 October 2011).

183. This point was made by Associate Professor Bilveer Singh of the S. Rajaratnam School of International Studies. See "Government's Statement on the Internal Security Act" *The Straits Times* (17 September 2011).

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It should be emphasized that the ISA scheme is an approach that is philosophically entirely different from the conventional criminal law—it is first preventive and prophylactic, next rehabilitative and redemptive. The end point of the ISA scheme is not to punish, but to prevent and to rehabilitate; detainees under the ISA have not been, and ought not to be, labelled as "criminals".

(c) *The balance under the ISA:* The concept of preventive detention has been described as a method which short-circuits the normal criminal law and process,[184] although the basic instruments of international human rights law neither explicitly permit nor prohibit preventive detention.[185]

Preventive detention inevitably entails some curtailment of the detainee's liberty. After all, the core criminal law requirement of culpability and blameworthiness is not established in traditional court proceedings before the detainee is taken into detention.[186] However, it is important to consider the framework of the ISA as a whole, in order to appreciate how the ISA attempts to strike the balance between the right to security and the right to liberty. Five brief points may be noted.

First, although the detainee is deprived of some of the safeguards of criminal law, he retains important rights of due process. These include the following:

(1) The right to be heard, albeit in camera, before an independent Advisory Board headed by a Judge of the Supreme Court sitting with two citizens (who are appointed by the President in consultation with the Chief Justice).[187] The Advisory Board has all the powers of a court of law for summoning and examining witnesses, compelling the production of documents and evidence that it deems relevant, and examining a detainee's representations, as well as examining officers of the ISD and statements of witnesses.[188] The Advisory Board considers the representations of the detainee within three months of the date of his Order of Detention and makes its recommendation to the President.[189] The Advisory Board is also required to review every Order of Detention and Restriction Order at intervals of no more than twelve months;[190]

184. Michael HOR, "Singapore's Anti-terrorism Laws: Reality and Rhetoric" in Ramraj *et al.*, *supra* note 56, 271 at 272.

185. It should, however, be noted that the basic instruments of international human rights law do establish certain essential substantive and procedural standards relevant to the issue. First, there must be freedom from arbitrary arrest or detention, and the requirement that arrest, detention, and other deprivations of liberty must be for lawful grounds and according to established legal procedures. Second, anyone arrested or detained has a right to information about the grounds of his arrest or detention, a right to independent proceedings to determine the lawfulness of the detention, and freedom from torture or any other form of cruel, inhuman, or degrading treatment or punishment. See John MCLOUGHLIN *et al.*, "Security Detention, Terrorism and the Prevention Imperative" (2009) 40 Case Journal of International Law 463 at 477.

186. Lucia ZEDNER, "Seeking Security by Eroding Rights: The Side-Stepping of Due Process" in Goold and Lazarus, *supra* note 5, 257 at 264.

187. Art. 151(2) of the Singapore Constitution; and Internal Security Act, ss.14, 15, 16.

188. Internal Security Act, s.14.

189. *Ibid.*, s.12(1).

190. *Ibid.*, s.13(1).

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(2) The right to be informed of the grounds of detention and the allegations made against him;[191]

(3) The right to be informed of his right to make representations within fourteen days of the service on him of the order;[192]

(4) The right to be furnished with a statement in writing of the grounds on which the Order of Detention was made, as well as the allegations of facts on which the Order of Detention was based, and any other particulars that he may, in the opinion of the Minister, reasonably require to make his representations against the order;[193] and

(5) The right to engage a lawyer or any person of his choosing who is not involved in the case to assist him in his representation to the Advisory Board.[194]

Second, since 1991, the President has been vested with veto powers vis-à-vis the continued detention of a detainee: where the Advisory Board recommends the release of any person, that person cannot be detained or further detained without the President's independent concurrence.[195] A number of detainees have been released on the basis of the Advisory Board's recommendation.[196]

Third, subsidiary legislation provides further safeguards of detainees' rights.[197] These safeguards include:

(1) Entitlement to visits from legal advisers, and once-a-week visits from family or friends;[198]

(2) Access to medical and dental care;[199]

(3) Avenues to make complaints and petitions;[200]

(4) Provision of food in accordance with a detainee's religious obligations, as well as provision for the dietary needs of those with medical problems;[201]

(5) Access to books and paper;[202]

