THE PROTECTION OF HUMAN RIGHTS IN THE CONTEXT OF COUNTERTERRORISM

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'Unable are the loved to die, for love is immortality.'

– Emily Dickinson, *Poem 809*.

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Chapter 1: Introduction

1.1. Introduction

Human rights law (HRL) ostensibly developed to protect the individual human from State uses of force and control over the public sphere. In 1948, the United Nations General Assembly (UNGA) adopted the Universal Declaration of Human Rights (UDHR) in response to the 'barbarous acts' that 'outraged the conscience of mankind' committed by States during the Second World War (WWII).[1] It was proclaimed as 'a common standard of achievement for all peoples and all nations' and was the first time the international community had agreed that all humans have inherent dignity, are free, and are equal.[2] The Declaration set the benchmark for global human rights standards,[3] providing the blueprint for regional human rights treaties, including the European Convention on Human Rights (ECHR),[4] and foundation for the two 1966 International Human Rights Covenants.[5]

As HRL was developed in response to State action, this thesis evaluates the extent to which modern HRL protects individuals from the coercive power of the State. Specifically, it offers a critique of HRL as a method of protecting the right to life of individual terrorist suspects from State uses of force in a counterterrorism context, outside of armed conflict, focusing on the right to life provided in Article 2 ECHR through relevant jurisprudence of the European Court of Human Rights (ECtHR) and specific counterterrorism operations undertaken by the UK that show an escalation in the willingness

[1] Universal Declaration of Human Rights (10 December 1948) UN Doc A/RES/217(III) Preamble.
[2] Ibid.
[3] H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25(1) Georgia Journal of International and Comparative Law 287, 290.
[4] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.
[5] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) and International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

of a State to utilise extrajudicial killing in a securitised[6] context. The intentional killing of terrorist suspects illustrates the subordination of HRL to State security concerns in the counterterrorism context and the absence of clear judicial direction on this issue, thereby potentially undermining the overall aim of HRL.[7] The ECtHR has provided unambiguous direction on Article 2's procedural obligations but has not directly confronted the issue regarding the legitimacy of States deliberately depriving terrorist suspects of their lives.

As mentioned, the discussion centres on the *intentional* taking of a terrorist suspect's life by the State in a non-armed conflict situation, be that through the aim of the operation[8] or through the intention of the State agent when applying the lethal force,[9] rather than on whether a State can kill an individual terrorist suspect in such circumstances per se. It is accepted that a State may deprive a person of their life where that deprivation results from a use of force that is no more than necessary to achieve one or more of the legitimate aims articulated in Article 2(2) ECHR.[10] However, it is posited that where the *intent* of the State's action at issue is to kill, it does not fall under the Article 2(2) exceptions, regardless of any claims of imminence of a threat to the lives of others – there is an important difference between a death caused accidentally in pursuit of a legitimate aim, and a death caused intentionally.

[6] Securitisation is discussed in Chapter 4: 4.3.1.
[7] Discussed in Chapter 3.
[8] Such as in the drone strike that killed Ryaad Khan, discussed in Chapter 8.
[9] Discussed in Chapter 6: 6.3.1.1.
[10] Discussed in Chapter 6: 6.3.2. The ICCPR also allows for the use of lethal force where it is 'strictly and directly necessary to save life.' UNGA, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' (28 May 2010) UN Doc A/HRC/14/24/Add.6 [33].

The UDHR provides that '*Everyone* has the right to life',[11] with the ICCPR similarly stating that '*Every human being* has the inherent right to life',[12] and States are enjoined by relevant HRL instruments to protect that right.[13] Accordingly, it can be said that every human life counts and so should not be disregarded or viewed as instrumental by the State. Thus, to *intentionally* kill a person in pursuit of another aim is to deny their inherent right to life through viewing that person as a means to an end, rather than an end in themselves. This utilitarian approach is arguably incompatible with a HRL framework asserting the equal and inherent right to life of all individuals. Additionally, intentionally taking the life of a terrorist suspect in a counterterrorism context disregards both the principle that HRL applies to all humans, regardless of their characteristics and perceived or actual guilt[14] and the duty of States to uphold the right to life of all individuals, even terrorists.[15] It subjects the terrorist suspect to discriminatory[16] treatment as they are being denied due process and deprived of their life due to the State's construction of them as a threat, in contrast to other civilians. However, the ECtHR has not directly addressed the issue of intentional killing by the State.

The aim of this thesis is to examine the articulation and implementation of HRL, specifically the right to life, on its own terms. Modern HRL can be described as being Western in origin,[17] proceeding from the formulation of legal rights held by individuals in relation to the State articulated in the

[11] UDHR Article 3.
[12] ICCPR Article 6(1).
[13] E.g., Ibid., 'This right shall be protected by law. No one shall be arbitrarily deprived of his life.' Article 2(2) ECHR 'Everyone's right to life shall be protected by law.'
[14] UN, 'Global Issues: human rights' (*United Nations*, 2023) <https://www.un.org/en/global-issues/human-rights> accessed 23 May 2023; F. Ní Aoláin, 'Truth telling, Accountability and the Right to Life in Northern Ireland' (2002) 5 EHRLR 572, 576.
[15] UNGA, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' (28 May 2010) UN Doc A/HRC/14/24/Add.6 [33].
[16] Meaning to treat a person or group differently from other people due to their characteristics. 'Discriminatory' (*Cambridge Dictionary*, 2024) <https://dictionary.cambridge.org/dictionary/english/discriminatory> accessed 16 January 2024.
[17] L. Swidler, 'Human Rights: a historical overview' in H. Küng and J. Moltman (eds), *The Ethics of World Religions and Human Rights* (Trinity Press International 1990) 12.

UDHR.[18] It is accepted that the 'standard history of human rights is Eurocentric' and the product of the philosophical traditions of a particular geographical context.[19] Accordingly, as the focus of enquiry is primarily on the actions of Western States and Courts, specifically the UK and European Court of Human Rights (ECtHR), the materials utilised in the analysis are also predominantly Western. This is both a practical decision, based on the location, origins, and linguistic limitations of the researcher, and a methodological one. HRL is being examined from the internal perspective – through relevant legal instruments and through the implementation and adjudication of HRL provisions – rather than through an external critical lens or comparative analysis. To employ, for example, predominantly post-colonial literature in the analysis would be to utilise a different methodological approach and method to answer alternative research questions.

The research is timely and relevant as States continue to utilise force to combat terrorism both domestically and internationally. Responses to terrorism since the events in New York on 11 September 2001 (9/11) have increasingly blurred the boundaries between legal frameworks[20] and seen the diminishing of human rights standards as they apply to suspected terrorists.[21] As this thesis demonstrates, States have consistently stretched the limits of law when confronting perceived terrorist threats without consequence as the judicial mechanisms established to uphold and protect

[18] B. Ibhawoh, 'Stronger than the Maxim Gun Law, Human Rights and British Colonial Hegemony in Nigeria' (2002) 72(1) Journal of the International African Institute 55, 56.
[19] J-M. Barreto, 'Imperialism and Decolonization as Scenarios of Human Rights History' in J'M. Barreto (eds), *Human Rights from a Third World Perspective: critique, history and international law* (Cambridge Scholars Publishing 2013) 142-3. A critique of the Eurocentric perspective is outside the scope of this thesis and does not assist in addressing the research questions.
[20] UNGA, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' (28 May 2010) UN Doc A/HRC/14/24/Add.6 [3].
[21] An example being the legitimisation of the torture of terrorist suspects held in Afghanistan, Guantánamo, and Abu Ghraib by the US government. K.J. Greenberg and J.L. Dratel (eds), *The Torture Papers: the road to Abu Ghraib* (CUP 2005).

human rights by holding States to account appear to fail in this securitised context. The gradual erosion of legal human rights standards, if they ever truly existed, has led to the legitimisation of killing terrorist suspects through an interpretation of HRL provisions to permit, or even in some cases require,[22] the *intentional* deprivation of life of those merely suspected of terrorist involvement.[23]

The contribution to knowledge made by the thesis is primarily through the focus on 'intentionality',[24] which demonstrates that the failure of HRL to protect terrorist suspects is attributable mainly to the interpretation and application of key provisions, rather than to vague drafting. Article 2 ECHR prima facie prohibits any intentional taking of life by the State. However, the explicit moratorium on a State 'intentionally' depriving a person of their life (excepting capital punishment) contained in Article 2(1) appears to have become divorced from the subsequent paragraph. Article 2(2) seems to be viewed more as the criteria a State must satisfy so as to be able to (intentionally) take life without that death being considered a rights violation, rather than as a corollary to the preceding provision.[25] The apparent acceptance that a State can intentionally kill an individual who is merely suspected of terrorism-related activity, based only on the subjective perspective of the relevant State agent at the time, endangers individuals and exposes a fundamental conflict in the centring of State security in the international legal order[26] whilst simultaneously establishing States as the

[22] In a situation of imminent threat 'the ECHR would not only permit but positively require the use of lethal force by the Government.' Joint Committee on Human Rights (JCHR), *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 8. Discussed in Chapter 8: 8.2.1.
[23] Discussed in Chapters 6-8.
[24] Referring to the knowledge of the State agent ordering and/or visiting the violence upon the terrorist suspect. The word 'intention' is given its ordinary meaning of being an aim or desired result of an action. 'Intention' (*Cambridge Dictionary*, 2024) <https://dictionary.cambridge.org/dictionary/english/intention> accessed 16 January 2024.
[25] Discussed in Chapter 6: 6.3.
[26] Discussed in Chapter 4.

primary protector of human rights. Recognising a significant limit and weakness of HRL in the counterterrorism context adds to debates around the value of HRL at a more general level. Only by acknowledging an issue and understanding its cause can it be addressed.

1.2. Concept of Terrorism

As this thesis offers a critique of the ability of HRL to temper the actions of States when combatting what *they* describe as terrorism, there will be no attempt to provide a comprehensive definition beyond the basic 'threat or use of instrumental or coercive violence against civilians.'[27] Although the term has its origins in revolutionary France and Robespierre's use of terror as a means of achieving and maintaining political power,[28] with State mechanisms being employed to further the revolutionary cause and oppress opposition,[29] its use today denotes activities of non-State actors (NSAs).[30]

The lack of a universally agreed definition of 'terrorism' and the overbroad scope of domestic definitions is a perennial issue in counterterrorism,[31] permitting governments to ascribe the label to unwanted behaviour, rather than terrorism, such as policy objections.[32] In a democratic State, expansive laws are undesirable as they grant too much power to individual law enforcement officers and government.[33] For example, the UK's definition[34] includes the intention to 'influence' the government,[35] rather than intention

[27] B. Saul, 'Defining Terrorism: a conceptual minefield' in E. Chenoweth, R. English, A. Gofas, S.N Kalyvas (eds), *The Oxford Handbook of Terrorism* (OUP 2019) 35.
[28] A. Parry, *Terrorism: from Robespierre to Arafat* (Vanguard Press 1976) 39.
[29] P. Griset and S. Mahan, *Terrorism in Perspective* (Sage 2003) 4.
[30] E.g., UN Security Council (UNSC) Res 1373 (28 September 2001) UN Doc S/RES/1373. Prohibiting State involvement in terrorist activities and requiring action to supress terrorism conceptualises terrorists as being separate from States.
[31] See, e.g., H. Duffy, *The "War on Terror" and the Framework of International Law* (2nd edn, CUP 2015) Ch7B.
[32] L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP 2011) 127.
[33] *R v Gul* [2013] UKSC 64 [34].
[34] S.1 Terrorism Act 2000.
[35] S.1(1)(b).

to 'intimidate or coerce'.[36] This has the effect of significantly expanding the scope of UK counterterrorism legislation to potentially include *any* activity aimed at influencing government if it can be articulated as being dangerous to life, public health, or public safety. The legislation was used against a journalist's partner carrying stolen NSA and GCHQ material for the purposes of informing the public of the US and UK's covert surveillance activities, including of citizens.[37] The High Court held that this fell within the definition of the Act, meaning publishing facts and opinions, which many may consider to be in the public interest, can constitute terrorism.[38] Further, the definition also includes the acts of any group fighting to bring down a government, including those supported by the UK Government and those fighting oppression,[39] such as those who fought against Colonial Gaddafi's regime in Libya, the Taliban in Afghanistan, and those fighting against Assad's regime in Syria.

Modern terrorism, as a method employed by NSAs against the State, arguably emerged in the post-WWII period with the increase in anti-colonial and anti-foreign rule movements, such as against the UK in Ireland and Cyprus,[40] and against France in Algeria,[41] and played a significant part in forcing the British to withdraw from Palestine, Cyprus, Aden, and France from Algeria.[42] In the 1960s, philosophies challenging the socio-political

[36] The OHCHR states terrorism involves 'intimidation or coercion' of governments as a *minimum*. OHCHR, 'Terrorism and Violent Extremism' (*UN*, 2023) <https://www.ohchr.org/en/terrorism> accessed 17 May 2023. The UN Special Rapporteur's model definition requires intention to provoke 'a state of terror' or 'compel a government'. UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (22 December 2010) UN Doc A/HRC/16/51 [28].
[37] C. Pitas, 'Partner of Snowden Reporter Challenges British Detention' (*Reuters*, 6 November 2013) <https://www.reuters.com/article/us-britain-security-miranda-idUSBRE9A50QO20131106> accessed 23 December 2022.
[38] *R (Miranda) v SSHD and MPC* [2014] EWHC 255 (Admin) [11], [29], [36].
[39] *R v Gul* [2013] UKSC 64 [28]-[9].
[40] D.C. Rapoport, 'The Four Waves of Modern Terrorism' in A.K. Cronin and J.M. Ludes (eds), *Attacking Terrorism: elements of a grand strategy* (Georgetown University Press 2004) 53.
[41] W. Laqueur, *The New Terrorism: fanaticism and the arms of mass destruction* (OUP 1999) 41.
[42] P. Wilkinson, *Terrorism versus Democracy: the liberal state response* (Taylor Francis 2011) 24.

orthodoxy inspired a new wave of ideologically motivated terrorism, with extreme left-wing groups, such as the Baader Meinhof Group, using terrorist tactics to effect radical socio-political change.[43] Prior to this point, terrorism was largely confined to its locality, focused on specific struggles and engaging actors in that area. However, from the late 1960s, terrorism became international with aircraft hijacking and incidents such as the 1972 Munich Olympics massacre of Israeli athletes,[44] and 1988 Lockerbie bombing.[45] Over 14,000 international terrorist incidents took place between 1968 and 1999.[46]

By the 1990s, the focus of terrorism was to maximise worldwide publicity through the perpetration of high casualty events.[47] Groups utilising theology as their ideological justification[48] also adopted terrorist tactics, resulting in 9/11 in 2001.[49] Since that point, international discourse has evolved to construct international terrorism as *the* threat of the 21st century, endangering not only the socio-political structures of States, but their very existence.[50] According to US President George W. Bush, al-Qaeda aimed to remake the world, 'imposing its radical beliefs on people everywhere.'[51]

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[43] W. Laqueur, *The New Terrorism: fanaticism and the arms of mass destruction* (OUP 1999) 47.
[44] D. Binder, 'The Munich Massacre' *The New York Times* (5 September 1972). <https://archive.nytimes.com/www.nytimes.com/packages/html/sports/year_in_sports/09.05.html> accessed 17 August 2023.
[45] A. Augustyn, 'Pan Am Flight 103' (*Britannica*, 22 May 2018) <https://www.britannica.com/event/Pan-Am-flight-103> accessed 17 August 2023.
[46] FBI, 'Terrorism in the United States 1999' (*US Department of Justice*, 2000) 15 <https://www.ojp.gov/ncjrs/virtual-library/abstracts/terrorism-united-states-1999> accessed 5 June 2021.
[47] Ibid., 37.
[48] See, e.g., Osama bin Laden's fatwa depicting the US as Crusaders occupying Islamic lands and justifying the killing of Americans. O. bin Laden, 'Jihad against Jews and Crusaders' (23 February 1998) <https://irp.fas.org/world/para/docs/980223-fatwa.htm> accessed 17 August 2023.
[49] P.L. Bergen, 'September 11 Attacks' (*Britannica*, 16 August 2023) <https://www.britannica.com/event/September-11-attacks> accessed 17 August 2023.
[50] As reflected in UNSC Resolutions determining that all terrorist acts amount to threats to international peace and security. UNSC Resolutions (*UN*, 2023) <https://www.un.org/securitycouncil/ctc/content/security-council-resolutions> accessed 23 June 2022. For example, UNSC Res 2396 (21 December 2017) UN Doc S/Res/2396 reaffirms 'that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security…'.
[51] J.W. Dietrich, *The George W. Bush Foreign Policy Reader: Presidential speeches with commentary* (Taylor Francis 2005) 51.

Terrorists are inspired by 'an aggressive ideology of world domination' and seek to 'overthrow our civilization' and impose 'on the whole world [their] religion and [their] law.'[52]

Whether Islamic terrorism is driven by a desire to destroy the West, rather than other aims, such as removing Western influence from Islamic states and establishing an Islamic Caliphate in the Middle Eastern region,[53] will not be debated here. The pertinent point is that Western States claim that Islamic terrorism is an existential threat and so act accordingly. Since 9/11, the international community has been fighting the 'global war on terror'[54] (WoT) to rid the world of the most significant risk to international peace and security[55] and defeat the existential threat.[56] Governments and international organisations have utilised 'security' to argue for the inapplicability of HRL in the exceptional terrorist context,[57] alongside an increase in exceptional countermeasures,[58] and State security mechanisms, including resource

[52] D. Frum and R. Perle, *An End to Evil: how to win the war on terror* (Random House 2003) 42-43.
[53] Osama bin Laden's objectives centred on removing Western States from Muslim countries. FBI, 'Terrorism in the United States 1999' (*US Department of Justice*, 2000) 36 <https://www.ojp.gov/ncjrs/virtual-library/abstracts/terrorism-united-states-1999> accessed 5 June 2021; J. Beckman, *Comparative Legal Approaches to Homeland Security and Anti-terrorism* (Ashgate 2007) 10.
[54] Meaning there is a global struggle against terrorist forces seeking to destroy democracy, human rights, and the rule of law. See, e.g., E. Schmitt and T. Shanker, 'US Officials Retool Slogan for Terror War' *The New York Times* (26 July 2005) <https://www.nytimes.com/2005/07/26/politics/us-officials-retool-slogan-for-terror-war.html> accessed 17 August 2023; R. Jackson, 'War on Terrorism: United States History' (*Britannica*, 16 August 2023) <https://www.britannica.com/topic/war-on-terrorism> accessed 17 August 2023; M. Landler, '20 years on, the War on Terror Grinds Along, with no End in Sight' *The New York Times* (26 September 2021) <https://www.nytimes.com/2021/09/10/world/europe/war-on-terror-bush-biden-qaeda.html> accessed 17 August 2023.
[55] See, e.g., UN Secretary-General Ban Ki-moon, 'Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security: a global strategy for fighting terrorism' (10 March 2005) <https://www.un.org/sg/en/latest/sg/statement?nid=1345> accessed 23 March 2019; ET, 'Terrorism biggest threat to democracy: India' *The Economic Times* (13 October 2014) <https://economictimes.indiatimes.com/news/politics-and-nation/terrorism-biggest-threat-to-democracy-india/articleshow/44801716.cms?from=mdr> accessed 23 March 2019.
[56] R. Jackson, L. Jarvis, J. Gunning, and M. Breen-Smyth, *Terrorism: a critical introduction* (Red Globe Press 2011) 71; T. McCrisken, 'Ten Years On: Obama's war on terrorism in rhetoric and practice' (2011) 87(4) International Affairs 781, 786; J. Mueller and M.G. Stewart, 'The Terrorism Delusion: America's overwrought response to September 11' (2012) 37(1) International Security 81.
[57] H. Duffy, *The "War on Terror" and the Framework of International Law* (2nd edn, CUP 2015) 457.
[58] R. Jackson, *Writing the International War on Terrorism: language, politics, and counterterrorism* (MUP 2005) 27.

spending and allocation,[59] to counter the threat. In both the national[60] and international spheres,[61] numerous counterterrorism measures have been implemented to meet new security demands, some of which provide politicians and law enforcement agencies with extraordinary powers.[62]

1.3. Concept of Statehood

International law is predicated on the existence and functioning of independent sovereign States, with international law providing the rules for State interaction and global activity.[63] The concept of a 'State' utilised and evidenced in this thesis originates in the historical, geographical, and socio-political context of Western Europe in the 16th century.[64] Although humans have required inter-community rules to regulate relations between groups since forming political communities, the European State system is at the heart of international law as understood today.[65] Outside of Europe, other peoples operated regional systems of rules that were eventually absorbed by European law, which became the globalised international law.[66]

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[59] E.g., the UK spends more than £2billion on counterterrorism measures. HM Government, 'CONTEST: the United Kingdom's strategy for countering terrorism' (June 2018) Cm 9608 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf> accessed 23 March 2019; in the decade after 9/11, the US spent over $1trillion on domestic homeland security. J. Mueller and M.G. Stewart, 'Balancing the Risks, Benefits, and Costs of Homeland Security' (2011) 7 Homeland Security Affairs 1, 2.