191. *Ibid.*, ss.9(a), 9(b) and 11.
192. *Ibid.*, s.11(2)(a).
193. *Ibid.*, s.11(2)(b).
194. Art. 9(3) of the Singapore Constitution; and Rule 4(1) of the Internal Security (Detained Persons Advisory Board) Rules.
195. Art. 151(4) of the Singapore Constitution; and Internal Security Act, s.13A of the ISA. See "ISA Is Needed Now More Than Ever" *The Straits Times* (20 October 2011), and "DPM Teo: Terrorism Act Lacks Pre-emptive Powers of ISA" *The Straits Times* (20 October 2011).
196. "ISA Is Needed Now More Than Ever" *The Straits Times* (20 October 2011).
197. This is a reference to the Internal Security (Detained Persons) Rules.
198. *Ibid.*, Rule 81.
199. *Ibid.*, Rule 53.
200. *Ibid.*, Rules 23 and 31. A Superintendent shall ensure that a detainee who has complaints is allowed to make them.
201. *Ibid.*, Rule 24.
202. *Ibid.*, Rule 80.

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(6) The ability to receive and send letters;[203] and

(7) Access to recreational, vocational, and other programmes.[204]

Fourth, there is an overarching focus on the rehabilitation and reintegration of detainees.[205] This is directed at dealing with the root cause of radicalization and its critical feature is the incorporation of the active support of the detainee's family and religious leaders, and of other professionals.[206] In keeping with the goal of securing the release and reintegration of detainees into society, there are at least three different aspects of rehabilitation in the ISA scheme:[207]

(1) Religious rehabilitation is facilitated through counselling conducted by counsellors from the Religious Rehabilitation Group (RRG).[208] This is undertaken by a group of respected local religious scholars who have volunteered their services in their individual capacities to counsel the detainees. The counselling aims to educate detainees on proper and mainstream religious teachings and, in the process, wean them away from militant or extremist ideologies.[209] The detainees are also provided support to fulfil their religious obligations and deepen their faith. Indeed, Professor Hoffman, whose work has been cited above, has interacted with RRG members during his visits to Singapore, and has described the RRG's work as "pioneering". Professor Hoffman also notes that the RRG's efforts "radiate outwards, not just to the detainees but to the families of the detainees and the community at large".[210]

(2) Psychological rehabilitation is facilitated through regular counselling sessions with assigned psychologists.[211] As the process of radicalization is unique for each detainee, the areas of concern for each individual are identified

203. *Ibid.*, Rule 83.

204. *Ibid.*, Rule 86.

205. This is alluded to in Rule 88 of the Internal Security (Detained Persons) Rules, which provides for the Minister to declare any place to be a place for the "rehabilitation of detained persons".

206. See, for instance, *Speech by PM Lee 2013, supra* note 163 at para. 2.

207. Zakir HUSSAIN, "Get Them Back on Track" *The Straits Times* (7 January 2012).

208. *Speech by PM Lee 2013, supra* note 163 at paras. 2–11. See also *DPM Teo's Parliamentary Speech 2013, supra* note 178 at para. 13. This was also referred to in passing in "Malay-Muslim Community Sets Up Inter-Agency Aftercare Group To Help Families of JI Detainees" in *Lianhe Zaobao* (14 November 2007) (translated).

209. *Speech by PM Lee 2013, supra* note 163 at para. 2.

210. See the publication commemorating the tenth anniversary of the RRG, Saat A Rahman (ed.), *Winning Hearts and Minds, Promoting Harmony: A Decade of Providing Care and Support* (Singapore, 2013) at 151 [*RRG*]; the publication was also reported on by the *Straits Times* on 7 April 2013 (see Shefali REKHI, "The Hidden Journey of a Singapore JI Detainee" *The Straits Times* (7 April 2013)).

211. For an example of an ex-detainee sharing his experience during detention and his interaction with his assigned officer, see Rekhi, *supra* note 210, detailing the experience of an ex-detainee Abu Harith. Abu Harith shared that "What kept me going was the constant support I received—from the doctors and psychologists, and members of the community who volunteered their time to counsel me." See also Susan SIM, "Captured Terrorists as Intelligence Sources and Counterradicalization Leverage" in A. DUYAN, ed., *Analyzing Different Dimensions and New Threats in Defence Against Terrorism* (Amsterdam: IOS Press BV, 2012) 65 at 76.

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by the psychologist and a counselling plan is tailored according to the individual's needs.[212]

(3) Social rehabilitation aims to provide detainees with social support to cope with detention, and the capacity to reintegrate into society upon release.[213] Detainees have regular engagement with assigned officers who counsel, guide, and support them during the course of detention.[214] Detainees are entitled to regular family visits, and emphasis is placed on preserving the family unit as much as possible.[215] The family unit also serves to stabilize the detainee upon release. Significant efforts are expended in helping detainees' families: aftercare officers and psychologists are assigned to support the affected families through this difficult time,[216] while the Aftercare Group—a network of organizations established in 2002—provides financial and social support to families.[217] Finally, detainees are also encouraged to pursue further education and training.[218]

The thrust of these efforts is directed at compensating the deprivation of the detainees' liberty interest by addressing the roots of the detainee's radical terrorist inclinations, thus helping them to move forwards in life and to reintegrate successfully into society.

Fifth, there has been a concerted endeavour to be transparent and honest about the choices that have been made in Singapore's counter-terrorism response. It suffices to mention two examples of this:

(1) Subsidiary legislation provides that Members of the Board of Inspection—a Board comprising more than fifty Justices of the Peace and community leaders—make unannounced visits to the detention centre to speak with the detainees.[219] Two different members visit the detention centre every month and they may

212. See Report of the Qatar International Academy for Security Studies (QIASS), "Countering Violent Extremism Risk Reduction Project" (2010), online: 〈http://soufangroup.com/wp-content/uploads/2013/12/QIASS-CVE-FINAL-Report-112410-copy.pdf〉.

213. Sim, *supra* note 211 at 76. See also Hussain, *supra* note 207.

214. See Rekhi, *supra* note 210. See also Sim, *supra* note 211 at 76.

215. Hussain, *supra* note 207.

216. Muhammad HANIFF bin Hassan and Kenneth George PEREIRE, "An Ideological Response to Combating Terrorism—The Singapore Perspective" (2006) 17 The Small Wars and Insurgencies 458 at 463, where it is noted that: "The immediate family members were also offered psychological and emotional support by trained counsellors who visited them regularly to assess their condition and offer assistance."

217. An Aftercare Group (ACG), a network of Muslim organizations which ISD facilitated the establishment of in 2002 (comprising Taman Bacaan, the Association of Muslim Professionals, Mendaki, Khadijah Mosque, and En-Naeem Mosque), provide financial and social support to the families. They provide a range of financial (subsidies, bursaries, school pocket money, etc) and other support (tuition, text books), and family care services like counselling, to help the families. The ISD aftercare officer will link up detainees' families with the ACG to obtain the necessary help, including watching over and mentoring children who have developed problems. See also "Malay-Muslim Community Sets Up Inter-Agency Aftercare Group To Help Families of JI Detainees" *Lianhe Zaobao* (14 November 2007) (translated).

218. Hussain, *supra* note 207. The author states: "The Straits Times understands that detainees and those on Restriction Orders are encouraged to pursue further education and training, whether in detention or post-release."

219. Rules 85(1), 85(2), 85(3), and 85(4) of the Internal Security (Detained Persons Advisory Board) Rules.

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speak to any of the detainees without officers from the ISD being present.[220] Detainees may convey requests and complaints to Board members who will report them, along with any other recommendations, to the Minister for Home Affairs.[221] This serves as an additional avenue for the detainee to be heard.

(2) Cognizant of the potential discomfort regarding preventive detention, the government published a publicly available White Paper to explain the arrests of the JI members and the threat posed by these members.[222] The Ministry of Home Affairs also keeps Singaporeans informed through news reports, and it regularly consults with religious community leaders.[223]

The ISA scheme's emphasis on achieving a nuanced and calibrated balance through a focus on rehabilitation has borne fruit. The extremely low recidivism rate of about two percent (more than two-thirds of the sixty-four detainees have been released, and of this figure, there has been only one case of recidivism) is an indicator of the ISA scheme's efficacy.[224] This figure compares favourably with the rate of recidivism amongst Guantánamo Bay detainees. The US Director of National Intelligence reported in January 2013 that the recidivism rate for detainees *confirmed* to have re-engaged in militant activities after their release was 16.1 percent (97 of 603), while the rate for those *suspected* of re-engaging in the same was 11.9 percent (72 of 603).[225] Furthermore, the rehabilitative focus of the ISA scheme has attracted the acclaim of government leaders, religious scholars, commentators, and even former detainees themselves.[226]

It should be noted that criticisms of the ISA scheme are relatively muted in today's post-9/11 context, as commentators increasingly become aware of and sympathize with (or, indeed, even laud) the objectives of the ISA. While the ISA scheme may not be perfect, a fuller understanding of the framework as a whole allows one to assess the extent to which it provides an example of a calibrated balancing approach that counters international terrorism on a human rights grounding. Associate Professor Kumar Ramakrishna, head of the Centre of Excellence for National Security at the

220. *Ibid.*

221. *Ibid.*, Rule 85.