[60] UK legislation includes: Terrorism Act 2000; Anti-terrorism, Crime and Security Act 2001; Criminal Justice Act 2003; Civil Contingencies Act 2004; Terrorism Act 2006; Counterterrorism Act 2008; Terrorism Asset-Freezing, etc. Act 2010; Terrorism Prevention and Investigation Measures Act 2011; Counter-Terrorism and Security Act 2019; Counter-Terrorism and Sentencing Act 2021.

[61] Such as the creation of a sanction regime for designated terrorists. UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267. Creation of the UN Counter-Terrorism Committee in 2001. UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

[62] See, e.g., the UK Civil Contingencies Act 2004 that provides for a Minister to be able to enact emergency regulations, which have the potential power to temporarily override almost all other existing legislation.

[63] M.N. Shaw, *International Law* (6th edn, CUP 2008) 1.

[64] M. Craven and R. Parfitt, 'Statehood, Self-Determination, and Recognition' in M.D. Evans (ed), *International Law* (5th edn, OUP 2018) 188.

[65] A. Clapham, *Brierly's Law of Nations* (7th edn, OUP 2014) 1.

[66] Y. Onuma, *A Transcivilizational Perspective on International Law: questioning prevalent cognitive frameworks in the emerging multi-polar and multi-civilizational world of the twenty-first century* (Brill 2010) Chapter IV.

The use or threat of violence to control public political discourse has arguably existed since humans first created societies. Indeed, the State is in part defined by its monopoly of the legitimate use of force.[67] This monopoly is not over the actual use of force, but over the legitimisation of force – violence utilised by other actors is only legitimate if it proceeds from the authority of the State.[68] Consequently, violence employed by other actors, such as persons labelled terrorist, is considered illegitimate as it is not sanctioned by the State. Whereas State actors are considered 'rational' beings possessing 'self-control, logic, and a sense of responsibility' in the pursuit of a higher goal[69] (the protection of the status quo), terrorists are 'irrational, driven by a deranged mind, and with aims of self-interest or illogical destructiveness.'[70]

1.4. Concept of Human Rights

HRL applies only to States, individuals and groups are bound by all national law applying to the territory in which they reside and international criminal law.[71] Human rights as a concept theoretically prioritises the individual over the State as the international instruments were created to restrict the coercive power of the State in relation to the individual.[72] HRL was needed because, as demonstrated during WWII, States do not always respect individuals and can be prone to abuses of power.[73] Thus, HRL presents a threat and challenge to State power and security, critiquing action,

[67] J. Dreijmanis, G.C. Wells, *Max Weber's Complete writings on Academic and Political Vocations* (Algora Publishing 2007) 127.
[68] Ibid.
[69] G. Wardlaw, *Political Terrorism: theory, tactics, and counter-measures* (2nd edn, CUP 1989) 6.
[70] Ibid, 7.
[71] H. Duffy, *The "War on Terror" and the Framework of International Law* (2nd edn, CUP 2015) 487.
[72] UDHR Preamble.
[73] R.W. Grant and R.O. Keohane, 'Accountability and Abuses of Power in World Politics' 99(1) 2005 The American Political Science Review 29, 35. L. Kemp, 'The "Stomp Reflex": when governments abuse emergency powers' (*BBC Future*, 28 April 2021) <https://www.bbc.com/future/article/20210427-the-stomp-reflex-when-governments-abuse-emergency-powers> accessed 20 August 2023.

particularly in situations of crisis.[74] However (and perhaps consequentially), human rights instruments make a concession to security.[75] This is perhaps (also) based on the (Hobbesian) concept of the natural state being a horrendous condition and that if humankind were not organised into socio-political groups, the world would descend into a brutal and hellish place in which people would continually fight with each other for survival.[76] Thus, terrorism, and any movement that potentially threatens the status quo, needs to be silence and quashed as the State must be maintained.

9/11 was a catastrophic event that caused a significant loss of human life.[77] However, that it constituted a dangerous threat to the universal values of democracy, human rights, and the rule of law,[78] requiring the launching of a continuous global war on a noun, is less certain. It could be argued that as there have been no similar attacks, it was an aberration rather than the harbinger of a new age of extremely destructive terrorism.[79] Nevertheless, national security concerns appear to have been centralised and prioritised over human rights principles,[80] creating a tension between respecting human rights and satisfying perceived security requirements[81] that needs to be confronted by the international community.[82] The modern terrorist is

[74] H. Duffy, *The "War on Terror" and the Framework of International Law* (2nd edn, CUP 2015) 456.
[75] See, e.g., the permitting of restrictions on Articles 6, 8, 10, 11 ECHR 'in the interests of national security.'
[76] T. Hobbes, *Leviathan* (Lerner 2018) ChXIII.
[77] N. Place, 'What Happened on 9/11 and How Many People Were Caught up in the Attacks?' *Independent* (10 September 2022) <https://www.independent.co.uk/news/world/americas/9-11-september-11-what-happened-b2164404.html> accessed 17 August 2023.
[78] E.g., 'terrorism … [is] aimed at the destruction of human rights, fundamental freedoms and democracy…' UN Global Counterterrorism Strategy UNGA Res 60/288 (20 September 2006) UN Doc A/RES/60/288.
[79] J. Mueller, 'Harbinger or Aberration? A 9/11 provocation' (2002) National Interest 45.
[80] E.g., The defence of the nation 'against its enemies is the first and fundamental commitment of the Federal Government.' Logically, this subordinates all other commitments, including human rights, to the needs and demands of national security. White House, 'National Security Strategy of the United States of America' (*White House*, 2002) <www.state.gov/documents/organization/63562.pdf> accessed 12 September 2020.
[81] N.D. White, 'The United Nations and Counterterrorism' in A.M. Salinas de Frías, K.H.L. Samuel and N.D. White (eds), *Counterterrorism: international law and practice* (OUP 2012) 56.
[82] A. Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 EJIL 993, 998.

presented as irrational and unreasonable,[83] posing such a substantial level of threat that they need and deserve to be robustly confronted and stripped of some, or all, of their rights,[84] even at the expense of human rights principles. Thus, those perceived to be on the 'wrong' side of the argument become less safe, undermining their human dignity.

In the years since the signing of the UDHR, previously inviolable principles of the inalienability of human rights and primacy of human dignity have been sidestepped or eroded in the fight against terrorism.[85] Counterterrorism has not replaced HRL, yet often undermines rights protections in practice.[86] Permitting States to intentionally deprive a terrorist suspect of their right to life centres imminence as the primary constraint against a use of deliberately lethal force. Where an individual is not presenting an imminent threat, there is no justification under HRL to deprive them of their life as it is not 'strictly necessary'.[87] However, States have interpreted this concept broadly to include targeted killings in non-armed conflict situations and anticipatory uses of force.[88] Combined with the law enforcement approach that favours a non-graduated recourse to lethal force in a counterterrorism context,[89] the safeguards protecting individuals from State force are removed. Pursuing a security strategy that places the universal respect for human rights at its centre is arguably a more productive approach that would lead to an

[83] E. Pronin, K. Kennedy, and Sarah Butsch, 'Bombing Versus Negotiating: how preferences for combating terrorism are affected by perceived terrorist rationality' (2006) 28(4) Basic and Applied Social Psychology 385, 386.
[84] A.K. Newheiser and T.C. DeMarco, 'Who Deserves Basic Rights? People condone violations of procedural and physical rights in the treatment of terrorist suspects' (2018) 42(1) Law and Human Behaviour 50; E. Gross, 'Trying Terrorists – Justification for Differing Trial Rules: the balance between security considerations and human rights' (2002) 13(1) Indiana International and Comparative Law Review 777.
[85] C. Gearty, *Civil Liberties* (OUP 2007) 49-58.
[86] L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP 2011) 128.
[87] ESC, 'Extrajudicial, Summary or Arbitrary Executions Report of the Special Rapporteur, Philip Alston' (8 March 2006) UN Doc E/CN.4/2006/53 [48].
[88] UNGA, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' (28 May 2010) UN Doc A/HRC/14/24/Add.6 [45]. Discussed in Chapter 4: 4.4.
[89] ESC, 'Extrajudicial, Summary or Arbitrary Executions Report of the Special Rapporteur, Philip Alston' (8 March 2006) UN Doc E/CN.4/2006/53 [49].

achievable level of peace and security,[90] without the sacrifice of the principles and values the security measures purport to protect. The universality of human rights and the applicability of human right safeguards to all, including terrorist suspects and regardless of their perceived or actual guilt, are at the heart of the thesis. By creating what is, in effect, a two-tiered human rights system, the current articulation of counterterrorism measures and approaches leaves each individual less safe.

1.5. Thesis Structure

Due to the killing of terrorist suspects in a counterterrorism context and the language utilised by State actors around the intentional use of lethal force, despite the provisions of Article 2 ECHR, this research explores whether State responses to terrorism undermine the principle of human dignity and right to life of terrorist suspects. The labelling of individual humans as terrorist threats[91] enables the violation of their right to life through the adoption of what appears to be a more utilitarian approach to security,[92] rather than adhering to the deontological principles from which human rights instruments draw.[93]

The concession to State security at the heart of HRL, and absence of any coercive power residing in human rights bodies, limits the effectiveness of HRL to protect persons considered unworthy of consideration. Law has been used to legitimise political responses to the perceived threat of terrorism and, instead of limiting public powers, law has facilitated their expansion and use. This is demonstrated in the three case studies. The response of the

[90] W.W. Burke-White, 'Human Rights and National Security: the Strategic Correlation' (2004) 17 Harvard Human Rights Law Journal 249, 253.
[91] Chapter 4: 4.3.1.2; Chapter 7: 7.3.1; Chapter 8: 8.4.3.
[92] The ends justify the means. M. Prabhakar, 'Do Ends Justify the Means? Understanding the utilitarian response' (2022) 1(1) Vidya-A Journal 77, 78.
[93] Humans are ends in themselves. O. O'Neill, 'Universal Laws and Ends-In-Themselves' (1989) 72(3) The Monist 341, 343.

international community to the Lockerbie incident, particularly the UNSC Resolutions driven by the UK and US, shows a use of law and international institutions to further political ends. In the case of terrorism at least, law follows, rather than regulates, power.

To examine whether the human rights legal framework provides adequate protection to the human dignity and right to life of those individuals suspected of terrorist involvement, the thesis is organised in two halves. The first considers the concepts of and legal frameworks around human dignity and human rights, and Statehood and security. The second builds on this theoretical foundation and utilises the legal principles in an analysis of three extrajudicial killings examples.

Following the outlining of the key themes, structure, and research question in this Chapter, Chapter 2 provides a discussion of the methods utilised in the conducting of this research project. The central research method employed is doctrinal, with elements of interdisciplinary and socio-legal approaches. The methodology is outlined, and the commentary provides a discussion on how the methods assisted in answering the research question.

To assess whether modern HRL adequately protects the right to life of individuals suspected of terrorism from the coercive power of the State within a counterterrorism context, the thesis first examines the stated purpose of HRL and articulation of the right to life in key human rights instruments. Chapter 3 considers the fundamental principle of human dignity underpinning and justifying the universality and inviolability of HRL. The concept is expressed in most human rights instruments as a legitimising and persuasive factor and HRL aims to recognise and protect all humans' inherent dignity through the articulation of specific rights.

To understand the concession to State security within HRL, Chapter 4 considers origins and concepts of Statehood that inform current discourse, national law, and international structures, including the centrality of States in international law. It also reflects on the meaning of State security and its use in constructing a narrative legitimising State use of coercive and punitive force in the protection of the State and State structures.

The thesis then moves from the general conceptual approach to focus on specific events in the history of international terrorism to understand how the law operates in practice. Chapter 5 examines the Montreal Convention and State reaction to the Lockerbie bombing as a pivotal moment in the international response to terrorism, demonstrating the ability of certain States to fundamentally alter international practice. This facilitates the consideration of the practical realities of the law and its use in the context of counterterrorism, which is continued in the following chapters.

Chapters 6, 7, and 8 narrow the focus further through three case studies involving the killing of individual terrorist suspects, respectively, the extra-judicial killings of IRA terrorists in Gibraltar in 1988, Jean Charles Menezes in 2005, and Reyaad Khan in 2015. In this context, the escalation of State responses to terrorism, the individualising of terrorist threats, and the subordination of HRL through arguments justifying the prioritisation of security over the right to life of individual terrorist suspects, demonstrates the inability of HRL to recognise and protect the inherent dignity and right to life of those persons in the counterterrorism context. HRL cannot achieve its aim of protecting individuals from the coercive power of the State if it also permits States to categorise a person or group as a threat to security and then deprive them of their life. The examination of the law in practice

facilitates a critique that has real-world relevance as it reveals the fundamental flaw in the current articulation and application of HRL, which exposes all individuals to the danger that should they be categorised as a threat, their right to life may not be upheld by the State.

The thesis concludes in Chapter 9: Conclusion that due to the functional articulation of human dignity, rather than it being valued in its own right, and the consequent prioritisation of State security as the primary value, the individual human person does not count in the fight against terrorism and is instead subordinated to the overriding needs of the State in the face of perceived security threats. Thus, it is argued that whilst the securitisation of terrorism *may* have resulted in a potential increase in State security, it comes at the cost of a reduction in safety for the individual.

Chapter 2: Methodology

2.1. Introduction

Reflecting the needs of the international community at the time, HRL developed post-WWII in response to the actions of the racist, nationalist ideology of Nazi Germany[94] and Fascist Italy that had led to international conflict and the deliberate, methodical murdering of millions of people.[95] However, as demonstrated by the Charter of the United Nations (UNC),[96] which contains a discretionary security order,[97] the modern international community was constructed with the primary aim of securing international peace and security. Consequently, in drafting the UDHR and subsequent human rights instruments, State security and the maintenance of international peace and security were centralised.[98] In the intervening decades, terrorism has moved to the fore as a primary security focus of States and the international community, accelerated by 9/11, and is now articulated as presenting an existential threat to States, capable of destroying 'our society',[99] and a threat to international peace and security.[100]

With the individualisation of the terrorist threat and the concurrent use of military tactics to counter criminal activities, the ability of HRL to protect individual terrorist suspects from the use of deliberately lethal State force is brought into question. As the categorisation of a person as a threat is a

[94] D. Zane, 'Being Black in Nazi German' *BBC News* (22 May 2019) <https://www.bbc.co.uk/news/world-africa-48273570> accessed 16 August 2023.
[95] S. Eislund, 'Why Did World War Two Happen? How the Fascists Hitler, Mussolini, and Horthy led to the outbreak of World War Two' (*History Is Now*, 7 July 2019) <http://www.historyisnowmagazine.com/blog/2019/6/30/why-did-world-war-two-happen-how-the-fascists-hitler-mussolini-and-horthy-led-to-the-outbreak-of-world-war-two> accessed 16 August 2023.
[96] UN, 'Charter of the United Nations' (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UNC).
[97] Under Chapter VII UNC the UNSC has the power to take coercive measures to address perceived threats to international peace and security.
[98] Discussed in Chapters 3 and 4.
[99] J.S. Goldstein, *The Real Price of War: how you pay for the war on terror* (NYUP 2004) 179; See generally, M. Ignatieff, *The Lesser Evil: political ethics in an age of terror* (PUP 2004).
[100] See, e.g., 'Terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security.' UNSC, 'Presidential Statement' (15 December 2022) UN Doc S/PRST/2022/7.

matter of definition, delineated by the State, the capability of HRL to protect those currently viewed as being on the outside of society speaks directly to its effectiveness as a mechanism to restrict State violence and to protect the citizenry more generally. Accordingly, this thesis asks whether the current human rights legal framework adequately protects individual terror suspects' right to life in the context of State counterterrorism actions. This Chapter outlines the methodology employed to answer this question. The term 'methodology' is used to denote the theoretical choices made regarding the field of study[101] and the process applied.[102]

It is important to recognise that international law is multi-faceted with various influences, such as international politics and economics, and approaches, such as international relations theories, utilised within the field.[103] It is also essential for international legal researchers to acknowledge and address pre-existing conceptions, assumptions, and influences informing their work. The doctrinal study of law 'has always been infused with intellectual presumptions and assumptions that have dominated the doctrinal argument,' despite being concealed by the doctrinal argument,[104] and an honest examination of the influences is necessary for accountability and academic rigor. Therefore, after providing the research questions, this Chapter continues by outlining the philosophical perspectives of the author that inevitably inform the research,[105] before providing a discussion of the methodological choices made and methods used.

[101] T. Hervey, R. Cryer, B. Sokhi-Bulley, and A. Bohm, *Research Methodologies in EU and International Law* (Hart 2011).
[102] E. Fisher, B. Lange, E. Scotford, and C. Carlarne, 'Maturity and Methodology: starting a debate about environmental law scholarship' (2009) 21 Journal of Environmental Law 213, 215.
[103] S. Ratner and A. Slaughter, 'Appraising the Methods of International Law: a prospectus for readers' 93 AJIL (1999) 291, 291.
[104] A. Bradney, 'Law as a Parasitic Discipline' (1998) 25 Journal of Law and Society 71, 72.
[105] D. Watkins and M. Burton, 'Introduction' in D. Watkins and M. Burton (eds), *Research Methods in Law* (Routledge 2013) 2.

2.2. Research Questions

The central research question of this thesis is whether modern HRL protects the right to life of individuals identified as terrorist suspects from the coercive power of the State in the counterterrorism context (as opposed to armed conflict). To answer this question, the doctrinal research addresses four subsidiary questions:

1. What is the central justification for HRL? This involves an examination of the relevant legal instruments and the identification of human dignity as a key foundational principle, utilising doctrinal methods.[106] However, it also reveals that State security is central in the articulation of HRL.
2. What is the State and why does it need to be secure? The aim is not to provide a detailed history of the development of States or an exposition of security as a concept, but to broadly understand the concepts of Statehood, security, and the concession within HRL[107] to facilitate the analysis and understanding of the operation of HRL.
3. How have States responded to terrorism? This question enables a shift in focus and bridges the gap between the general conceptual approach and the later specific focus of the case studies. An example of a significant event in the history of international terrorism, involving the UK, enables an assessment of how States have utilised the law in addressing what was viewed as a security threat.[108]
4. In what way do security and HRL interact and impact an individual terrorist suspect's right to life within a counterterrorism context? This utilises the previous analysis and applies it to specific incidents involving the right to life of suspected terrorists to assess the

[106] Chapter 3.
[107] Chapter 4.
[108] Chapter 5.

effectiveness of HRL in this situation and identify issues of more general application and relevance to HRL and other individuals.[109]

2.3. Researcher Perspectives

It is taken as the basic premise that something called 'law' exists and that this can compel humans to act or refrain from acting.[110] From an ontological perspective, the overall approach here is broadly positivist in terms that 'law' is considered to be created by, and is the decrees of, humans and there is not a necessary relationship between law and morality.[111] Meaning, morality is not considered to be essential to legality.[112] There are no operating preconceptions regarding where the law is from or whether it has, or should have, a moral and ethical dimension.[113]

A positive perspective examines legal rules sans moral/ethical analysis[114] and holds States are, theoretically, only bound by what they have given consent to.[115] The naturalist conception of laws existing in a state of nature is rejected here. Therefore, the thesis does not examine *why* the law exists, seeking a deeper philosophical motivation, nor is it concerned with what *ought* to be, for example, through utilising a critical perspective, such as feminism, Marxism, or post-colonialism. Instead, it seeks to examine HRL on its own terms by establishing what *is* and how this law operates in the context of counterterrorism against an individual terrorist suspect. Broader observations are then made based on what is and what has occurred.

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[109] Chapters 6, 7 and 8.
[110] F. Schauer, *The Force of Law* (HUP 2014) 1; I. Jenkins, *Social Order and the Limits of Law: a theoretical essay* (PUP 1980) 10.
[111] H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593, 601.
[112] C.f., L.L. Fuller, 'Positivism and Fidelity to Law: a reply to Professor Hart' (1958) 71 HLR 630, 632.
[113] Cf., e.g., T. Angier, *Natural Law Theory* (CUP 2021) Ch.1.
[114] H. McCoubrey and N.D. White, *Textbook on Jurisprudence* (2nd edn, Blackstone's 1996) 11.
[115] M.N. Shaw, *International Law* (6th edn, CUP 2008) 9-11.

However, the context of the law is not ignored as it cannot be isolated from the social world. As a human construction[116] and reflection of the society it governs, albeit not a complete mirroring,[117] law is subject to change as the needs of the society it governs evolve.[118] The 'law is a presence of the social past… an organizing of the social presence' and 'a conditioning of the social future.'[119] Thus, the context within which the law operates influences its creation, application, and effectiveness. The law may be a closed system[120] in the sense that the relevant legal rules are determinable,[121] but the application of the law is not considered formulaic and independent of the socio-legal context, meaning judgments can be critiqued.[122]

More broadly, the general epistemological perspective can be described as a combination of: postmodernism, meaning that reality and 'truth' is not viewed as objective but rather constructed, and the Enlightenment concept of a natural human progression[123] is rejected;[124] subtle realism, to the extent that it is believed there are not multiple realities[125] and that knowledge of the socio-political reality in which humans operate is knowable; and constructivism, denoting the view that knowledge is constructed through the responses and interpretations of each individual[126] and the sociological

[116] J.R. Searle, *The Construction of Social Reality* (Free Press 1995) 117-9.
[117] See, e.g, B.Z. Tamanaha, *A General Jurisprudence of Law and Society* (OUP 2001) Ch3.
[118] R.A. Posner, 'Security versus Civil Liberties' (2001) 288(5) The Atlantic Monthly 46.
[119] P. Allott, 'The Concept of International Law' in M. Byers (ed), *The Role of Law in International Politics: essays in International Relations and International Law* (OUP 2000) 68.
[120] H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593, 602.
[121] B. Leiter, 'Is There an "American" Jurisprudence?' (1997) 17(2) Oxford Journal of Legal Studies 367, 373.
[122] R.A. Posner, *How Judges Think* (HUP 2008) 41.
[123] Such as Fukuyama's contention that history is an evolutionary process and liberal democracy is the natural end point. F.Y. Fukuyama, *The End of History and the Last Man* (Free Press 1992).
[124] B. Duignan, 'Postmodernism' (*Britannica*, 31 March 2023) <https://www.britannica.com/topic/postmodernism-philosophy> accessed 4 April 2023.
[125] In contrast to relativist approaches. M. Baghramian, and J.A. Carter, 'Relativism' (*Stanford Encyclopedia of Philosophy*, 21 March 2022) <https://plato.stanford.edu/entries/relativism/> accessed 4 April 2023.
[126] M. Hammersley, *What's Wrong with Ethnography?* (Routledge 1992); J.R. Searle, *The Construction of Social Reality* (Free Press 1995) Ch3.

context is relevant.[127] As posited by Van Hoecke, 'there is no "objective" reality outside the constructions of legal doctrine' and legal scholars occupy normative positions, furthering a distinction between values and demonstrating subjectivity.[128]

2.4. Doctrinal Methodology

Law can be viewed as a body of rules, as a set of dynamic processes, or it can be asked, what is the law? Or what is it for (if it can be *for* anything)?[129] The overarching research question seeks to understand how the normative standards of HRL operate in the precise situation of a perceived threat to State security and the impact of the security exemption on HRL provisions. The case studies enable the analysis of the legal rules in context. Consequently, this is a legal normative thesis, and the methodology is the study and consideration of the law and jurisprudence. The perspective is legal, and the research displays skills and knowledge of the law. Hence, this thesis employs a doctrinal methodology to measure the extent to which HRL (the applicable rules) protects the right to life of terrorist suspects in the counterterrorism context.

Although traditionally more intuitively understood than coherently expressed,[130] doctrinal research methodology can be defined as: 'a detailed and highly technical commentary upon, and systematic exposition of, the context of legal doctrine;'[131] the establishment of 'legal "doctrines" through

[127] J.V. Wertsch, *Vygotsky and the Social Formation of Mind* (HUP 1985) Ch3.
[128] M. Van Hoecke, 'Legal Doctrine: which method(s) for what kind of discipline?' in M. Van Hoecke (ed), *Methodologies of Legal Research: which kind of method for what kind of discipline?* (Hart 2011) 18.
[129] A. Slaughter and S.R. Ratner, 'The Method is the Message' (1999) 93(2) AJIL 410, 412.
[130] S. Egan, 'The Doctrinal Approach in International Human Rights Scholarship' (2017) UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No.19/17 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082194> accessed 4 April 2022.
[131] M. Salter and J. Mason, *Writing Law Dissertations: an introduction and guide to the conduct of legal research* (Pearson 2007) 31.

the analysis of legal rules;'[132] and identification of the law from amongst the mass of 'rules, legislation, case law and… scholarly materials' applicable to the issue under examination,[133] by adopting an analytical, as opposed to a data collection, approach.[134]

Historically the dominant form of legal research, doctrinal legal method utilises a rules-based approach when examining and analysing the law[135] and considers the relevant legal rules and principles without imposing external moral or ethical concepts in the analysis. [136] As already acknowledged, there is no application of an explicit theoretical perspective and so, although there is an inevitable implicit theoretical perspective that has driven the choice of doctrinal methodology,[137] the research is not taking a law and theory approach. Rather, the subject of HRL is approached as an open-ended line of enquiry as the objective is to evaluate the human rights and security relationship on its own terms, i.e., whether HRL can temper the activities of the State in a security (counterterrorism) context. Adopting a doctrinal methodological approach does not exclude reference to external factors to assist in the interpretation of the normative sources alongside the pursuit of answers that cohere with the relevant body of rules. [138] Consequently, although the methodology is doctrinal, approaches from other disciplines are utilised as both internal and external method are valid and

[132] P. Chynoweth, 'Legal Research' in A. Knight and L. Ruddock (eds) *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 29.
[133] S. Egan, 'The Doctrinal Approach in International Human Rights Scholarship' (2017) UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No.19/17 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082194> accessed 4 April 2022.
[134] P. Chynoweth, 'Legal Research' in A. Knight and L. Ruddock (eds) *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 37.
[135] R. Banakar, and. M Travers (eds), *Theory and Method in Socio-Legal Research* (Hart 2005) 7.
[136] J. Penner and E. Melissaris, *McCoubrey and White's Textbook on Jurisprudence* (5th edn, OUP 2012) Ch3.
[137] R. Banakar, and. M Travers (eds), *Theory and Method in Socio-Legal Research* (Hart 2005) 19.
[138] P. Chynoweth, 'Legal Research' in A. Knight and L. Ruddock (eds) *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 30.

have a part to play within legal scholarship.[139] An outline of and justification for the methods employed is outlined below.

2.5. Methods

'Methods are merely tools'[140] and each research enterprise must discover and/or develop those methods most appropriate to the questions being asked.[141]

As a liberal State with a history of counterterrorism,[142] and being the State respondent in the first substantive European Court of Human Rights (ECtHR) case addressing the right to life provided in Article 2 ECHR,[143] the thesis centres on the UK with reference to the international context. The primary authorities for international law are treaties, customary international law, and the decisions of international courts.[144] Thus, the relevant data set for this research will be international human rights treaties, UNSC Resolutions and relevant case law. UK domestic legislation, case law, and policy is also utilised in the analysis where relevant to the application of HRL, such as in the ECtHR judgments on the right to life,[145] or to the implementation of international law.[146]

2.5.1. Doctrinal Method

Acceptance of the validity of the relevant legal rules is the 'touchstone of internal method' and law is 'essentially an argument about the content and

[139] R.L. Schwarz, 'Internal and External Method in the Study of Law' (1992) 11(3) Law and Philosophy 179.
[140] K. Charmaz, *Constructing Grounded Theory: a practical guide through qualitative analysis* (Sage 2006) 15.
[141] E. Fisher, B. Lange, E. Scotford, and C. Carlarne, 'Maturity and Methodology: starting a debate about environmental law scholarship' (2009) 21 Journal of Environmental Law 213, 227.
[142] Discussed in relation to Northern Ireland in Chapter 6.
[143] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995).
[144] Article 38(1) Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993.
[145] See Chapter 6.
[146] See Chapter 8.

application of these rules.'[147] As a method, the legal rules relating to the human right to life, as provided in relevant primary legislative sources, are analysed to describe the law and facilitate a critical, qualitative analysis of its application[148] in caselaw and the context of the three case studies in Chapters 6, 7, and 8. Statements and decisions made throughout the thesis regarding what the law is are based on primary authorities.[149] Due to the UK's 'multi-layered constitution,'[150] the consideration of HRL within the domestic sphere involves the use of European and international instruments and caselaw, alongside domestic legislation and court judgments.

HRL is examined on its own terms, identifying the central justification contained within the legal instruments for its articulation, and the resulting legal provisions evaluated according to its effectiveness in satisfying its stated aim. The researcher has the internal point of view[151] and utilises the legal rules and principles that exist within the system being examined. The judgments and legal decisions are then evaluated according to those identified internal standards.

2.5.2. Socio-Legal Method

Generally, the boundary between internal and external method is blurred in the everyday view of law, and legal scholarship tends to 'represent a multi-layered composite of the two.'[152] The interpretation of normative sources can be assisted through an understanding of the historical and social context.[153]

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[147] R.L. Schwarz, 'Internal and External Method in the Study of Law' (1992) 11(3) Law and Philosophy 179, 183.
[148] T. Hutchinson, 'The Doctrinal Method: incorporating interdisciplinary methods in reforming the law' (2015) 8 Erasmus Law Review 130, 132.
[149] M. McConville and W.H. Chui, *Research Methods for Law* (EUP 2007) 23.
[150] N. Bamforth and P. Leyland, *Public Law in a Multi-Layered Constitution* (Hart 2003) 1 (emphasis omitted).
[151] H.L.A. Hart, *The Concept of Law* (3rd edn, OUP 2012) 88-91.
[152] R.L. Schwarz, 'Internal and External Method in the Study of Law' (1992) 11(3) Law and Philosophy 179, 194-5.
[153] P. Chynoweth, 'Legal Research' in A. Knight and L. Ruddock (eds) *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 30.

Consequently, and in line with the Researcher Perspectives outlined above, the law is viewed as an adaptable and flexible part of the wider social, economic, and political structures in which it operates.[154] Although often conceptually limited to empirical research and studies,[155] the socio-legal method enables the development of a theory of law that accounts for legal pluralism[156] and answers the 'law in context' or 'law in action' questions[157] contained within the thesis. This approach becomes most relevant in the latter part of the thesis when the law in practice is examined through the case studies of extra-judicial killings and the relationships between the law, political speech, and individuals in the counterterrorism context are studied.

The thesis moves beyond the examination of human behaviour in a purely legal context. Here, the external view of the law is taken, as opposed to the internal view of the doctrinal element, and the now widely accepted view that sociological inquiry has an important role to play in illuminating those social, political and/or historical processes that shape legal doctrine[158] is acknowledged. As Lauterpacht asserted, the human individual is the foundational unit of law and so the protection of the human is the fundamental purpose of the law.[159] Thus, it is logical to examine the law as it relates to the individual in their social context. This is especially pertinent for this study as the law being examined has the stated aim of providing security to the State and to the individual.

[154] R. Banakar, and. M Travers (eds), *Theory and Method in Socio-Legal Research* (Hart 2005) xi.
[155] F. Cownie, *Legal Academics, Culture and Identities* (Hart 2004) 57.
[156] R. Cotterrell, 'Subverting Orthodoxy, Making Law Central: a view of sociological studies' (2002) 29 Journal of Law and Society 632, 642.
[157] M. Salter and J. Mason, *Writing Law Dissertations: an introduction and guide to the conduct of legal research* (Pearson 2007) 150-3.
[158] R. Cotterrell, 'Why Must Legal Ideas be Interpreted Sociologically?' (1998) 25 Journal of Law and Society 171, 173.
[159] H. Lauterpacht, *International Law and Human Rights* (Stevens & Sons 1950) 61-2.

The social-legal element of this research is present in the approach as opposed to the use of empirical data. Qualitative research focuses on the words of the subject, as opposed to quantification,[160] to uncover what the subjects know, what they do, how they think/feel about it,[161] and to encourage the participants to reflect on the context and circumstances surrounding an event.[162] Although considered, this research does not conduct interviews with legal or political practitioners for two pragmatic reasons. Firstly, although candid interviews with members of the security, legal, and political communities would provide useful context and insight into the world behind the international instruments and press releases, it is highly unlikely that the relevant people would be accessible. Secondly, it is even less likely that, should they be accessible, they would reveal anything other than what is already in the public domain. Consequently, the interviews would be constrained by the desire of the participants to demonstrate their competence[163] and also the narrow, and potentially distorted, perspective of the participants.[164] Additionally, the legal instruments and State practice is the end result of international politics and history, and it is this in reality that has the impact on the lives of individuals and the preservation of human rights. Consequently, the thesis remains doctrinal and centred in the reading and interpretation of legal and other texts.

2.5.3. Interdisciplinary Method

No universally accepted definition of interdisciplinarity exists,[165] but the basic precept can be established as a combination of two or more different

[160] A. Bryman, *Social Research Methods* (3rd edn, OUP 2008) 366.
[161] C. Robson, *Real World Research: a resource for social scientists and practitioner-researchers* (Blackwell 1993) 228.
[162] A. Bryman, *Social Research Methods* (3rd edn, OUP 2008) 388.
[163] G. Miller and R. Dingwall (eds), *Context and Method in Qualitative Research* (Sage 1997) 59.
[164] M.W. Bauer and G. Gaskell (eds), *Qualitative Researching with Text, Image and Sound: a practical handbook* (Sage 2000) 44.
[165] D.W. Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31(2) Journal of Law and Society 163, 164.

disciplinary perspectives within one approach in order to 'transcend some of the theoretical and methodological limitations of the disciplines in question and create a basis for developing a new form of analysis.'[166] International law may be described as a collection of professional disciplines in which projects are pursued in diverse institutional, political, and national settings.[167] As the research is firmly rooted in the law as it is, it is unnecessary to utilise a different methodological framework. Thus, this thesis cannot be said to be truly interdisciplinary as it will not borrow methodologies from other disciplines.

However, insights obtained from other disciplinary methods, such as the use of the Copenhagen School approach to 'securitisation' from the field of International Relations[168] and 'othering' from social theory,[169] assist in the analysis and supplement the underlying doctrinal approach. For example, although there is no empirical element to the research, the speech acts of Government representatives and State agents made in the context of HRL and counterterrorism are utilised to facilitate an understanding of both the context within which HRL operates and the justifications provided for its (non)application in the events studied. The concept of security is often cited as a purely political concept, prominent in international relations and ignored by international law,[170] making the use of resources from the schools of politics, international relations, philosophy, and history more than appropriate for this project.

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[166] R. Banakar, and. M Travers (eds), *Theory and Method in Socio-Legal Research* (Hart 2005) 5.
[167] D. Kennedy, 'The Disciplines of International Law and Policy' (1999) 12 Leiden Journal of IL 9, 83.
[168] The seminal text of the Copenhagen School is, B. Buzan, O. Wæver, and J. de Wilde, *Security: a new framework of analysis* (Lynne Reinner 1998).
[169] See, e.g., E.W. Said, *Orientalism: Western conceptions of the orient* (Penguin 1991); A.L. Macfie, *Orientalism* (Taylor-Francis 2002).
[170] B. Buzan, *People, States and Fear: an agenda for international security studies in the post-cold war era* (Harvester 1991) 12.

2.6. Conclusion

This research project adopts an essentially doctrinal methodological approach as it seeks to identify provisions of HRL on the right to life and the presence of the concept of State security in those instruments. However, the political and historical context of its creation, the philosophical context of its foundational principles, and the practical context of counterterrorism are utilised to examine the success of HRL in achieving its aim of protecting the individual human when that person has been categorised as a threat to State security. As the conclusions are rooted in the law and its context, broader observations of the effectiveness of HRL in moderating the coercive power of the State can be made.

Chapter 3: Human Dignity and Human Rights

3.1. Introduction

This chapter does not aim to answer the question, 'what is human dignity?' or to examine the multitude of philosophical, theological, sociological, and political responses that have been formulated over the centuries.[171] Similarly, it will not address the question, 'why only human dignity?' or examine any of the propositions arguing for the (equal) rights of other animals.[172] These questions, though undoubtedly extremely interesting, are outside the scope of this thesis. Rather, the focus here is on human dignity as the central justification for HRL, addressing the first subsidiary research question,[173] through an examination of the relevant legal instruments utilising doctrinal methods. The concern here is not with the content of the concept of human dignity, but with its instrumental value, as articulated through the various human rights instruments, as the meta concept and unifying feature of HRL. In other words, this Chapter is concerned with the second order question of the articulation of human dignity in human rights instruments and examining the coherence of HRL as a method of protecting human dignity on its own terms, rather than with the first order question of deconstructing the concept of human dignity to identify a meaning or content through various methodologies and the imposition of a particular theoretical approach.

In this respect, the approach taken is broadly positivist as the Chapter is concerned with lex lata as opposed to lex ferenda. The Chapter identifies and discusses the principle of human dignity expressed in key human rights

[171] See, e.g., I. Kant, *Groundwork for the Metaphysics of Morals* (A.J. Wood (ed), YUP 2002); C. McCrudden, *Understanding Human Dignity* (British Academy/OUP 2013).
[172] See, e.g., UNESCO, 'Universal Declaration of Animal Rights' (proclaimed 15 October 1978) <https://constitutii.files.wordpress.com/2016/06/file-id-607.pdf> accessed 20 August 2022; C. Wellman, *The Proliferation of Rights: moral progress or empty rhetoric?* (Westview Press 1999) Ch5.
[173] Chapter 2: 2.2.

instruments as the central justification for the universal application and legitimacy of HRL, which are constructed with the aim of protecting human dignity. It considers the articulation of respect for human dignity as being functional, rather than being valued for its own sake, and a means by which international peace and security is to be maintained, noting the subsequent apparent subordination of the scope of HRL, which is also functional as its purpose is to protect human dignity, to State security concerns. Understanding how HRL is justified and what it aims to achieve assists in the critique of its effectiveness in the context of State counterterrorism activity. As outlined in the Introduction, a predominantly Western perspective is adopted, and materials utilised. This Chapter and the next provide the basis for the detailed analysis in the Case Studies, which apply and evaluate HRL in practice and in the context of the UK's definition and understanding of terrorism and security.[174]

In accordance with the methodology and methods outlined in Chapter 2, the Chapter commences with a brief overview of the development of the concept of human dignity utilised in the drafting of the UDHR. This is followed in Section 3.3 by an outline of the historical and political context that led to the articulation of human dignity in the UDHR and later legal instruments. Section 3.4 begins the examination of human rights legal instruments expressing the existence of human dignity as a foundation for the rights contained therein. The analysis continues in Section 3.5 with a consideration of the functional character of human dignity expressed in the normative sources as a method of securing international peace and security (this theme is returned to in Chapter 4) and protecting human dignity.

[174] See Chapters 6-8.

The Chapter demonstrates that normative sources of human rights articulate human dignity as both pre-existing and deserving of protection through the provision of legal human rights instruments. It also shows that whilst the fundamental nature of human dignity is acknowledged, the sources place it in a functional relationship with security – it is recognised and protected to prevent conflict. This is evidenced in the provisions of the human rights instruments themselves. For narrative purposes, and to avoid repetition, specific details of the legal provisions relating to the protection of the right to life and their application are utilised in the analysis contained within the Case Study Chapters 6-8.

3.2. The Concept of Human Dignity

The idea of humans possessing a special quality, apart from all other animal species, has existed in some form or another for centuries.[175] This central concept at the heart of human rights can be traced back to natural law theory and Judeo-Christian theology.[176] However, the first use of 'dignity of man' was not rooted in religious or theological concepts but in Greek philosophy, which was then translated into Latin by Roman noblemen.[177] Early Roman articulations of 'dignitas hominis' referred not to the inherent dignity of humankind, but to the concept of 'status',[178] it was the external manifestation of the socio-political role a person occupied, not their internal human nature, that commanded respect.[179] Within Romanic legal systems, dignity was conceptualised as being the rights attached to personality and

[175] S.E. Boslaugh, 'Anthropocentrism' (*Britannica*, 28 October 2013) <https://www.britannica.com/topic/anthropocentrism> accessed 22 April 2022.
[176] L. Kolakowski, *Modernity on Endless Trial* (Chicago University Press 1990) 214.
[177] H. Cancik, '"Dignity of Man" and "*Persona*" in Stoic Anthropology: some remarks on Cicero, De Officiis I 105-107' in D. Kretzmer and E. Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002).
[178] C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) EJIL 655, 656.
[179] H. Cancik, '"Dignity of Man" and "*Persona*" in Stoic Anthropology: some remarks on Cicero, De Officiis I 105-107' in D. Kretzmer and E. Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002) 19.

status, with associated civil and criminal remedies for its infringement.[180] Internationally, the concept referred to all elements and members of the Roman State and to diminish this collective dignity (statehood) was a serious crime.[181]

Cicero defined dignity as 'someone's virtuous authority which makes him worthy to be honoured with regard and respect'[182] and held that human dignity derives from human nature, being endowed by Nature with reason, moral choices, and individuality.[183] Thus, the idea that humans have a special status distinct from other animals began to be articulated – humans have a positive worth owing to their humanness.[184] During the Middle Ages, the concept of 'dignitas', as applied to individuals, began to be used to articulate the distinction between humans and other animals. In a merging of philosophical and theological thought, the difference was explained by the notion that humankind had been created in the image of God and so bore some of God's characteristics.[185] In the Abrahamic religious traditions, for example, the human person is conceived of as the principal creation of God, made in God's own image.[186] People were defined according to their inherited characteristics. There were 'distinct hereditary castes, each with its peculiar and irreducible legal status defined by elaborate sets of rights and duties.'[187] The rights enjoyed by people were a result of their status and there was no pretence or concept that rights were, or should be, distributed equally.