222. THIO Li-Ann, "'Pragmatism and Realism Do Not Mean Abdication': A Critical and Empirical Inquiry into Singapore's Engagement with International Human Rights Law" (2004) 8 Singapore Year Book of International Law 41 at 69. The White Paper titled "The Jemaah Islamiyah Arrests and the Threat of Terrorism" is publicly available at the website of the Ministry of Home Affairs, online: 〈http://www.mha.gov.sg/get_blob.aspx?file_id=252_complete.pdf〉.

223. Thio, *supra* note 222 at 69.

224. See the Press Release dated 7 March 2013, detailing the further detention and releases under the ISA, on the Ministry of Home Affairs website, online: 〈http://www.mha.gov.sg〉.

225. See the "Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba", online: 〈http://www.dni.gov/files/documents/March%202013%20GTMO%20Reengagement%20Release.pdf〉. It should be noted that these figures may be compared with the figures provided by the New America Foundation, a US-based non-profit, non-partisan public policy institute, which cites lower figures of about four percent and 4.7 percent for the *confirmed* and *suspected* recidivists respectively, online: 〈http://newamerica.net/sites/newamerica.net/files/profiles/attachments/GTMO_Appendix_5-7-2013.pdf〉.

226. See, for instance, *RRG*, *supra* note 210. See also the recent news report, Maryam MOKHTAR, "Religious Rehab Group's Work Praised" *The Straits Times* (26 June 2013), which reports on the Deputy Prime Minister's praise for the RRG and its efficacy in fighting the terror threat.

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S. Rajaratnam School of International Studies, has suggested that more public education on how the ISA has actually been used can help to dispel popular myths about the law.[227] There is force in this—further public conversations on the ISA will help to promote transparency and honesty about the choices that have been made in Singapore's counter-terrorism responses.

IV. CONCLUSION

"Honor Bound to Defend Freedom" is the motto of Joint Task Force Guantánamo.[228] This proud declaration is, unfortunately, also widely regarded as one of the great ironies of the "war on terror". A book and a theatre drama of the same name have explored the personal stories and political debate surrounding detention in Guantánamo Bay, "examining the divisive line between maintaining national security and protecting human rights".[229]

The events of 9/11 have sparked an important debate on how the world in general, and democracies in particular, will address security concerns in an age of terror. While there may be some polarization on the issues raised, that should not lead us to throw our hands up in despair. Instead, we must accept that the need to balance security and liberty is a fundamental and recurring problem that will always be a challenge for democracies, even in times of peace or after threats of imminent terrorist attack have receded.[230] Our responses to international terrorism may well define the philosophical and political fate of democracies in the twenty-first century.

There may be a tendency for the legal fraternity to approach the security and rights debate purely from the perspective of the rule of law, legal institutions, and legal rights.[231] But counter-terrorism crosses the traditional disciplinary boundaries of administrative, constitutional, criminal, financial, immigration, international, and military law.[232] Indeed, as suggested above, one day counter-terrorism law may and probably should stand as a distinct category of international law. There are, however, other equally important dimensions to this debate, where the expertise of sociologists, criminologists, psychologists, historians, religious leaders, political leaders, philosophers, and international relations scholars play hugely important roles.[233] We must engage these perspectives in our discussions.

The challenges posed by international terrorism and human rights are daunting. They require multilayered, multidimensional, and multidisciplinary perspectives. We must, to the greatest extent possible, embrace continued debate on these important matters. For we are facing what must surely be one of the greatest challenges of the twenty-first century—countering international terrorism on a human rights grounding.

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227. "Government's Statement on the Internal Security Act" *The Straits Times* (17 September 2011).
228. Joint Task Force Guantánamo is the American military force based at Guantánamo Bay.
229. Timeline Theatre Company, "Guantánamo: Honor Bound to Defend Freedom", online: 〈http://www.timelinetheatre.com/guantanamo/〉.
230. Lazarus and Goold, *supra* note 103 at 22.
231. *Ibid.*, at 8.
232. Kent ROACH *et al.*, "Introduction" in Ramraj *et al.*, *supra* note 56 at 1.
233. Lazarus and Goold, *supra* note 103 at 8. See also *ibid.*

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