[180] C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) EJIL 655, 657.
[181] H. Cancik, '"Dignity of Man" and "*Persona*" in Stoic Anthropology: some remarks on Cicero, De Officiis I 105-107' in D. Kretzmer and E. Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002) 23-4.
[182] Cited in Ibid., 23.
[183] Ibid., 24.
[184] C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) EJIL 655, 657.
[185] Ibid., 658.
[186] *Holy Bible: New International Version* (Hodder and Stoughton 1994) Genesis 1:26-27.
[187] J. Feinberg, *Social Philosophy* (Prentice-Hall 1973) 88.

In the fifteenth century, Europeans began to explore the globe seeking (and taking) riches from lands inhabited by previously unencountered peoples.[188] The first indigenous peoples to experience European civilisation were those living on the American continent – where the term 'indigenous peoples' originates[189] and where arguably the worst violations against indigenous peoples occurred.[190] Although debates in intellectual circles at that time were exploring the concept of dignity, differentiating humans from other animals and endowing humans with an elevated status amongst animals, the separation of humans from animals, and consequent recognition of inherent dignity, only applied to European humans – or those with recognisable modes of being and modalities of behaviour.

In 1492, approximately one fifth of the world's population were Native Americans, approximately 100 million individuals organised in diverse and varied civilisations.[191] However, the indigenous peoples of America were viewed as 'a degenerate race'[192] and, by the early 1500s, the population had been decimated, many groups were rendered extinct, and their resources appropriated.[193] The European explorers, settlers, and conquistadors felt able to subjugate the people and resources of the continent.[194] The foreigners also brought previously unencountered disease and pestilence, which, due to the lack of appropriate antibodies within the indigenous peoples, devastated the populations and, by 1600, the population stood at less than a tenth of its original number.[195]

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[188] See, R. Wright, *Stolen Continents: The Indian Story* (Random House 1993); J.H. Elliott, *Empires of the Atlantic World: Britain and Spain in America 1492-1830* (YUP 2006); P. Radin, *The Story of the American Indian* (John Murray).
[189] M. Freeman, *Human Rights: an Interdisciplinary Approach* (Polity Press 2002) 121.
[190] R.L. Barsh, 'The Challenges of Indigenous Self-Determination' (1992/3) 26 University of Michigan Journal of Law Reform 277, 285.
[191] R. Wright, *Stolen Continents: The Indian Story* (Random House 1993) 4.
[192] J.H. Elliott, *Empires of the Atlantic World: Britain and Spain in America 1492-1830* (YUP 2006) 80.
[193] R. Wright, *Stolen Continents: The Indian Story* (Random House 1993) 4-10.
[194] J.H. Elliott, *Empires of the Atlantic World: Britain and Spain in America 1492-1830* (YUP 2006) 21-23.
[195] R. Wright, *Stolen Continents: The Indian Story* (Random House 1993) 14.

Assertions of a moral and legal authority were used to answer questions regarding the legitimacy of their actions. The terra nullius principle[196] was utilised in justifying the acquisition of land considered unoccupied.[197] Although lands occupied by human groups with a socio-political structure recognised by Europeans were not considered terra nullius.[198] Similarly, the Spanish used the requerimiento in America to claim a divine right to territory, which needed to be accepted by the indigenous peoples or they would face violent consequences.[199] This view of non-European peoples as 'other' arguably remains and has resurfaced throughout history.[200] In the context of counterterrorism, the suspect terrorist is arguably differentiated and considered to not possess the same rights as other humans.[201]

3.3. Contextual Overview

The claim made in human rights instruments that all humans possess inherent dignity is controversial.[202] Recognising the equal worth, and consequential rights, of every human being inevitably limits the powers of those in high status positions[203] as human rights are a 'political practice' and establish moral parameters for States and individuals.[204]

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[196] *Island of Palmas Case (United States v Netherlands)* (1928) II RIAA 829. A State can gain sovereignty to territory through discovery but needs to exercise authority over the territory to secure title.
[197] See, e.g., R.Y. Jennings and A.D. Watts (eds), *Oppenheim's International Law: Volume I Peace* (9th edn, OUP 2008) 687.
[198] *Western Sahara Advisory Opinion* (1975) ICJ Rep 12, 39.
[199] J.H. Elliott, *Empires of the Atlantic World: Britain and Spain in America 1492-1830* (YUP 2006) 11.
[200] See, e.g., A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005); I. Mgbeoji, 'The Civilised Self and the Barbaric Other: imperial delusions of order and the challenges of human security' (2006) 27(5) Third World Quarterly 855; A. Heraclides and A Dialla, *Humanitarian Intervention in the Long Nineteenth Century: setting the precedent* (MUP 2015) Ch3.
[201] Discussed in Case Studies, Chapters 6-8.
[202] M.P. Perry *Towards a Theory of Human Rights: religion, law, courts* (CUP 2007) 8.
[203] J. Feinberg, *Social Philosophy* (Prentice-Hall 1973) 89.
[204] S. Killmister, 'Dignity, Torture, and Human Rights' (2016) 19(5) Ethical Theory and Modern Practice 1087, 1091.

Modern HRL was overtly developed after the end of WWII and the Nuremberg Trials.[205] Where the UN Charter provided the basis for a human rights framework, but lacked applicable provisions, the trial of Axis war criminals 'gave the nascent human rights movement a powerful impulse.'[206] In the aftermath of the second global armed conflict within a century that had not yet reached its midway point, it was clear that the existing international legal framework did not provide adequate protection for the individual human from the coercive power of the State. The 'obvious human wrongs' committed during the war periods provoked an international response and desire to criminalise[207] these 'barbarous acts' that 'outraged the conscience of mankind.'[208]

The morality of human rights in international law emerged to become the 'global morality.'[209] This morality asserts that all humans have inherent dignity, and that this dignity has normative force.[210] The developmental process of the violation of moral rights prompting the imposition of legal rights, the move 'from morality to law', is at the heart of the modern human rights story.[211] If moral rights had been sufficient, there would be no need for legal proscriptions and provisions to enforce and protect them.[212] The behaviour of Nazi Germany towards its own citizens and those in the territories it invaded demonstrated that morality alone was an insufficient constraint on a State's use of coercive power. The Nazis utilised the legal mechanisms of the State to further their agenda and consolidate power.

[205] See generally, W.A. Schabas (ed), *The Universal Declaration of Human Rights: the travaux préparatoires* (CUP 2013).
[206] H.J. Steiner, P. Alston, R. Goodman, *International Human Rights in Context: law, politics, morals* (3rd ed, OUP 2007) 115.
[207] M. Freeman, *Human Rights: an interdisciplinary approach* (Polity Press 2002) 55.
[208] UDHR Preamble.
[209] M.P. Perry *Towards a Theory of Human Rights: religion, law, courts* (CUP 2007) 4.
[210] Ibid., 5.
[211] Ibid., 35.
[212] F. Robinson, 'The Limits of a Rights-Based Approach to International Ethics' in T. Evans, (ed) *Human Rights Fifty Years On: A Reappraisal* (MUP 1998) 60.

Legislation was introduced, under the guise of protecting the State, that furthered the Nazi ideology of racial purification.[213] Hitler utilised the legislative process to pass the Enabling Act in 1933, which gave him the ability to enact legislation without Parliamentary or Presidential approval. Although there were issues regarding the intimidation of political opponents, the majority of the judiciary viewed Hitler's Government as legitimate and continued to uphold and apply the law.[214] The general view is that the Nazi regime was criminal and so illegitimate.[215] However, Fraser argues that the law of Nazi Germany was just as much 'law' as that which governed the pre- and post-war German State.[216] He asserts the Holocaust and surrounding events were 'lawful and legal'[217] and the regime operated a 'lawful' barbarism.[218] The operation of the law and the complicity of legal practitioners were essential to the implementation of the Nazi racist ideology and the categorisation of persons who could be lawfully exterminated, as opposed to unlawfully murdered.[219] A discussion regarding whether the law of Nazi Germany is/should be considered 'real law' or not, is outside the purview of this thesis. What is important here is the existence of a significant gap between the law in Nazi Germany and the morality of a significant proportion of the world's population.

[213] W.F. Meinecke and A. Zapruder, *Law, Justice, and the Holocaust* (United States Holocaust Memorial Museum 2014) 8. <https://www.ushmm.org/m/pdfs/20140711-ljh-booklet-2nd-Edition.pdf> accessed 17 March 2023.
[214] Holocaust Encyclopedia, 'The Enabling Act' (*United States Holocaust Memorial Museum*, nd) <https://encyclopedia.ushmm.org/content/en/article/the-enabling-act> accessed 17 March 2023.
[215] See, e.g., F. Neuman and P. Hayes, *Behemoth: the structure and practice of National Socialism 1933-1944* (Ivan R. Dee 2009); R.J. Evans, 'Coercion and Consent in Nazi Germany' (2007) 151 Proceedings of the British Academy 53.
[216] D. Fraser, *Law After Auschwitz: towards a jurisprudence of the Holocaust* (Carolina Academic Press 2005) 44.
[217] Ibid., 5, 13, 15.
[218] Ibid., 48. It is important to note that in this context, 'lawful' does not denote moral correctness.
[219] Ibid., 16.

International HRL developed to fill this lacuna.[220] Thus, the moral norms identified during the Enlightenment period became legally enforceable on an individual basis. In the criminal sphere, individuals were held accountable for their role in the killing of millions of Jews and other minority groups through the Nuremberg trials, despite arguing that the crimes were only attributable to the State and not to them as individuals.[221] The recognition of the individual, as both victim and perpetrator, within the international legal system was a significant development[222] and the conception of human rights obligations as being erga omnes[223] in character means all States have the duty to defend them – the foundational concept being that human rights violations injure and risk society as a whole, not just the individual victim.[224] Human dignity was also referenced in several States' post-WWII constitutions, including the agitators Japan, Italy, and West Germany.[225]

The word 'right' indicates the existence of a claim to some entitlement, either directed specifically towards an entity or a general assertion.[226] In modern human rights parlance, the contention of a 'right' is generally understood to mean both a moral and legal assertion. In public fora, individuals often claim a 'right' in a moral sense, indicating that they feel a wrong has occurred. However, moral rights are not justiciable, unlike legal rights, they cannot be asserted in courts/legal proceedings against another.[227] The positive acts of

[220] J.J. Shestack, 'Globalisation of Human Rights Law' (1997/8) 21 Fordham International Law Journal 558, 559.
[221] See, e.g., G.A. Finch, 'The Nuremberg Trial and International Law' (1947) 41(1) AJIL 20.
[222] A. Randelzhofer, 'The Legal Position of the Individual Under Present International Law' in A. Randelzhofer and C. Tomuschat (eds), *State Responsibility and the Individual: reparation in instances of grave violations of human rights* (Martinus Nijhoff 1999) 232.
[223] See, e.g., *Barcelona Traction, Light and Power Company Ltd. (Belgium v Spain)* (Judgment) (1970) ICJ Rep 3, [34]; Y. Dinstein, 'The Erga Omnes Applicability of Human Rights' (1992) 30(1) Drittstaaten und Sanktionen im Völkerrecht 16.
[224] D. Shelton, *Remedies in International Human Rights Law* (OUP 2006) 48.
[225] C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) EJIL 655, 667.
[226] J Feinberg, 'The Nature and Value of Rights' in Feinberg, (ed) *Rights, Justice and the Bounds of Liberty: essays in social philosophy* (Princeton University Press 1980) 148-153.
[227] Ibid., 153.

the legislature, human action, results in legal rights. The origins of moral rights are far less certain and is a subject that attracts much debate.[228]

Finding a non-religious basis for the proposition that all humans possess inviolable inherent dignity is difficult.[229] Some argue that humans (as opposed to other animals) have inherent dignity due to their capacity for conceptual thought, deliberation, and free will.[230] Each human is a person with consequent dignity because of the type of being they are – one with a rational nature. It is the potentiality of that nature that is viewed as relevant for the recognition of the 'intrinsic dignity' upon which full moral worth is grounded[231] – so infant humans or humans with conditions that prevent them from being able to display rational thought still possess intrinsic human dignity due to their belonging to the category of human. The argument is that the worth or inherent dignity of the human person is not based on the possession of certain attributes (and so variable and gradable), but on the fact that they are this entity.[232] However, connecting human dignity to the ability of humans to conceptualise their world and to make free choices is still to base it on an aspect of human life, rather than as an 'original and defining'[233] feature of humans. Human dignity is expressed in legal instruments as being 'intrinsic' and 'self-justifying' in that it is grounded only in itself.[234] The term can be successfully translated to all cultures and

[228] An exploration of the origins of moral human rights is outside this thesis. From the deontological and liberal perspective see, J. Rawls, *A Theory of Justice* (OUP 1999); J. Rawls, *The Law of Peoples: with the idea of public reason revisited* (HUP 1999); R.M. Dworkin, *Taking Rights Seriously* (Duckworth 1978); Cf. the utilitarian viewpoint, J. Bowring (eds), *The Works of Jeremy Bentham* (Vol. 2, Russell & Russell 1962); and Marxist, K. Marx and F. Engels, *The Communist Manifesto: with an introduction by David Harvey* (Pluto 2008).
[229] See, e.g., M.P. Perry *Towards a Theory of Human Rights: religion, law, courts* (CUP 2007) Ch3.
[230] P. Lee and R.P. George, 'The Nature and Basis of Human Dignity' (2008) 21(2) Ratio Juris 173, 174.
[231] Ibid., 175.
[232] Ibid., 182.
[233] G. Bennett, *Technicians of Human Dignity: bodies, souls and the making of intrinsic worth* (Fordham University Press 2016) Preface ix.
[234] Ibid., xi-x.

provides the crucial point of agreement as to why human rights are important.[235]

3.4 Human Dignity in Human Rights Instruments

The idea of universal equal human rights is based on the concept of all humans having equal worth.[236] Human rights 'derive from the inherent dignity of the human person,'[237] making it the foundational concept in HRL. This section outlines the references made to human dignity in the UNC, UDHR, core international human rights instruments,[238] and regional provisions, noting the primacy of the concept as the basis of HRL, alongside references to national security. It is considered an essential objective in the field of HRL. For example, the UN Declaration on the Elimination of All Forms of Racial Discrimination[239] affirms the necessity 'of securing understanding of and respect for the dignity of the human person.' As already explained, the intention is not to define the content of human dignity, but to examine its use within human rights instruments to facilitate the assessment of the effectiveness of HRL. The most significant of these are what is termed the 'International Bill of Rights,'[240] comprising the UDHR, ICESCR, and ICCPR.

[235] D. Luban, 'Human Dignity, Humiliation, and Torture' (2009) 19 Kennedy Institute of Ethics Journal 211, 213.
[236] J. Feinberg, *Social Philosophy* (Prentice-Hall 1973) 89.
[237] Conference on Security and Cooperation in Europe, 'Final Act of Helsinki' (1 August 1975) 14 ILM 1292 Principle VII; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) Preamble; UNGA, 'Vienna Declaration and Programme of Action' World Conference on Human Rights (25 June 1993) UN Doc A/CONF.157/23 Preamble.
[238] As listed on the UN OHCHR website, <https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies> accessed 20 August 2023.
[239] UNGA Res 1904 (XVIII) (20 November 1963).
[240] OHCHR, 'International Bill of Rights' (*United Nations*, 2023) <https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights> accessed 26 April 2022.

3.4.1. International Bill of Rights

The UNC Preamble declares the States Parties determined to 'reaffirm faith… in the dignity and worth of the human person… And for these ends… to unite our strength to maintain international peace and security,' articulating a resolution by the States Parties to combine efforts for the achievement of certain aims.[241] The language is interesting and can be interpreted in different ways. It could be read that the maintenance of international peace and security is being undertaken to achieve the end of reaffirming human dignity. Alternatively, the maintaining of peace and security is one of the ends for which the Parties have come together. Given that the purposes listed in Article 1 do not mention human dignity, the latter interpretation seems preferable. Consequently, the Preamble seems to suggest that the reaffirmation of human dignity is an aspiration, which will be realised through maintaining international peace and security, rather than being declared in the Covenant.[242] A positive aspect of this language is that States Parties commit themselves to constantly strive to achieve this reaffirmation. However, a negative view is that the language places the reaffirmation of human dignity beyond the realm of what is achievable – it is always in the future. In practice, the UNC has been viewed as reaffirming 'the dignity and worth of the human person,'[243] albeit without providing detail regarding the rights that need to be protected.[244]

In contrast, the International Bill of Rights[245] positively reaffirms the current existence of human dignity. The UDHR and subsequent rights instruments demonstrate an archonic conception of human dignity – a 'self-grounding

[241] B. Simma, D-E. Khan, G. Nolte, A. Paulus, N. Wessednorf (eds), *The Charter of the United Nations: a commentary, Vol. I* (3rd edn, OUP 2012) 102.
[242] Although it is viewed as being of a 'declaratory character.' Ibid., 103.
[243] UNGA, 'Report of the Secretary General "We the Peoples: the role of the United Nations in the twenty-first century"' (27 March 2000) UN Doc A/54/2000 [10].
[244] S. Casey-Maslen, *The Right to Life Under International Law* (CUP 2021) 9[1.02].
[245] OHCHR, 'Fact Sheet No.2 (Rev.1) The International Bill of Human Rights' (*OHCHR*, June 1996) <www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> accessed 23 April 2020.

and self-justifying' feature that 'does not need to appeal to anything other than itself in order to establish its political and moral rectitude.'[246] The first paragraph of the UDHR Preamble declares that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' Thus, the initial recognition and centring of human dignity in an international human rights instrument is not based on it being valuable in its own right but because it is deemed essential to the stability of the international order.

The UDHR[247] makes explicit the connection between the legal protection of human rights and absence of conflict.[248] The international system had failed to protect individuals from the power of an unscrupulous State and to prevent inter-State conflict, prompting the articulation of a universal human rights standard [249] that would restrict the actions of States, thereby preventing the conditions that led to WWII.[250] The international human rights instruments make it clear that human rights are a means to an end, rather than simply an end in themselves. Through the recognition and protection of human dignity, the international community can secure 'freedom, justice and peace', [251] thus, human rights have an instrumental function and ultimately serve the interests of States. They need to connect with the wider powers of the State as part of its capacity to preserve itself and maintain security. In the drafting of the UDHR, earlier versions of Article 2 made the centrality of the State clearer by reference to the limitations

[246] G. Bennett, *Technicians of Human Dignity: bodies, souls and the making of intrinsic worth* (Fordham University Press 2016) 11.
[247] Although a soft-law instrument, many of the UDHR's provisions reflect CIL. See, e.g., B.G. Ramcharan, 'The Legal Status of the International Bill of Human Rights' (1986) 55 Nordic Journal of International Law 366, 380; H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25(1) Georgia Journal of International and Comparative Law 287, 326.
[248] UDHR Preamble.
[249] M. Freeman, *Human Rights: an Interdisciplinary Approach* (Polity Press 2002) Ch 2.
[250] UDHR Preamble.
[251] ICCPR Preamble, para. 1

placed on rights through 'the rights of others and by the just requirements of the democratic State.'[252]

The UDHR Preamble explicitly links the violation (or neglect) of human rights to an absence of peace. However, the fifth paragraph states that the signatories of the UNC have 'reaffirmed their faith in… the dignity and worth of the human person.' The use of 'reaffirm' demonstrates the drafters of the UDHR viewed the Charter as evidence of the international community's *restatement* of the existence of human dignity and not an aspiration. Importantly, the language suggests that the recognition is of a pre-existing quality and does not call it into being.

In recognising human dignity, the UDHR utilises a similar technique to the American Declaration of Independence (ADI), which states '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.' [253] Through stating that identified truths are 'self-evident', the ADI asserts that the equality of all men and their possession of inalienable rights is a truth – a fact. Similarly, the 1789 French Declaration of the Rights of Man declares 'the natural, unalienable, and sacred rights of man.' The UDHR, in their language, claim to be articulating a pre-existing quality inherent in all humans. As confirmation, Article 1 UDHR declares that, 'All human beings are born free and equal in dignity and rights.'

The ICCPR and ICESCR consider in their Preambular paragraphs that 'in accordance with the principles proclaimed in the [UNC] recognition of the inherent dignity and of the equal and inalienable rights of all members of

[252] W.A. Schabas (ed), *The Universal Declaration of Human Rights: the travaux préparatoires* (CUP 2013) 1325.
[253] (4 July 1776) Second Paragraph.

the human family is the foundation of freedom, justice and peace in the world' and that 'these rights derive from the inherent dignity of the human person.' Again, human dignity is being centred as a means by which other aims can be achieved, rather than as an end in itself, which seems to conflict with the concept of human dignity if it is viewed in the Kantian sense.[254] The Humanity Formulation of Kant's Categorical Imperative provides that humanity should always be treated as an end in itself and never just as a means.[255] However, here the instruments appear to be adopting an more utilitarian approach by articulating human dignity as the means by which security is to be achieved.

3.4.1.1. Utilitarianism

Utilitarianism,[256] as propounded by Jeremy Bentham[257] and John Stuart Mill,[258] is probably the most significant consequentialist position and posits that only the results of an act have intrinsic value. Thus, a moral agent is obliged to choose that act which will result in the best outcome, measured by the level of happiness. Other acts or things may only have instrumental value insofar as they assist in achieving maximum happiness. For a utilitarian the best consequences are those maximising happiness (utility) over pain (disutility).[259] Thus, when faced with a choice of two courses of action, the utilitarian will consider the possible consequences and will choose the act that will either maximise utility or minimise disutility. In its absolute form, utilitarianism holds that the happiness of each person is of equal value or

[254] D. Luban, 'Human Dignity, Humiliation, and Torture' (2009) 19 Kennedy Institute of Ethics Journal 211, 213 asserts that the term is 'preeminently European' and key to Kant's perspective of humans possessing inherent dignity, rather than an ascribed value.
[255] R. Johnson and A. Cureton, 'Kant's Moral Philosophy' (*Stanford Encyclopedia of Philosophy*, 21 January 2022) <https://plato.stanford.edu/entries/kant-moral/> accessed 24 April 2022.
[256] For ease of discussion the form of utilitarianism used will be act utilitarianism.
[257] J. Bowring (eds), *The Works of Jeremy Bentham* (Vol. 2, Russell & Russell 1962).
[258] J.S. Mill, *Utilitarianism, Liberty, Representative Government* (Dent and Sons Ltd 1962).
[259] J. Driver, 'The History of Utilitarianism' (*Stanford Encyclopedia of Philosophy*, 22 September 2014) <https://plato.stanford.edu/entries/utilitarianism-history/> accessed 24 April 2022.

worth,[260] which coincides with the philosophical foundation of the modern human rights movement, although from a different perspective to deontological approaches.

3.4.1.2. Deontology

For the deontologist the consequences of an act are also relevant, but other things have intrinsic value. In direct contrast to utilitarianism, which views humans as vessels for experiencing happiness,[261] in deontology human beings are intrinsically valuable and are to be viewed as ends in themselves, as opposed to mere means to an end.[262] In pure deontological terms, acts should be performed from a sense of duty. If there is no moral duty informing the act, then the act is not the correct moral choice.[263] However, the security imperative in human rights instruments necessitates the taking of an approach that places less emphasis on the individual. This is perhaps the centre of the apparent conflict between the human rights concept of each person being vested with inviolable dignity and the reality of security and politics. HRL could be viewed as a compromise between the two.

3.4.2. International Human Rights Instruments

HRL is based on the foundational principle that each human being is of equal intrinsic value, irrespective of their actions or status, and each holds inalienable rights.[264] This concept created a 'universal republican ideal' putting the State in a moral partnership with its citizens to achieve the

[260] S. Nathanson, 'Act and Rule Utilitarianism' (*Internet Encyclopedia of Philosophy*, 2023) <https://iep.utm.edu/util-a-r/#:~:text=The%20utilitarian%20method%20requires%20you,all%20members%20of%20the%20society> accessed 24 August 2023.
[261] M.S. Moore, 'Torture and the Balance of Evils' (1989) 23 Israel Law Review 280.
[262] I. Kant, *Groundwork for the Metaphysics of Morals* (A.J. Wood (ed), YUP 2002).
[263] Johnson and Cureton (n).
[264] Preamble of the UDHR, ICCPR, and ICESCR; H. Duffy, *The "War on Terror" and the Framework of International Law* (2nd edn, CUP 2015) 456.

common good, rather than wielding its power for its own interests.[265] In its Preambular paragraphs, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[266] considers the UNC to be 'based on the principles of the dignity and equality inherent in all human beings' and states the UDHR 'proclaims that all human beings are born free and equal in dignity and rights.' After utilising the same language for its first Preambular paragraph as is in the ICESCR, the Optional Protocol[267] makes the same reference to the UDHR utilising similar language, as does the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[268] The ASEAN Human Rights Charter (AHRC)[269] similarly declares that 'all persons are born free and equal in dignity and rights.' Consequently, it can be said that human dignity is something every human has by virtue of being born human.

Utilising different terminology, the American Convention on Human Rights (ACHR)[270] bases the 'rights of man… on the attributes of human personality,' which justifies the creation of legal protection. This echoes the language in the American Declaration (ADRDM),[271] which acknowledges 'the dignity of the individual' and recognises that 'the essential rights of man… are based upon attributes of his human personality'. Likewise, the African Charter (AfCHR)[272] also states that human rights are founded in human dignity when it states that 'fundamental human rights stem from the attributes of human beings'

[265] Y. Arieli, 'On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights' in D. Kretzmer and E. Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (Kluwer 2002) 14.
[266] (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.
[267] UNGA Res 63/117 (10 December 2008) UN Doc A/RES/63/117.
[268] (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.
[269] Association of Southeast Asian Nations (adopted 19 November 2012).
[270] (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No.36.
[271] ICAS, 'American Declaration on the Rights and Duties of Man' (adopted 2 May 1948) UN Doc E/CN.4/122/Rev.1.
[272] African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 363.

and further claims that this foundation 'justifies their international protection.'

Article 5 AfCHR states that 'Every individual shall have the right to the respect of the dignity inherent in a human being' and Article 1 of the Charter of Fundamental Rights of the European Union[273] states 'Human dignity is inviolable. It must be respected and promoted.' Correspondingly, Article 1(1) of Germany's Grundgesetz [274] states 'Die Würde des Menschen ist unantastbar.' The Constitutive Act of the African Union[275] recalls 'the heroic struggles waged… for… human dignity.' It could be argued that this language suggests human dignity was achieved through struggle, rather being inherent within African peoples. However, due to the context of subjugation, human dignity is more realistically interpreted as a motivating factor for self-manumission. Thus, it is apparent that human dignity, as an undefined concept, is viewed as being a primary or 'primordial'[276] facet of human beings – it simply exists and is present in every human person.

What is not immediately clear is whether a person can lose or reduce their dignity, such as through their actions or the actions of others,[277] and thereby their rights. However, if human dignity is to adequately serve as the foundation for human rights, it cannot be something than is countable and so reducible and such a view of dignity is not supported in the human rights instruments. The German Federal Constitutional Court held that the concept of human dignity relates to the dignity of the entire species, not just to

[273] 2010/C 083/02.
[274] Grundgesetz für die Bundesrepublik Deutschland (Federal Law Gazette Part III).
[275] OAU Doc. CAB/LEG/23.15 (adopted 11 July 2000, entered into force 26 May 2001)
[276] G. Bennett, *Technicians of Human Dignity: bodies, souls and the making of intrinsic worth* (Fordham University Press 2016) 10.
[277] S. Killmister, 'Dignity, Torture, and Human Rights' (2016) 19(5) Ethical Theory and Modern Practice 1087, 1091-5 offers an explanation as to why actions such as torture do not reduce a person's dignity and so their human rights.

individuals – it is universal and 'not at the disposal of the individual'.[278] Although the inalienability of human rights has been contested since the European Enlightenment,[279] it is a concept essential to the universality, applicability, and relevance of human rights. Without it, rights could be separated and differentiated between groups, they would be dependent on a person being considered deserving of rights, something gifted to the citizenry by a benevolent government or ruler. Thus, they could also be taken away should a person no longer meet the criteria. Rights would then lose their essential function and purpose of recognising human dignity, thereby protecting humans from (abuses of) State power to prevent inter-State conflict. Instead, human dignity is presented as the foundation of human rights and the subsequent rights articulated in the legal instruments are how dignity is realised.[280]

CEDAW and its Optional Protocol,[281] along with the Convention on the Rights of the Child (CRC),[282] and CRC Optional Protocol on a Communications Procedure,[283] follow the UDHR in noting that the UNC 'reaffirms faith in fundamental human rights, in the dignity and worth of the human person,' rather than viewing it as a statement of a goal. The Cairo Declaration on Human Rights in Islam (CDHRI)[284] frames its provisions within the tenets of Islam. Article 1 provides that 'all men are equal in terms of basic human dignity' and Article 6 declares that 'woman is equal to man in human dignity.'

[278] BVerfGE 45, 187, 229 (1977) cited in E. Klein, 'Human Dignity in German Law' in D. Kretzmer and E. Klein, *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002) 148.
[279] See, e.g., Bentham describing the concept of human rights as 'nonsense on stilts.' J.A. Bentham, 'Critical Examination of the Declaration of Rights' in J. Bowring (ed), *The Works of Jeremy Bentham* (Vol 2, Russell and Russell 1962); M. Cranston, 'Are There Any Human Rights?' (1983) 112(4) Daedalus 1; Cf. American Declaration of Independence (US 1776) holding 'that all men are created equal' and 'are endowed... with certain unalienable Rights.'
[280] J. Waldron, 'Is Dignity the Foundation of Human Rights?' in R. Cruft, S.M. Liao, M. Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 119.
[281] UNGA Res 54/4 (6 October 1999) UN Doc A/RES/54/4.
[282] (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[283] UNGA Res 66/138 (19 December 2011) UN Doc A/RES/66/138 (CRC OP).
[284] Organisation of the Islamic Conference (adopted 5 August 1990) UN Doc A/CONF.157/PC/62/Add.18.

The Arab Charter on Human Rights (ArCHR)[285] states at Article 3(3) that 'men and women are equal in respect of human dignity.' Thus, arguably demonstrating that the international community categorically view the UNC as making a statement of reaffirmation regarding human dignity in the present.

Various instruments explicitly connect the human rights being protected with human dignity, confirming the assertion that rights are derived from and serve to protect human dignity. CEDAW recalls that 'discrimination against women violates the principles of equality of rights and respect for human dignity.' The CRPD recognises discrimination on the grounds of disability as 'a violation of the inherent dignity and worth of the human person.' Similarly, the ArCHR asserts that 'All forms of racism, Zionism and foreign occupation and domination constitute an impediment to human dignity and a major barrier to the exercise of the fundamental rights of peoples.'[286] The ICCPR Second Optional Protocol,[287] aimed at the abolition of the death penalty, declares the States Parties believe 'that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights.'[288] Similarly, the Thirteenth Protocol to the ECHR[289] predicates the need for the abolition of the death penalty on the protection of the right to life to ensure 'the full recognition of the inherent dignity of all human beings.'

The term 'human dignity' could be viewed as a form of philosophical padding that filled a gap and was acceptable to the drafters in lieu of something of

[285] League of Arab States (adopted 22 May 2004, entered into force 15 March 2008) reprinted in (2005) 12 International Human Rights Report 893.
[286] Article 2(3).
[287] UNGA Res 44/128 (15 December 1989) UN Doc A/RES/44/128.
[288] The death penalty is discussed in relation to the killing of terrorist suspects in Chapter 6: 6.3.2.1.
[289] CETS No. 187 (adopted 3 May 2002, entered into force 1 July 2003).

more substance.[290] According to Schachter, the meaning of human dignity in the instruments invoking it 'has been left to intuitive understanding' resulting in an inability to 'easily draw specific implications for relevant conduct.'[291] However, the instruments also demonstrate another function of human dignity. Alongside its being the foundation of international peace and security and the source of human rights,[292] it also provides the measure of success. UDHR Articles 22 (realisation of economic, social, and cultural rights) and 23(3) (just remuneration) provide the appropriate level to which economic, social and cultural rights are to be fulfilled, and the level of pay workers must receive, is that which enables human dignity. Similarly, Article 10(1) ICCPR provides 'All persons deprived of their liberty shall be treated… with respect for the inherent dignity of the human person.' Article 13 ICESCR asserts that States Parties 'agree that education shall be directed to the full development of the human personality and the sense of its dignity.' CRC Article 23(1) refers to conditions that 'ensure dignity' for a 'mentally or physically disabled child.' Article 28(2) provides school discipline must be 'administered in a manner consistent with the child's human dignity.' Article 37(c) provides that 'Every child deprived of liberty shall be treated with… respect for the inherent dignity of the human person.' Thus, human dignity is both the foundation for and the measure by which human rights are to be realised. Further, it also provides a standard for treatment in International Humanitarian Law (IHL) as detainees must be protected from 'outrages upon personal dignity.'[293]

[290] C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) EJIL 655, 675-8.
[291] O. Schachter, 'Human Dignity as a Normative Concept' (1983) 77 AJIL 848, 849.
[292] D. Luban, 'Human Dignity, Humiliation, and Torture' (2009) 19 Kennedy Institute of Ethics Journal 211, 212; S. Killmister, 'Dignity, Torture, and Human Rights' (2016) 19(5) Ethical Theory and Modern Practice 1087, 1088.
[293] Common Article III, Geneva Conventions (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[294] does not reference dignity in its Preamble. However, it does use human dignity as the measure of the standard to be met. Article 17 provides that 'Migrant workers and members of their families… deprived of their liberty shall be treated with… respect for the inherent dignity of the human person.' Article 70 requires States Parties to ensure conditions for the workers are 'in keeping with the… principles of human dignity.' Similarly, the International Convention for the Protection of All Persons from Enforced Disappearance[295] does not situate the rights within the context of the principles expressed in the UNC and UDHR, yet uses dignity as determining factor. Article 19(2) covers the collection of data and provides it 'shall not infringe or have the effect of infringing the… human dignity of an individual.'

Consequently, human dignity can be seen to have three facets: as the foundation for human rights, the source from which they are derived; as the means by which international peace and security is secured and maintained; and as the measure for human rights fulfilment.

3.5. Human Dignity, Rights, and Security

The interconnectedness and co-dependency of security and human rights protection, including the need to confront the causes of terrorism, such as human rights violations, is broadly recognised and reflected in international instruments and initiatives.[296] As already outlined, the majority of human rights instruments reference human dignity as the foundation of human

[294] (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.
[295] (adopted 23 December 2010, entered into force 23 December 2010) 2716 UNTS 3.
[296] H. Duffy, '"Foreign Terrorist Fighters": a human rights approach?' (2018) 29 Security and Human Rights 120, 123.

rights and that security[297] is achieved through its recognition. The ECHR, CAT, CRC, CRC OP, and CRPD, the Convention on the Rights of Persons with Disabilities (CRPD),[298] state that 'recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,' asserting human dignity's instrumental role. The ArCHR recognises 'the close link that exists between human rights and international peace and security,' reaffirming the International Bill of Rights. The ECHR does not explicitly state that human dignity is the foundation of the rights contained therein. However, it does consider the UDHR's aim of 'securing the universal and effective recognition and observance' of its rights provisions and acknowledges that a method of achieving the Council of Europe's aim of unity between its members 'is the maintenance and realisation of Human Rights and Fundamental Freedoms.' Thereby, connecting human rights with peace and security as European disunity was the cause of both World Wars. The ICERD references 'security' in its Preamble stating discrimination is 'capable of disturbing peace and security among peoples,' explicitly connecting the absence of respect for human rights with potential conflict, echoing the sentiments of the UDHR Preamble.

As a logical proposition, the idea that respecting human dignity is essential for the establishment and maintenance of international peace and security, and that human dignity is realised through the articulation and protection of various rights, appears sound. The connection between peace and the recognition of human rights stems from the experiences of WWII. Hitler's aspirations of world domination were rooted in an ideology of Aryan exceptionalism and view of non-Aryans as 'Untermenschen' or

[297] Various terminology is utilised, such as 'freedom, justice and peace.' Security is used here to encapsulate all these concepts as they relate to the ability of humans to live freely.
[298] (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

'subhumans.'[299] The invasion of other countries was justified by the need to defend Europe from the scourge of inferior beings.[300] This perception of other groups as a threat to civilisation and fabric of society led to the perpetration of systematic violence against peoples viewed by the Nazi regime as being less than human, and so deficient in inherent dignity.[301] The Mexican Government referred to the actions of the Nazi State as 'crimes against human dignity.'[302] Post-WWII, States appeared compelled to respond to the scale and extent of dehumanisation that had led to extreme violence in an effort to prevent future conflict.

However, the drafters of the UDHR themselves appeared to make disparaging distinctions between different groups of people. In a discussion on an earlier version of Article 1, Professor Cassin (France) viewed it as emphasising the unity of the human race, in opposition to discriminatory theories, such as Hitler's.[303] Criticisms of the draft included the generality of definitions, which would include fascists.[304] The Chair, Eleanor Roosevelt, expressed the view that as fascists were criminals, they did not fall within the scope of the definition.[305] Throughout the *Travaux*, multiple references are made to the desire and need to eradicate fascism and to restrict the rights of persons holding those views. The USSR Representative delivered a speech to the Committee in May 1948 in which he argued the granting of rights to all could be used by fascists and Nazis to undermine democracy.[306]

[299] The term 'under man' was first coined in 1922 by American Lothrop Stoddard to describe those deemed inferior and incapable of civilisation. *The Revolt Against Civilization: the menace of the under man* (1923 Chapman and Hall).
[300] See, e.g., H. Himmler, 'Der Untermensch' (trans. H. Feuer, Nordland Verlag 1942) <http://www.holocaustresearchproject.org/holoprelude/deruntermensch.html> accessed 4 March 2022, describing the Untermensch as 'only a partial human being' and 'nothing more.'
[301] The treatment of the Jewish and other minority populations in Germany and invaded countries represents an extreme version of 'othering.'
[302] W.A. Schabas (ed), *The Universal Declaration of Human Rights: the travaux préparatoires* (CUP 2013) 1448.
[303] Ibid., 1165.
[304] Per Mrs Uralova (Rapporteur of the Commission on the Status of Women). Ibid., 1166.
[305] Per Elena Roosevelt (Chair). Ibid., 1166.
[306] Ibid., 1521.

Thus, even as the world was responding to the denial and mass violations of the rights of humans and seeking to lay the foundations for a legal framework that would prevent its repetition, fundamental distinctions were being made between groups based on arbitrary characteristics. Individuals' 'capacity for moral personality' or 'sense of justice' is not a valid reason to deny them the full protections of justice.[307] However, the belief that wrongdoing makes someone less worthy, meaning they should not be afforded the same rights as a person deemed to be innocent remains prevalent[308] and is particularly relevant when examining the operation of human rights in the context of counterterrorism.[309] The consequences of violating individual rights has a community impact.[310]

It seems to be merely the application of common sense to hold that people who 'practise tolerance and live together in peace with one another as good neighbours'[311] would have no need for conflict. However, the instruments themselves arguably contain a contradiction as most allow for the derogation of rights in times of public emergency.[312] By definition, a 'public emergency' is of short duration, meaning derogations cannot be permanent and are

[307] J. Rawls, *A Theory of Justice* (1972 OUP) 504-5.
[308] See, e.g., the emotive political arguments against lifting the blanket ban on prisoner voting after it was ruled unlawful by the European Court (*Hirst v the United Kingdom (No 2)* [2005] ECHR 681). David Cameron stated in the House of Commons that 'It makes me physically ill even to contemplate having to give the vote to anyone who is in prison.' HC Deb vol 517 col 921 (3 November 2010); Shadow Justice Secretary Sadiq Khan said that 'The public will be rightly concerned at reports prisoners could get a vote. If true, thousands of those serving sentences for serious and violent crimes… would be given a say in who runs the country.' 'Prisoners will not get the vote, says David Cameron' *The Guardian* (24 October 2012) <www.bbc.co.uk/news/uk-politics-20053244> accessed 4 September 2020.
[309] Chapter 8: 8.4.3 highlights the language used by David Cameron when justifying the targeted strike.
[310] S. Killmister, 'Dignity, Torture, and Human Rights' (2016) 19(5) Ethical Theory and Modern Practice 1087, 1096.
[311] UNC Preamble.
[312] See, e.g., ECHR Article 15(1) 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention' and ICCPR Article 4(1) 'In time of public emergency which threatens the life of the nation… the States Parties… may take measures derogating from their obligations under the present Covenant' and the ACHR Article 27(1) 'In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention.'

limited by what is reasonably necessary to achieve the stated aim.[313] However, the concept of proportionality is subjective and can be distorted when it is asserted that the very foundations of Western civilisation are threatened.[314] Thus, rights protect individuals' inherent dignity from the State in order to prevent atrocities and maintain peace and security, yet a State can declare a situation as being one that requires those rights to be restricted or suspended. This arguably places State interests above human rights obligations.[315]

The ICCPR references 'national security' as a reason to restrict the rights contained in Articles 12 (freedom of movement), 13 (expelling aliens), 14 (fair trial), 19 (freedom of expression), 21 (peaceful assembly), and 22 (freedom of association). Article 18(3) (religion) allows limitations to 'protect public safety.' Similarly, the ECHR permits restrictions for the purposes of 'national security' in Articles 6 (fair trial), 8 (private life), 10 (freedom of expression), and 11 (freedom of assembly and association). ECHR Protocols 4 Article 2(3) (freedom of movement), and 7 Article 1(2) (expulsion of aliens), also allow restrictions necessary for 'national security.' The ICESCR allows restrictions on Article 8 (trade union rights) for 'national security' purposes, as does Article 35(2) ArCHR. Article 24(7) ArCHR permits restrictions on political activity 'in the interests of national security.' These restrictions must be 'necessary' to achieve the security objectives and are limited by that necessity. However, the need for and extent of limitations on the right are again decided and assessed by the State.

[313] ICCPR Article 4; *De Morais v. Angola*, Communication No. 1128/2002, UN Doc CCPR/C/83/D/1128/2002 (2005) [6.8].
[314] J.W. Dietrich, *The George W. Bush Foreign Policy Reader: Presidential speeches with commentary* (Taylor Francis 2005) 53.
[315] H. Duffy, *The "War on Terror" and the Framework of International Law* (2nd edn, CUP 2015) 482.

Utilising slightly different language, Article 26(2) ArCHR permits the expulsion of aliens for 'compelling reasons' of 'national security' and Article 32(2) (right to information and freedom of opinion and expression) permits restrictions on the basis they are 'required' for the 'protection of national security.' The AHRC provides a general principle of limitations on rights 'to meet the just requirements of national security.' These provisions grant the State a much broader scope for determining when the restriction of rights is necessary.

Nevertheless, some controls are provided within the human rights instruments. For example, ECHR Article 18 aims to prevent the misuse of State power[316] and expressly prohibits the restriction of rights for purposes outside the Convention. A contravention of this provision can only occur where a qualified right has been subject to restrictions, although it can be breached without a corresponding violation of the substantive right.[317] The jurisprudence on Article 18 is limited as complaints regarding the motivations behind restrictions of qualified rights can be examined under the relevant substantive provision.[318] ICCPR Article 5 states that the Convention provisions do not permit activity 'aimed at the destruction of any of the rights… or at their limitation to a greater extent than is provided' in the Covenant. Additionally, there are rights from which derogation is not permitted,[319] under any circumstances, as to violate them is considered

[316] *Merabishvili v Georgia* App no. 72508/13 (ECHR, 28 November 2017) [303], [306]; *Ilgar Mammadov v Azerbaijan* App no. 15172/13 (ECHR, 29 May 2019) [189], [214]; *Kavala v Turkey* App no. 28749/18 [144], [169].
[317] *Merabishvili v Georgia* App no. 72508/13 (ECHR, 28 November 2017) [265]; *Mammadli v Azerbaijan* App no. 47145/14 (ECHR, 19 April 2018) [93].
[318] E.g., *Bączkowski and Others v Poland* App no. 1543/06 (3 May 2007) [97], [100] examining whether a refusal to allow an anti-homophobia protest march was motivated by the Major's publicly expressed homophobic views under Articles 14 and 11.
[319] See, e.g., Article 15(2) ECHR and Article 4(2) ICCPR exclude the right to life, prohibitions on torture and inhuman or degrading punishment, prohibitions on slavery and servitude, and the principle of non-retroactivity from derogation. The ICCPR includes the right to freedom of thought, conscience, and religion in the list of non-derogable rights. However, this is a right that can be restricted in certain circumstances and so does not require derogation.

malum in se as opposed to malum prohibitum. The right to life[320] and the right to be free from torture are two such rights[321] and the prohibition is jus cogens and obligatio erga omnes – they are absolutely non-derogable.[322]

However, a further contradiction appears in the consideration of human dignity itself and the functional purpose of human rights as a means of materialisation, with the aim of maintaining security. Limiting rights, and so the manifestation of dignity, to achieve security, which itself is dependent on the expression of dignity, appears to be a logical fallacy. Security is not in conflict with human rights.[323] Notwithstanding this objection, the desire to restrict the rights of those considered 'other' was present in the drafting of the UDHR[324] and is arguably based on a misconception of dignity. If dignity is inherent in all humans, it simply exists as an unquantifiable quality and cannot be diminished.[325] Individuals' dignity is not in competition and so their human rights, as the means by which their dignity is respected, cannot be in competition either.[326] An example of this mistake can be seen in ADRDM Article XXVIII, which provides 'The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.' It is difficult to see how this can be an accurate description of the reality of rights as articulated in the same instrument.

[320] W.P. Gormley, 'The Right to Life and the Rule of Non-Derogability Peremptory Norms of *Jus Cogens*' in B.G. Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff 1985); Inter-American Court of Human Rights, *Case of the 'Street Children' (Villagrán-Morales) v Guatemala* (Merits) (19 November 1999) [139].
[321] E. de Wet, 'The Prohibition of Torture as an International Norm of *Jus Cogens* and its Implications for National and Customary Law' (2004) 15 EJIL 97.
[322] M.C. Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 Law and Contemporary Problems 63.
[323] H. Duffy, *The "War on Terror" and the Framework of International Law* (2nd edn, CUP 2015) 457.
[324] W.A. Schabas (ed), *The Universal Declaration of Human Rights: the travaux préparatoires* (CUP 2013) 1165-6.
[325] T.E. Hill, 'Humanity as an End in Itself' (1980) 91(1) Ethics 84; M. Neumann, 'Did Kant Respect Persons?' (2000) 6 Res Publica 285, 294.
[326] Cf. J. Griffin, *On Human Rights* (2008 OUP) Ch3.

A person's human rights, to give full expression to their human dignity (thereby securing international peace and security) must be limitless. As obligations applying only to States, individuals and organisations cannot violate human rights.[327] Additionally, two people's rights do not limit each other's. As an illustration, Person A is an adherent to a religion that requires the sacrifice of an unwilling human person. Person A selects Person B as their sacrifice. Person B claims that the State should prevent Person A from sacrificing them. Person A claims this would be a violation of their rights to freedom of religion, thought and conscience. However, Person A's right to freedom of religion does not include the right to take another human person's life. They can adhere to a religion that advocates human sacrifice, they can want to do it, and feel it is morally just and correct that they do it. However, they have no right to take life and are prevented from doing so. Thus, there is no rights conflict or limitation of rights because Person A's right to freedom of religion does not include taking human life.

The concession to security in HRL can be described as an inbuilt balancing between what are often presented as competing objectives, enabling restrictions on rights in specific circumstances, which must be 'distinguished from an abstract "balancing" exercise so often invoked to justify counter-terrorism… measures that go beyond the limits of the law.'[328] However, utilising limitation language and legitimising the restriction of an individual's rights (and thereby the recognition of their dignity) based on the idea that rights conflict, or for collective security objectives, takes a utilitarian approach to a deontological concept that presents a potential danger for the individual as it raises the possibility of State abuse. The discourse presents other people

[327] H. Duffy, *The "War on Terror" and the Framework of International Law* (2nd edn, CUP 2015) 487.
[328] H. Duffy, '"Foreign Terrorist Fighters": a human rights approach?' (2018) 29 Security and Human Rights 132.

as a threat to rights, as a barrier to full rights expression. Given that full human rights protection is key to the prevention of conflict,[329] inhibiting the full expression of rights for security reasons appears counterproductive. Yet, States retain a wide margin of appreciation in being able to determine what constitutes potential threats to national security with limited or inadequate oversight and safeguards, particularly as the judiciary tend to defer to governments on matters of security.[330] Arguably, if the motivation behind an act has the effect of denying an individual's inherent dignity, then that amounts to an absence of respect for their dignity and is a violation of that person.[331] State action against terrorist suspects can be motivated by a dehumanisation of the person, amounting to a dignity breach. The subordination of rights to security imperatives can arguably led to a belief that security imperatives trump human rights – even those that are theoretically non-derogable.[332] A human rights approach necessitates consideration of the broader impact of counterterrorism measures, particularly on the 'insidious impact' of legislation 'on the ability to defend human rights.'[333]

3.6. Conclusion

This Chapter outlined the centrality of the concept of human dignity in normative human rights instruments, demonstrating universal agreement on both the existence of human dignity and its need to be protected. It is the

[329] World Bank, *World Development Report: conflict, security, and development* (World Bank 2011) 82.
[330] See, e.g., *R v Secretary of State ex parte Hosenball* [1977] 1 WLR 766, 783; *Secretary of State v Rehman* [2001] UKHL 47 [62]; S. Sinnar, 'A Label Covering a "Multitude of Sins": the harm of national security deference' (2022) 136(1) Harvard Law Review Forum 59; H. Duffy, *The "War on Terror" and the Framework of International Law* (2nd edn, CUP 2015) 482; cf. *A v Secretary of State* [2004] UKHL 56.
[331] M.P. Perry *Towards a Theory of Human Rights: religion, law, courts* (CUP 2007) 5.
[332] See, e.g., K.J. Greenberg and J.L. Dratel (eds), *The Torture Papers: the road to Abu Ghraib* (CUP 2005) detailing the political and administrative process that led to soldiers torturing detainees. The security imperative was seen as taking precedence over any individual human rights concerns.
[333] H. Duffy, '"Foreign Terrorist Fighters": a human rights approach?' (2018) 29 Security and Human Rights 130.

impetus for human rights, which exist to promote the recognition and respect of human dignity. Thus, the Chapter also demonstrated that whilst the essential nature of human dignity is acknowledged, the instruments place it in a functional relationship with security – it is recognised and protected to prevent conflict. This recognition is key to securing international peace and security, which is the central objective of the UN, as outlined in the UNC. Therefore, it can be said that the ultimate aim of preserving human dignity is not because it is something to be valued in and of itself, but due to its instrumental value in helping to prevent international armed conflict.

Additionally, the legal human rights instruments provide for the limitation of rights for the purpose of achieving national security objectives. This concession reveals the inconsistency at the heart of HRL – the State sets the parameters and controls the protection individuals can receive from the State to protect them from State abuse of its monopoly on coercive force. Additionally, the provision of human rights is essential to international peace and security as rights violations, and the consequent denial of dignity, is a primary cause of conflict and insecurity. Consequently, States can restrict rights, the expression of which are necessary for security, on the grounds of security concerns.

Chapter 4: The State and Security

4.1. Introduction

This Chapter assists in understanding the security concession contained within HRL outlined above through a consideration of Statehood and security narratives justifying the use of force. In addition, it introduces the self-defence exception to the general prohibition on the use of force expressed in the UNC, which is raised in Chapter 6 in the individual context of State agents and considered more fully in Chapter 7. Self-defence as a justification for the use of force by a State in the international sphere is considered in the context of force against an individual in Chapter 8. The aim is not to provide a detailed history of the development of States and international law as it exists today, or an examination of the concepts of sovereignty and security. Rather, the focus is on the second subsidiary research question 'What is the State and why does it need to be secure?'[334] As with Chapter 3, the discussion facilitates the building of the foundation of understanding of Statehood, security, and the concession within HRL to be employed in the analysis of the three case studies and assessment of the effectiveness of HRL in practice.[335]

The approach is again broadly positivist, identifying the relevant legal principles relating to Statehood, security, and uses of force. The Chapter identifies the State as being the primary subject and actor in international law, the 'person' within the society. It considers the articulation of the security objective as both the State's raison d'être and as a necessary method by which it maintains its existence. The Chapter also utilises materials from other disciplines to assist in placing the law in context and viewing it as part of, and responding to, the wider socio-political frameworks

[334] Chapter 2: 2.2.
[335] Chapters 6-8.

within which it operates.[336] Further, the interdisciplinary approach outlined above[337] is employed in the discussion of security, the Copenhagen School's 'securitisation' approach outlined, and the perception of human rights and security being in conflict is highlighted. This enables an understanding of the actions of States, particularly as States fear that groups, such as ISIL, will utilise foreign fighters returning home to carry out attacks, despite the low numbers of individuals engaging in terrorism on their return and most attacks emanating from 'homegrown' terrorists.[338]

The Chapter begins with an outline of the concept of the State and criteria for Statehood, which is followed by an overview of security and the 'securitisation' approach in Section 4.3, including an introduction to the concept of 'other'. The use of force in self-defence is detailed in Section 4.4. The important development of pre-emptive action by the State is highlighted and returned to in all three Case Study Chapters. The Chapter demonstrates that the State is central to international law and is the primary focus for protection, rather than the individual human. The functional relationship of HRL to security is demonstrated as States do not feel themselves bound by its strictures when confronting terrorist threats.

4.2. The State

In classical legal theory, the sovereign[339] State, as an identifiable socio-political construct, is the primary subject of international law,[340] which is

[336] See Chapter 2: 2.5.2.
[337] Ibid., 2.5.3.
[338] H. Duffy, '"Foreign Terrorist Fighters": a human rights approach?' (2018) 29 Security and Human Rights 126.
[339] Meaning independent from control by other States, not freedom from restraint by law. A. Clapham, *Brierly's Law of Nations* (7th edn, OUP 2014) 145; A. Orakhelashvili, 'The Dynamics of Statehood in the Practice of International and English Courts' in C. Chinkin and F. Baetens (eds), *Sovereignty, Statehood and State Responsibility* (CUP 2015) 172.
[340] A. Cassese, *International Law* (2nd edn, OUP 2005) 71.

created through the will and interaction of sovereign States.[341] A State can be conceptualised as having three components: the idea, the physical base, and the institutions.[342] Thus, it is a structure created by individuals to establish an order within which they can operate and whose governmental power has the ability to conduct external relations.[343] As such, the State possesses both rights and duties that are enforceable through the operation of international law[344] and are equal in sovereignty.[345] Other legal persons are also recognised and act within the international legal sphere[346] although they do not possess the independent law-making power of States as they lack Statehood.[347]

4.2.1. Criteria for Statehood

Unlike in domestic law, there is no definitive international legislation providing detailed rules regarding the creation of States.[348] The Montevideo Convention[349] provides the basic criteria for Statehood, Article 1 provides four essential criteria: a permanent population; b) a defined territory; c) a government; and d) capacity to enter into relations with the other States. The Badinter Commission similarly defined a State as 'a community which consists of a territory and a population subject to an organised political authority… characterised by sovereignty.'[350] Although not the totality of

[341] Treaties and State practice are primary sources of international law, Article 38(1) ICJ Statute 1945; Lauterpacht *International Law* 489; A. Clapham, *Brierly's Law of Nations* (7th edn, OUP 2014) 54.
[342] B. Buzan, *People, States and Fear: an agenda for international security studies in the post-Cold War era* (2nd edn, 2007) 67-9.
[343] A. Clapham, *Brierly's Law of Nations* (7th edn, OUP 2014) 139, 141.
[344] M.N. Shaw, *International Law* (6th edn, CUP 2008) 195.
[345] UNGA, 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations' (24 October 1970) UN Doc A/RES/2625 (XXV).
[346] J. Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 105-6.
[347] Ibid., 117.
[348] A. Cassese, *International Law* (2nd edn, OUP 2005) 72.
[349] Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19.
[350] Badinter Commission, 'Opinion No.1' (1991) 92 ILR 162.

relevant conditions,[351] these criteria are the foundation for Statehood and will be addressed briefly.

The necessity of a stable political community of humans is an obvious criterion given that the State is a human construct for the purpose of conducting international relations. A State is the delineation of one group of humans, separating them from others. The territory requirement is again understandable as the political community that forms the State must be geographically located. There are no size constraints and borders do not need to be uncontested, the crucial factor is the existence of a political community within the area.[352]

Crawford suggests that the criterion of (effective) government is crucial as 'all the others depend upon it.'[353] However, although some form of centralised control is necessary for the political community to function, it does not need to be sophisticated[354] or fully-functioning.[355] Potential issues arise where there is internal dispute regarding the government, but the loss of centralised control does not eliminate Statehood.[356]

The final requirement is essentially a manifestation of the independence of the political entity called a State, a demonstration that the State controls its external relations.[357] As there is a distinction between agency and interference, the intrusion by another State in its affairs does not automatically present a barrier to Statehood.[358] The concept of sovereignty

[351] J. Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 118.
[352] Badinter Commission, 'Opinion No.1' (1991) 92 ILR 162.
[353] J. Crawford, *The Creation of States in International Law* (OUP 2006) 56.
[354] *Western Sahara Case* (Advisory Opinion) (1975) ICJ Rep 12 [93]-[97].
[355] R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963) 162-4.
[356] J. Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 119.
[357] A. Clapham, *Brierly's Law of Nations* (7th edn, OUP 2014) 143.
[358] J. Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 120.

denies the existence of any higher authority and is an assertion by the State that it is the 'supreme decision-making authority' within its jurisdiction and over its citizens.[359] The protection of sovereignty, in its internal and external sense, is claimed by governments in matters of security.[360]

A significant factor impacting the establishment and expression of Statehood is recognition by other States. Although the existence of a State is a matter of fact,[361] it is only through other States' acceptance of its Statehood can a State exercise its legal personality within the international sphere, for example, through entering legal relations. The recognition of Statehood is a 'unilateral and discretionary act'[362] and carries both international and national consequences.[363] There are two competing doctrines regarding the nature of recognition – constitutive and declaratory.[364] The former posits that a State is endowed with international personhood and becomes a subject of international law only through the recognition of other States.[365] It is the recognition that creates the legal personality of a State.[366] The latter advances that the recognition serves to acknowledge what is already in existence[367] and is more aligned to the realities of international relations.[368] For example, in the *Genocide Convention Case*, the ICJ adhered to the declaratory approach in the sense that the Former Republic of Yugoslavia's

[359] B. Buzan, *People, States and Fear: an agenda for international security studies in the post-Cold War era* (2nd edn, 2007) 72.
[360] B. Buzan, O. Wæver, and J. de Wilde, *Security: a new framework of analysis* (Lynne Reinner 1998) 151.
[361] Badinter Commission, 'Opinion No.1' (1991) 92 ILR 162.
[362] T. Grant, 'How to Recognise a State (and not)' in C. Chinkin and F. Baetens (eds), *Sovereignty, Statehood and State Responsibility* (CUP 2015) 193.
[363] J. Crawford and S. Olleson, 'The Character and Forms of International Responsibility' in M.D. Evans (ed), *International Law* (5th edn, OUP 2018) 444; M. Craven and R. Parfitt, 'Statehood, Self-Determination, and Recognition' in M.D. Evans (ed), *International Law* (5th edn, OUP 2018) 207.
[364] H. Lauterpacht, 'Recognition of States in International Law' (1944) 53 Yale Law Journal 385.
[365] A. Clapham, *Brierly's Law of Nations* (7th edn, OUP 2014) 150.
[366] R.Y. Jennings and A.D. Watts (eds), *Oppenheim's International Law: Volume I Peace* (9th edn, OUP 2008) 134; A. Cassese, *International Law* (2nd edn, OUP 2005) 73.
[367] Badinter Commission, 'Opinion No.1' (1991) 92 ILR 162; J. Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 151.
[368] Ibid., 85; J. Crawford, *The Creation of States in International Law* (OUP 2006) 22ff.

(FRY) refusal to recognise Bosnia-Herzegovina did not prevent its being able to enforce its rights against the FRY from the time it became a State.[369] However, there is a constitutive element in that the recognition gives effect to the Statehood[370] and creates rights and duties towards the recognising State.[371] This recognition is a political act and can be utilised for a State's own ends.[372] Thus, a State can be said to be a political entity formed by humans to facilitate interaction, which accords with philosophical perspectives on the nature of Statehood.

4.2.2. Philosophical Perspectives

Various conceptions of the State and its origins exist, a common theme being that the State arises as a (natural) consequence of humankind's social and political interaction. Outlined below are key conceptions of the State that influence modern political thought.

For Plato, the State was a naturally occurring phenomenon, establishing an ethical community founded on the maintenance of justice.[373] Similarly, Aristotle held that 'the State is both natural and prior to the individual'[374] and 'comes for the sake of life, and exists for the sake of the good life'.[375] Writing in the seventeenth century, Hobbes also believed the State to exist for the benefit of humankind as otherwise people would live in perpetual bellum omnium contra omnes and life would be 'solitary, poor, nasty, brutish and short.'[376] Humans have the natural right to decide for themselves what

[369] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595, 613.
[370] M. Craven and R. Parfitt, 'Statehood, Self-Determination, and Recognition' in M.D. Evans (ed), *International Law* (5th edn, OUP 2018) 204.
[371] R.Y. Jennings and A.D. Watts (eds), *Oppenheim's International Law: Volume I Peace* (9th edn, OUP 2008) 130.
[372] A. Clapham, *Brierly's Law of Nations* (7th edn, OUP 2014) 152.
[373] Plato, *The Republic* (C Rowe tr, Penguin Classics 2012).
[374] Aristotle, *Politics: books I and II* (T.J. Saunders tr, OUP 1995) I.21253a18-29 [3].
[375] Ibid., I.21252b27-30 [3].
[376] T. Hobbes, *Leviathan* (Lerner 2018) 130.

is necessary for their own survival and act accordingly,[377] which needs to be renounced to give effect to the 'fundamental law of nature' to seek peace.[378] Through collectively agreeing to restrict their natural right and establish a common 'Power,' a political body that facilitates peace, humans are able to give full effect to their right to self-preservation, their highest good.[379] Consequently, the 'Soveraigne' is established and is endowed with rights and powers necessary for maintaining peace, which amount to a form of political absolutism as the sovereign power has control over all religious, political, and judicial doctrines and can use force to maintain its position.[380]

Locke's perspective of the state of nature was, in contrast to Hobbes, one of benevolent individualistic anarchy and the use of force put people outside that condition and into a state of war.[381] However, the establishment of a political power is also envisaged as being the result of humans collectively establishing a common law and agreeing to be bound by it.[382] Rousseau likewise argued for the 'social contract' theory[383] and against the concept of divinely appointed rulers. Thus, a unifying feature of these different philosophical explanations and justifications of the State is that it assists humans in living together. Additionally, the social contract theories all subscribe to the idea that States are human-made for the benefit of humankind. The State is not considered 'an artificial restriction of liberty but [rather] a means of gaining it' and is the natural goal to towards which human life moves.[384]

[377] T. Hobbes, *Leviathan* (Lerner 2018) 133-4.
[378] Ibid., 135.
[379] Ibid., 173.
[380] Ibid., 206.
[381] J. Locke, *Two Treatises of Government and a Letter Concerning Toleration* (I. Shapiro (ed), YUP 2003) §4, §19.
[382] Ibid., §97.
[383] J-J Rousseau, *The Social Contract and the First and Second Discourses* (S. Dunn (ed), YUP 2002) 163.
[384] W.D. Ross, *Aristotle* (Methuen 1937) 239.

For Marx, the State is also the external manifestation of a collection of individuals. However, the power of the State is utilised by the ruling class who maintain economic, social, and ideological domination.[385] Governments are 'decision-making' and 'influence' elites, comprising of those who either make or influence State decision-making due to their position in the political structure.[386] As States use coercion to 'secure compliance' with its rules, whilst seeking to establish the 'supremacy' of those rules and supress opposition and alternatives,[387] the aims and interests of the State reflect those of the ruling class. In contrast to the Lockean concept of government representing the interests of all citizens and ultimate authority residing in the individual, Marxism conceptualises the State as a system of oppression the 'pattern of society' centring on conflict between different groups.[388]

The dependence of the State upon groups of people for its existence gave rise to the 'imagined political community' of the nation[389] and the idea that the cultural and ethnic identity of the people (the Nation) coincides with the geographical and political entity (the State), inventing 'Nations where they do not exist'[390] and separating people along arbitrary lines. Most members of the community have no interaction with each other and will never meet, but nevertheless 'consider themselves to form a nation'[391] and are bound together in a deep, 'horizontal comradeship'.[392] The Nation-State concept ignores the inherent differences existing within all human groups and attempts to connect every individual by articulating an idea of 'national

[385] K. Marx and F. Engels, *Manifesto of the Communist Party* (Foreign Languages Press 1975) 32ff.
[386] W. Wesołowski, 'Ruling Class and Power Elite' (1965) 11 The Polish Sociological Bulletin 22, 23-4.
[387] A. Buchanan, 'Political Legitimacy and Democracy' (2002) 112(4) Ethics 689, 690.
[388] W. Wesołowski, 'Class Domination and the Power of Interest Groups' (1962) 3/4 The Polish Solciological Bulletin 53, 55.
[389] B. Anderson, *Imagined Communities* (Verso 2006) 6.
[390] E. Gellner, *Thought and Change* (Verso 1964) 169.
[391] H. Seton-Weston, *Nations and States: an enquiry into the origins of nations and the politics of nationalism* (Westview Press 1977) 5.
[392] B. Anderson, *Imagined Communities* (Verso 2006) 7.

identity'. This identity often ignores individual, sub-regional, and regional differences, and ignores the commonalities that transcend State borders, engendering separation and a 'them' and 'us' mentality that is essential to the construction of the State – it is impossible to construct an internal 'self' without an external 'other'.[393]

Separating human groups along cultural and geopolitical lines arguably encourages war and conflict between different groups[394] and justifies the defence of the Nation/State group from external 'others.' Differences present a threat to group cohesion and expose the lack of uniformity, thereby also creating a potential internal threat to the structure of the group. Thus, a certain degree of internal suppression and oppression of ideas and practices that run contrary to the group identity is also required.[395] Speech acts maintain both the group identity and the differences between those who belong within and without the group. Language is used to naturalise 'a particular political and social order' and to 'construct and maintain a hegemonic regime of truth.'[396] This is done in a variety of ways, in numerous fora[397] and is designed to protect and preserve the group identity as manifested in the Nation-State,[398] whilst assisting in the justification of the use of force to protect the State as a perceived collective.

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[393] D. Campbell, *Writing Security: US foreign policy and the politics of identity* (MUP 1998).
[394] A. Wimmer and B. Min, 'From Empire to Nation-State: explaining wars in the modern world, 1816-2001' (2006) 71(6) American Sociological Review 867.
[395] As demonstrated by UK Prime Minister David Cameron arguing that Muslim community groups must adhere to and uphold certain values to receive public funds and stating that certain values 'define us as a society: to belong here is to believe in these things.' D. Cameron, 'Speech on Radicalisation and Islamic Extremism' at the Munich Security Conference (5 February 2011) <webarchive.nationalarchives.gov.uk/20130109092234/http://number10.gov.uk/news/pms-speech-at-munich-security-conference/> accessed 20 February 2021.
[396] R. Jackson, 'Constructing Enemies: 'Islamic Terrorism' in Political and Academic Discourse' (2007) 42(3) Government and Opposition 394, 397.
[397] See, e.g., R. Wodak, R. de Cilla, M. Reisigl and K. Liebhart, *The Discursive Construction of National Identity* (2nd edn, EUP 1999) for a discussion on the complex construction of national identity.
[398] See, e.g., A. Fisher, 'Selling the Self: the discursive construction of identities in the first UK televised Prime Ministerial debates' (PhD Thesis, University of Nottingham 2013) for a linguistic analysis of political discourse identifying the group ('us') and those who are outside it ('other').

4.3. Security

The international law drafted and enacted in the post-WWII period arguably demonstrates the centrality of State security in the international legal system, rather than an absolute conviction that respecting human dignity through human rights principles is essential to ensuring a lasting peace. For example, although created in response to the WWII atrocities and following the 1947 UNGA Resolution,[399] the 1948 Genocide Convention[400] was signed without including an enforcement mechanism. Similarly, the UDHR was adopted as a UNGA Resolution, rather than a treaty that created legal obligations for its signatories. Additionally, as mentioned above,[401] the UNC makes no individual or collective human rights provisions and is instead focused on security.

Thus, it can be argued that the modern international community, consisting mainly of States and international organisations formed by States, was developed with the primary aim of securing and maintaining international peace and security.[402] The UNC preceded human rights instruments and was not substantively strong in terms of international law; rather 'security' as a discretionary concept took centre stage allowing States to use their own judgment and conscience on matters of security, instead of establishing hard legal rules. Despite being present in human rights instruments, which provide for the restriction of certain rights in the interests of national security,[403] security is an undefined term.

[399] UNGA Res 180(II) (21 November 1947) UN Doc A/RES/180(II).
[400] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.
[401] Chapter 3: 3.4.1.
[402] UNC Preamble; B. Simma and A.L. Paulus, 'The "International Community": facing the challenge of globalisation' (1998) 9 EJIL 266.
[403] As outlined above, Chapter 3: 3.5.

In the international arena, security is usually referenced in relation to threats that may 'undermine States as the basic unit of the international system'[404] and is generally perceived in terms of State security, with Article 24 UNC, the conferring of primary responsibility for the maintenance of international peace and security onto the UNSC, being interpreted accordingly.[405] Security can be generally defined as the condition of being protected from threats.[406] International security requires the assurance of peace and implies States have the right to both enjoy and support relevant security systems.[407] Although understanding of the term has expanded beyond aggression to include other issues, such as climate change,[408] the focus here remains on security in the traditional sense.

The scope and content of the term 'security' is set by political decision, rather than legal definition. The discourse around terrorism and counterterrorism is an exercise of State power[409] serving a clear political purpose.[410] Ideas of security can be employed to justify (lack of) action by a State and condemn the acts of opponents, which are often generally accepted by the citizenry[411] as fear evokes a range of emotions that can increase support for punitive

[404] B. Simma, D-E. Khan, G. Nolte, A. Paulus, N. Wessednorf (eds), *The Charter of the United Nations: a commentary, Vol. I* (3rd edn, OUP 2012) 111.
[405] As evidenced in the majority of UNSC Resolutions. UNSC, 'Resolutions' (*UNSC*, 2023) <https://www.un.org/securitycouncil/content/resolutions-0> accessed 02 February 2023.
[406] 'Security' (*Cambridge Dictionary*, 2022) <https://dictionary.cambridge.org/dictionary/english/security> accessed 30 May 2022.
[407] B. Simma, D-E. Khan, G. Nolte, A. Paulus, N. Wessednorf (eds), *The Charter of the United Nations: a commentary, Vol. I* (3rd edn, OUP 2012) 111.
[408] UNSG Kofi Anan, 'In Larger Freedom: towards development, security and human rights for all' (21 March 2005) UN Doc A/59/2005 [6]-[11].
[409] For Schmitt, sovereignty is the ability to determine 'the state of exception.' C. Schmitt, *Political theology: four chapters on the concept of sovereignty* (MIT Press 1985) 1.
[410] R. Jackson, *Writing the International War on Terrorism: language, politics, and counterterrorism* (MUP 2005) 2.
[411] E.g., UK Prime Minister David Cameron used security to justify the intrusive surveillance actions of GCHQ and the inaction of both the UK Government and Parliament in response to the Snowden revelations. 'The World at One' *BBC Radio Four* (25 October 2013). Media outlets that facilitated Snowden's actions were criticised for endangering UK national security. A. Sparrow, 'Guardian Faces Fresh Criticism over Edward Snowden Revelations' *The Guardian* (10 November 2013) <www.theguardian.com/media/2013/nov/10/guardian-nsa-revelations-edward-snowden> accessed 23 May 2020.

policies.[412] The public narrative has become one in which violence by the State towards enemies is seen as being reasonable, acceptable, and appropriate.[413] Security is treated as a 'social value, a generally applicable normative criterion,' with no independent meaning and intimately connected to the values of the individuals and their society.[414] The construction of threat, an 'other' posing an existential threat to the self serves as the constitutive external that brings the self into being.[415] As outlined above at 4.2.2, conceptions of the State rely on the idea that to be outside the State is to be in a place of danger – the central justification of the State is that it provides security. Thus, there must always be an 'other' from which the collective needs protecting through the mechanism of the State. A method of understanding the operation of 'security' in the counterterrorism context is through the application of 'securitisation theory.'

4.3.1. Securitisation Theory

The Copenhagen School approach is radically constructivist in understanding security as a political construction.[416] The central proposition of securitisation theory is that security is an illocutionary speech act, meaning the very utterance of the word, the designation of something as a 'security issue' results in it becoming one.[417] The content of 'security' depends on its framing and usage.[418] Through declaring the State (the referential object) to be

[412] M.L. Misis, M.D. Bush, and N. Hendrix, 'An Examination of College Students' Fears About Terrorism and the Likelihood of a Terrorist Attack' (2017) 9(2) Behavioural Sciences of Terrorism and Political Aggression 125, 135.
[413] R. Jackson, *Writing the International War on Terrorism: language, politics, and counterterrorism* (MUP 2005) 1.
[414] V. Csépe, 'The Psychological Dimensions of Subjective Security' in G. Finszter and I. Sajbanics (eds), *Security Challenges in the 21st Century* (Dialóg Campus 2018) 279, 280.
[415] D. Campbell, *Writing Security: US foreign policy and the politics of identity* (MUP 1998) 12-3.
[416] B. Buzan, 'Rethinking Security After the Cold War' (1997) 32(1) Cooperation and Conflict 5, 20-1.
[417] O. Wæver, 'Aberystwyth, Paris, Copenhagen: the Europeanness of new "schools" of security theory in an American field!' in A.B. Tickner and D.L. Blaney, *Thinking International Relations Differently* (Routledge 2012) 53.
[418] B. Buzan, O. Wæver, and J. de Wilde, *Security: a new framework of analysis* (Lynne Reinner 1998) 24.

existentially threatened,[419] the securitising actor (such as the UK Prime Minister) claims the right to take extraordinary measures to secure the State's survival. This then fundamentally alters the applicable legal framework as the issue is now within the exceptional, emergency sphere, where action can be taken without the usual constraints.

As already highlighted, 'security' does not have an independent or legal definition and so can reference anything the securitising actor is able to convince their audience of. The terms 'security' and 'defence' form part of a 'global public discourse of fear' that encourages and legitimises State uses of force[420] and are used to facilitate the securitisation of terrorism. The approach bears similarities with Carl Schmitt's view of the political as the act by which humans can be divided 'according to enemy and friend.'[421]

The defining feature of securitisation is the specific security rhetoric of survival, priority of action, and urgency.[422] A securitising speech act must follow three rhetorical steps: 1) the securitising actor claims the referent object is subject to an existential threat; 2) the right to take emergency action is asserted; 3) the audience is convinced that the rule-breaking action is justified in dealing with the threat.[423] The first step, called a securitising move, is theoretically open to any actor as it is only through the next two stages of convincing the audience of the legitimacy of entering the emergency sphere, thereby going beyond the usual rules, does securitisation

[419] The securitising actor is asserting that unless the threat is confronted, 'everything else will be irrelevant' as it will cease to exist or be inalterably (and negatively) changed. B. Buzan, O. Wæver, and J. de Wilde, *Security: a new framework of analysis* (Lynne Reinner 1998) 24.
[420] U. Linke and D. Taana Smith, 'Fear: a conceptual framework' in U. Linke and D. Taana Smith (eds), *Cultures of Fear: a critical reader* (Pluto Press 2009) 3.
[421] C. Schmitt, *The Concept of the Political* (University of Chicago Press 1996) 37.
[422] O. Wæver, 'Insecurity, Security, and Asecurity in the West European Non-War Community' in E. Adler and M. Barnett (eds), *Security Communities* (CUP 1998) 80.
[423] B. Buzan, O. Wæver, and J. de Wilde, *Security: a new framework of analysis* (Lynne Reinner 1998) 6.

occur.[424] Thus, the speech act is the securitising move that becomes a securitisation through the acceptance and consent of the audience in an inter-subjective construction of security.[425] In practice, as it is a political act,[426] the capacity of the securitising actor is limited by their ability to socio-politically construct the threat and communicate and convince the audience. Hence, in the context of this thesis, it is the purview of the government and other State actors.

Within international relations, security exists on several levels and between different actors. Securitisation is generally more successful at the 'middle' level where the political unit is the State, as opposed to the individual or system levels.[427] One rationalisation of this is that States, as a limited collective, 'engage in self-reinforcing rivalries' with other States that bolster the 'we' feeling.[428] However, there can also exist an over-arching, meta-security narrative that subordinates, or at lease incorporates, other securitisations, such as the Cold War[429] and global War on Terror (WoT).[430] These then create constellations as relations and identities are organised around the central securitisation. [431] As with the Cold War macrosecuritisation, the global WoT utilises a universalist ideology[432] that speaks to the core identities of the central actors, as being defenders of

[424] B. Buzan, 'Rethinking Security After the Cold War' (1997) 32(1) Cooperation and Conflict 5, 15; O. Wæver, 'The EU as a Security Actor: reflections from a pessimistic constructivist on post-sovereign security orders' in M. Kelstrup and M.C. Williams (eds), *International Relations Theory and the Politics of European Integration* (Routledge 2000) 251.
[425] B. Buzan, O. Wæver, and J. de Wilde, *Security: a new framework of analysis* (Lynne Reinner 1998) 26-33.
[426] O. Wæver, 'The EU as a Security Actor: reflections from a pessimistic constructivist on postsovereign security orders' in M. Kelstrup and M. Williams (eds), *International Relations Theory and the Politics of European Integration* (Routledge 2000) 252.
[427] B. Buzan, O. Wæver, and J. de Wilde, *Security: a new framework of analysis* (Lynne Reinner 1998) 36-7.
[428] B. Buzan and O. Wæver, 'Macrosecuritisation and Security Constellations: reconsidering scale in securitisation theory' (2009) 35 Review of International Studies 253, 255.
[429] Ibid., 254.
[430] B Buzan, 'Will the "Global War on Terrorism" be the new Cold War?' (2006) 82(6) International Affairs 1101.
[431] B. Buzan and O. Wæver, 'Macrosecuritisation and Security Constellations: reconsidering scale in securitisation theory' (2009) 35 Review of International Studies 253, 259.
[432] Ibid., 260.

freedom and peace, and to the wider audience of the global community of States. It can be described as containing elements of existing order universalism, terrorism is threatening order, and US-centred inclusive universalism, Western liberalism is the optimal socio-political structure.[433] Terrorism is threatening the Western ideas holding the State together, which threatens the established political order. [434] Key to the successful macrosecuritisation is the 'construction of higher-level referent objects capable of appealing to, and mobilising, the identity politics of a range of actors within the system.'[435] The UN represents concepts of order, the enshrining and upholding of principles and norms that may require defending should they be significantly threatened. Thus, reference to these principles in a security way can legitimate extraordinary action.[436] 'Empty signifiers,'[437] such as 'freedom, justice, and human rights' from the UNC, can be utilised in this way.

4.3.1.1. Securitisation in practice

In opposition to freedom stands Islamic terrorism, which is viewed as an 'apocalyptic, religiously inspired terrorism directed against the free world.'[438] The successful macrosecuritisation of terrorism means it is now considered to be self-evident that it presents an existential threat, in much the same way as the threat of Soviet power and nuclear weapons was seen as a reality,[439] superseding other 'securitisations' between regions and states and

[433] Ibid., 265.
[434] B. Buzan, O. Wæver, and J. de Wilde, *Security: a new framework of analysis* (Lynne Reinner 1998) 150.
[435] B. Buzan and O. Wæver, 'Macrosecuritisation and Security Constellations: reconsidering scale in securitisation theory' (2009) 35 Review of International Studies 253, 268.
[436] B. Buzan, O. Wæver, and J. de Wilde, *Security: a new framework of analysis* (Lynne Reinner 1998) 148-9.
[437] B. Buzan and O. Wæver, 'Macrosecuritisation and Security Constellations: reconsidering scale in securitisation theory' (2009) 35 Review of International Studies 253, 266
[438] A. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (YUP 2002) 168.
[439] R. Jackson, *Writing the International War on Terrorism: language, politics, and counterterrorism* (MUP 2005).

framing the international security discourse.[440] However, despite the West seriously overestimating Soviet capability,[441] it was known at the time that the USSR had nuclear weapons and functioning and equipped armed forces of significant size. In contrast, al-Qaeda is a disparate network of an indeterminate size and with limited resources and capability. [442] Nevertheless, the use of the security narrative continues to reinforce the securitisation as each contribution builds upon the last, with other key concepts, such as the protection of human rights and democracy, are then brought into the frame to lend weight and support to the 'securitisation' of terrorism.[443]

Terrorism is portrayed as presenting a threat peculiar to its epoch, with 'challenges… qualitatively different from the past'.[444] The world is now viewed as a very different place, facing a unique and unprecedented threat where the luxuries of the rule of law and due process can no longer be afforded.[445] As asserted by former UK Prime Minister Tony Blair, a primary and central function of government is to ensure the safety of its citizenry above all else – even at the sacrifice of civil liberties and individual freedoms.[446] Discussions tend to focus on achieving the correct 'balance'

[440] B. Buzan, O. Wæver and J. De Wilde, *Security: A New Framework for Analysis* (Lynne Rienner, 1998); B Buzan, 'Will the "Global War on Terrorism" be the new Cold War?' (2006) 82(6) International Affairs 1101.
[441] H. Spruyt, *Ending Empire: Contested Sovereignty and Territorial Partition* (Cornell University Press 2005) 61.
[442] J. Bajoria and G. Bruno, 'al-Qaeda' *Council on Foreign Relations* (6 June 2012) <www.cfr.org/terrorist-organizations-and-networks/al-qaeda-k-al-qaida-al-qaida/p9126>.
[443] Democracy is seen as the only legitimate form of government and so it is possible to justify the use of armed force in its defence. This is arguably a continuation of the civilising mission present at the establishment of the UN. S. Marks, 'The End of History? Reflections on Some International Legal Theses' (1997) 3 EJIL 449; J. Gray, *Straw Dogs: Thoughts on Humans and Other Animals* (Granta Books 2002); F. Fukuyama, *The End of History and the Last Man* (Penguin 1992); T.M. Franck, 'The Emerging Right to Democratic Governance?' (1992) 86 AJIL 46.
[444] C. Pantazis and S. Pemberton, 'From the "Old" to the "New" Suspect Community: examining the impacts of recent UK counterterrorism legislation' (2009) 49 British Journal of Criminology 646, 650.
[445] S. Pickering, J. McCulloch and D. Wright-Neville, *Counter-Terrorism Policing* (Springer 2008) 7.
[446] L.S. Heard, 'Using War on Terror to Flout Own Laws' *Gulf News* (4 July 2006) <gulfnews.com/opinions/columnists/using-war-on-terror-to-flout-own-laws-1.243286>.

between security and civil liberties, a concept that is both familiar and widely accepted,[447] rather than questioning the securitisation of terrorism.[448] Islamic terrorism represents an enemy so powerful and pervasive that almost any action perceived as necessary to maintain security can be legitimised. Although disquiet may be voiced over the more extreme activities, such as torture and targeted killings,[449] these practices do not cease as terrorists threaten the very fabric of civilisation, the 'freedoms' upon which society is built.[450] Consequently, acts against terrorists are framed as being necessary to protect human rights, preserve democracy, and defend 'our way of life'.[451] The referent objects being protected by the securitisation of terrorism are the sovereignty of the State, its democracy, values, and culture, and international order, which is intimately connected with the domestic values.

The perceived tension between respecting human rights and democratic freedoms and satisfying security requirements presents a contemporary predicament for the international community.[452] The successful[453]

[447] R. Dworkin, *Taking Rights Seriously* (Duckworth 1978) 234.
[448] E.g., in the Case Studies (Chapters 6-8) the premise that State action was necessary due to the threat of terrorism was never questioned in the ensuing examinations of the events.
[449] S. Jenkins, 'The Real Threat to Our Way of Life? Not Terrorists or Faraway Dictators, but our own Politicians and Securocrats' *The Guardian* (27 August 2013) , https://www.theguardian.com/commentisfree/2013/aug/27/real-threat-terrorist-politicians-national-security#:~:text=Not%20terrorists%20or%20faraway%20dictators%2C%20but%20our%20own%20politicians%20and%20securocrats,-This%20article%20is&text=What%20is%20Britain's%20national,precise%20and%20the%20language%20clear> accessed 18 December 2021; International Commission of Jurists, 'Assessing Damage, Urging Action: report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights' (ICJ 2009) 61ff.
[450] E.g., UNGA, 'Global Counterterrorism Strategy' (20 September 2006) UN Doc A/RES/60/288: 'terrorism… [is] aimed at the destruction of human rights, fundamental freedoms and democracy.'
[451] 'A Strong Britain in an Age of Uncertainty: The National Security Strategy' (Cabinet Office, October 2010) 23.
[452] A. Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 EJIL 993, 993.
[453] As evidenced by the connecting of 'terrorism' with the terms 'threat' and 'security' by politicians and international organisations as a precursor to new action or measures. The threat to international peace and security presented by terrorism is self-evident and justifies whatever measures are deemed necessary. E.g., UNGA 'Global Counterterrorism Strategy' (20 September 2006) UN Doc A/RES/60/288; R. Jackson, *Writing the International War on Terrorism: language, politics, and counterterrorism* (MUP 2005) 3; S. Wood, 'Terrorism

securitisation of terrorism as an existential threat has enabled governments to move beyond the politicisation of the concept, through the legalisation of responses, and to persuade the citizenry to accept extraordinary counterterrorism measures. Such legislation usually develops in response to articulated threats to security. After 9/11, Western governments significantly reduced civil liberties and the procedural rights of terrorists, whilst increasing immigration restrictions.[454]

Counterterrorism measures in the UK significantly expanded the powers of the State and its organs. For example, s.23 of the Anti-Terrorism Crime and Security Act 2001 (ACTA) permitted the Home Secretary to order the indefinite detention of foreign terrorist suspects who could not be deported on the basis they may face ill-treatment contrary to Article 3 ECHR, requiring the UK to derogate from Article 5 ECHR. Detainees could only appeal their detention through the Special Immigration Appeals Commission and were not permitted to see or challenge all the evidence against them. Instead, a special advocate, who was precluded from communicating with the detainee, was appointed to argue on the detainee's behalf in the closed hearings.[455]

Biggest Threat to National Security, Officials Say' (*US Department of Defense News*, 28 February 2006) <www.defense.gov/news/newsarticle.aspx?id=14735> accessed 19 December 2020; P. Parham (UK Ambassador), 'Terrorism Continues to Pose a Grave Threat to International Peace and Security' Statement to UNSC Meeting on Briefings by Chairmen of Subsidiary Bodies of the Security Council (10 May 2013) <www.gov.uk/government/speeches/terrorism-continues-to-pose-a-grave-threat-to-international-peace-and-security> accessed 19 December 2020. Additionally, as seen in the Case Studies (Chapters 6-8), the context of terrorism legitimised the security operations in which the victims were killed.

[454] M. Epifanio, 'Legislative Response to International Terrorism' (2011) 48(3) Journal of Peace Research 399, 400.

[455] The compliance of these measures with the ECHR was successfully challenged in *Belmarsh Case* (*A and others v Secretary of State for the Home Department* [2004] UKHL 56. However, the response was to enact the Prevention of Terrorism Act 2005, which permitted the Home Secretary to impose control orders (s.1) on individuals suspected of terrorism again with a low-level of judicial review and us of closed proceedings. Control orders were abolished by the Terrorism Prevention and Investigation Measures Act 2011, s.26 enables the imposing of restrictions, such as limiting association and communication, and monitoring of terrorist suspects.

Further, UK emergency legislation, which includes powers to pass emergency regulations,[456] defines 'emergency' as including 'terrorism which threatens serious damage to the security' of the UK with no definition of 'damage' or 'security'. [457] Counterterrorism legislation also contains enhancement provisions enabling the curtailing of rights in undefined situations of 'urgency', such as s.58 of the Protection of Freedoms Act 2012, which allows the increasing of the 14-day pre-trial detention period for terrorist suspects to 28-days. In Australia, the Security Intelligence Organisation was empowered to detain persons for up to seven days without charge or trial without any suspicion of an offence.[458] Assisting in the justification of rights-curtailing legislation is the idea that States are disadvantaged by the asymmetric nature of terrorism. Whereas terrorists are more flexible, secretive, and only need be lucky once, the openness of liberal States can be used against them as terrorists can assess the resources of a State through publicly available information.[459]

Consequently, the 'securocratic language… diminishes civil society [and] abandons human rights.'[460] In a democracy the securitising speech act facilitates a reduction in public scrutiny of security measures by legitimising the extraordinary measures and then allowing the application of secrecy to prevent the enemy from acquiring the information, thereby protecting the public and State agents.[461] This leads to the 'democratic dilemma' of 'a democracy destroying itself in the process of defending itself.'[462] According

[456] Civil Contingencies Act 2004 (CTA) s.20.
[457] CTA 2004 s.1 and s.19.
[458] C. Michaelsen, 'Australia and the Threat of Terrorism in the Decade after 9/11' (2010) 18(3) Asian Journal of Political Science 248, 249.
[459] T. Sandler, 'Collective versus Unilateral Responses to Terrorism' (2005) 124 Public Choice 75, 79.
[460] U. Linke and D. Taana Smith, 'Fear: a conceptual framework' in U. Linke and D. Taana Smith (eds), *Cultures of Fear: a critical reader* (Pluto Press 2009) 3.
[461] B. Buzan, O. Wæver, and J. de Wilde, *Security: a new framework of analysis* (Lynne Reinner 1998) 28.
[462] J-W. Müller, 'Militant Democracy' in M. Rosenfeld and A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 1254.

to Amnesty, the 'threat to the life of a nation,' which includes respect for human rights, emanate 'from governments and societies that are prepared to abandon their own values' in confronting terrorism.[463] Additionally, the effect of securitisation is the silencing of opposition and the enabling of power holders to exploit 'threats' for domestic purposes and claim the right to address an issue with less democratic control and restraint. Thus, security should be viewed as a failure to tackle contentious matters within the sphere of normal politics and law.[464] The ultimate outcome is the undermining of the social values of the measures purport to protect[465] as the relinquishing of fundamental liberties in the name of security arguably undermines both liberty and security[466] and potentially fuels terrorism as governments are perceived as being hypocritical and self-serving.[467]

4.3.1.2. The dangerous 'other'

According to the conception of Statehood outlined above,[468] States are partly defined through the separation of one collection of individuals from another. Consequently, they must protect themselves, as the manifestation of the collective, from external threats and so are permitted, in international law, to defend against an attack.[469] The primary audience for securitisation

[463] Amnesty International, 'Dangerously Disproportionate: the ever-expanding national security state in Europe' (Amnesty International 2017) 8.
[464] B. Buzan, O. Wæver, and J. de Wilde, *Security: a new framework of analysis* (Lynne Reinner 1998) 45.
[465] H.M. Fenwick, 'Editorial: Counterterrorism Strategies, Human Rights, and the Roles of Technology' (2011) 25(3) International Review of Law, Computers and Technology 107, 108.
[466] B. Franklin and W.T. Franklin, *Memoirs of the Life and Writings of Benjamin Franklin* (H Colburn 1818) 270.
[467] M.C. Bassiouni, 'Legal Control of International Terrorism: A Policy-Orientated Assessment' (2002) 43 Harvard International Law Journal 83, 103; individuals are only vulnerable to the bifurcation of the world into good/evil, light/dark once they are convinced that the state is no longer legitimate, E. Sprinzak, 'The Process of Delegitimization: Towards a Linkage Theory of Political Terrorism' (1991) 3(1) Terrorism and Political Violence 50, 56–57.
[468] Chapter 4: 4.2.2.
[469] As demonstrated in various international materials: Article 1 ECHR imposes a duty on the Contracting Parties to secure the rights and freedoms contained within Section I for all in their jurisdiction; UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 World Summit Outcome; UNSC Res 1674 (28 April 2006) UN Doc S/RES 1674; UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894; UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970; UNSC Res 1973 (17 March 2011) UN Doc S/RES 1973; UNSC Res 2016 (27 October 2011) UN Doc S/RES/2016 in relation to Libya; UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975 in

discourses is the public as their compliance is required to maintain the social, political, legal, and economic structures upholding and perpetuating the status quo. The construction of an external and internal 'other', distinct from 'us', from whom 'we' require protection as they seek to destroy 'us' and 'our way of life'[470] provides the rationale for the State's use of coercive force.

In securitisation theory, securitising actors and their audiences exist in 'sedimented social and political structures' placing actors 'in positions of power to influence the [securitisation] process.'[471] One position of power is through access to and influence over the media,[472] which plays a significant role in constructing and articulating discourses relating to minority groups,[473] with representations shaping constructions of reality for the consumer.[474]

'Discourse' refers to 'different ways of structuring areas of knowledge and social practice.'[475] It represents rule-governed, systematic methods of discussing objects that makes the object meaningful to participants of the discourse. As such, discourses can also constitute and construct, as well as represent, social reality – they are 'practices that systematically form the

relation to Côte d'Ivoire; UNSC Res 2014 (21 October 2011) UN Doc S/RES/2014; UNSC Res 2085 (20 December 2012) UN Doc S/RES/2085; UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100 in relation to Mali; UNSC Res 1996 (8 July 2011) UN Doc S/RES/ 1996; UNSC Res 2126 (25 November 2013) UN Doc S/RES/2126 in relation to Sudan; UNSC Res 2121 (10 October 2013) UN Doc S/RES/2120; UN Res 2127 (5 December 2013) UN Doc S/RES/2127; UNSC Res 2134 (28 January 2014) UN Doc S/RES/2134 in relation to the Central African Republic.

[470] HM Government, 'Contest: the United Kingdom's Strategy for Countering Terrorism' (June 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf> accessed 1 September 2022. Foreword by Prime Minister Theresa May; Foreword by Home Secretary Sajid Javid; [3], [7], [95].

[471] H. Stritzel, 'Towards a Theory of Securitization: Copenhagen and beyond' (2007) 13(3) EJIR 357, 360.

[472] T. Balzacq, 'The Three Faces of Securitization: political agency, audience and context' (2005) 11(2) EJIR 171, 191.

[473] A. Saeed, 'Media, Racism and Islamophobia: the representation of Islam and Muslims in the media' (2007) 1/2 Sociology Compass 443, 444.

[474] P. Power, R. Kubey, and S. Kiosis, 'Audience Activity and Passivity: an historical taxonomy' (2002) 26(1) Annals of the International Communication Association 116, 124.

[475] N. Fairclough, *Discourse and Social Change* (Polity Press 1992) 3.

objects of which they speak.'[476] Consequently, any example of speech does not exist in isolation and is just one part of a network of interrelated discourses.[477] Every speech act is part of a substantial network, meaning every instance of discourse informs, and becomes situated within, the wider discourse.

Levels of ignorance regarding an 'out-group' correlate to perceptions of threat,[478] with higher levels of unfamiliarity and absence of knowledge correlating to higher levels of threat perception. Perceived threat is the cognitive process relating to a contextual danger or harm,[479] leading to a fear response. Fear can be activated through media reports, increasing the threat perception from those identified as potential terrorists, i.e., Muslims.[480] The important aspect is not how the individual terrorist suspects view themselves but how the identities are understood and made meaningful by the intended audience.

Identity is socially constructed in a dialectic manner through the discourse of speakers and the discursive practices of the consumers of that speech,

[476] M. Foucault, *The Archaeology of Knowledge and the Discourse on Language* (trans. A.M. Sheridan-Smith, Pantheon Books 1972) 49.
[477] Ibid., 21-24.
[478] J. Novotný and F. Polonský, 'The Level of Knowledge about Islam and Perception of Islam among Czech and Slovak University Students' (2011) 43(6) Sociológia 674, 676.
[479] K. Witte, 'Fear Control and Danger Control: a test of the extended parallel process model (EPPM)' (1994) 61(2) Communication Monographs 113, 115. Media coverage of terrorists in the UK focus on Muslims as a threat and/or belonging to a separate, incompatible culture. See, K. Moore, P. Mason and J. Lewis, 'Images of Islam in the UK: the representation of British Muslims in the national print news media' (2008 Report published by Cardiff School of Journalism, Media and Cultural Studies, commissioned by Channel 4) <https://orca.cardiff.ac.uk/id/eprint/53005/1/08channel4-dispatches.pdf> accessed 1 September 2022; I. Rafa and A.B. Shaikh, 'Digitalized Ethnic Press and the Representations of British Muslims in the Wake of the 7/7 Bombings' in S.S. Yu and M.D. Matsaganis (eds), *Ethnic Media in the Digital Age* (Routledge 2018); P. Baker, C. Gabrielatos, and T. McEnery, 'Sketching Muslims: A corpus-driven analysis of representations around the word "Muslim" in the British press 1998-2009' (2013) 34(3) Applied Linguistics 255; E. Poole and J.E. Richardson, *Muslims and the News Media* (Tauris 2005); S. Akbarzadeh and B. Smith, 'The Representation of Islam and Muslims in the Media (the Age and Herald Sun Newspapers) (2005 Report School of Political and Social Inquiry, Monash University) <https://www.academia.edu/8645594/The_Representation_of_Islam_and_Muslims_in_the_Media> accessed 27 April 2022.
[480] J. Ewart, A. Cherney, and K. Murphy, 'News Media Coverage of Islam and Muslims in Australia: an opinion survey among Australian Muslims' (2017) 37(2) Journal of Muslim Minority Affairs 147, 150.

who create and attach meaning to what has been heard.[481] To the extent that the creation and formation of identity is a culturally situated social practice, it is also facilitated and constrained by meta-discourses that serve as information databases for participants.[482]

'Othering' is part of a 'social process of differentiation'[483] 'whereby a dominant group defines into existence an inferior group.'[484] It ensures the 'antagonistic and alienated perception of the "other"', hindering the development of understanding, empathy, and connection with that 'other', whilst 'de-legitimising them as political actors.'[485]

'Terrorism' is usually used as a pejorative label for politically weaker opponents[486] and the labelling of political activity as 'terrorist' is central to the public's understanding of both the act and the State's response to it.[487] The description of an event as 'terrorism' connects with pre-existing perceptions and moral judgements, such as ideas around the positive value of democracy and Western values, and produces a negative view of the event in the mind of the public,[488] distinguishing the 'legitimate' State violence from the 'morally repugnant' violence of the terrorist.[489] Additionally, the use of the 'Islamist' label further induces the public to favour harsher penalties,

[481] M. Bucholtz and K. Hall, 'Identity and Interaction: a sociocultural linguistic approach' (2005) 7(4-5) Discourse Studies 585.
[482] N. Fairclough, *Language and Power* (Longman 1989) 24.
[483] M. Breen-Smyth, 'Theorising the "Suspect Community": counterterrorism, security practices and the public imagination' (2014) 7(2) Critical Studies on Terrorism 223, 229
[484] M. Schwalbe, S. Goodwin, D. Holden, D. Schrock, S. Thompson, and M. Wolkomir, 'Generic Processes in the Reproduction of Inequality: an interactionist analysis' (2000) 79(2) Social Forces 419, 422
[485] M. Breen-Smyth, 'Theorising the "Suspect Community": counterterrorism, security practices and the public imagination' (2014) 7(2) Critical Studies on Terrorism 223, 229
[486] M. Innes and D. Thiel, 'Policing Terror' in T. Newburn (ed), *Handbook of Policing* (Willan 2008) 556; W. Laqueur, *The New Terrorism: fanaticism and the arms of mass destruction* (OUP 1999) 16.
[487] B. Hoffman, *Inside Terrorism* (3rd edn, Columbia University Press 2017) 29.
[488] S.J. Baele, O.C. Sterck, T. Slingeneyer, and G.P. Lits, 'What Does the "Terrorist" Label Really Do? Measuring and explaining the effects of the "terrorist" and "Islamist" categories' (2017) 42(5) Studies in Conflict and Terrorism 520, 535.
[489] G. Wardlaw, *Political Terrorism: theory, tactics, and counter-measures* (2nd edn, CUP 1989) 8.

global responses, and to view military and intelligence services as being the most appropriate and effective actors in combatting the violence.[490] Hence, today the use of the 'terrorist' label delegitimises the action and the associated political movement, and the 'Islamist' label justifies an extreme response by the State.

Counterterrorism discourse constructs the 'other', the enemy, against whom the State is fighting and who can also be termed 'suspect community'. The 'suspect community' is a community targeted through counterterrorism legislation, policing, and policy. Hillyard coined the term to describe the racialisation and criminalisation of the (Northern) Irish through the operation of the 1974 Prevention of Terrorism (Temporary Provisions) Act on the Irish community in Britain during the 'Troubles.'[491] The provisions allowed for detention without charge, reason, or notification for up to seven days.[492] The increasing scope of surveillance and power of the State over individuals was significant, with over 101,000 people travelling to/from Ireland in 1991 having their names checked against a national intelligence register.[493] Pantazis and Pemberton utilised the term to describe the experiences of Muslim communities post-9/11 of the implementation of counterterrorism legislation.[494]

[490] S.J. Baele, O.C. Sterck, T. Slingeneyer, and G.P. Lits, 'What Does the "Terrorist" Label Really Do? Measuring and explaining the effects of the "terrorist" and "Islamist" categories' (2017) 42(5) Studies in Conflict and Terrorism 520, 537.
[491] P. Hillyard, *Suspect Community: people's experience of the Prevention of Terrorism Acts in Britain* (Pluto Press 1993) 257-8.
[492] S.7.
[493] P. Hillyard, *Suspect Community: people's experience of the Prevention of Terrorism Acts in Britain* (Pluto Press 1993) 28; s.8 provided broad powers for the examination of persons entering or leaving Great Britain and Northern Ireland.
[494] C. Pantazis and S. Pemberton, 'From the "Old" to the "New" Suspect Community: examining the impacts of recent UK counterterrorism legislation' (2009) 49 British Journal of Criminology 646.

Oppressive othering involves the assertion of 'difference as deficit'.[495] These 'boundaries of difference' are routinely maintained through ideological and spatial separations,[496] such as views of the West being inherently different (and superior) to the rest of the globe, particularly Muslims.[497] Established discourses can serve to reproduce inequality through the identification of 'other' and consequent maintenance of boundaries.[498] The media encourages anti-Muslim racism through its portrayal of Muslims and Islam as a homogenous, dangerous group, devoid of individuality.[499] This plays on latent fears regarding non-integrated groups[500] and feeds them back into society to create an idea of solidarity and 'togetherness' against the threat that appears to strengthen the political unit.[501] The 'suspect community' can be described as a sub-set of the population constructed as 'suspect' by mechanisms employed by the State for security purposes and from whom the threat is perceived to be (exclusively or primarily) emanating.[502]

In the West, Islam is viewed as being a backward religion, incompatible with European civilisation,[503] and many non-Muslims view Muslims as inherently violent.[504] Second and third generation minorities are represented as being the 'alien within', despite being as culturally Western as their majority

[495] M. Schwalbe, S. Goodwin, D. Holden, D. Schrock, S. Thompson, and M. Wolkomir, 'Generic Processes in the Reproduction of Inequality: an interactionist analysis' (2000) 79(2) Social Forces 419, 423.
[496] Ibid., 433.
[497] E.W. Said, *Covering Islam* (Routledge 1981); A.L. Macfie, *Orientalism* (Taylor-Francis 2002) 286-7.
[498] M. Schwalbe, S. Goodwin, D. Holden, D. Schrock, S. Thompson, and M. Wolkomir, 'Generic Processes in the Reproduction of Inequality: an interactionist analysis' (2000) 79(2) Social Forces 419, 435.
[499] A. Saeed, 'Media, Racism and Islamophobia: the representation of Islam and Muslims in the media' (2007) 1/2 Sociology Compass 443, 454.
[500] S. Pickering, J. McCulloch and D. Wright-Neville, *Counter-Terrorism Policing* (Springer 2008) 5.
[501] C. Aradau and R. van Munster, 'Exceptionalism and the "War on Terror": criminology meets international relations' (2009) 49 British Journal of Criminology 686, 690.
[502] M. Breen-Smyth, 'Theorising the "Suspect Community": counterterrorism, security practices and the public imagination' (2014) 7(2) Critical Studies on Terrorism 223, 231-2.
[503] E.W. Said, *Covering Islam* (Routledge 1981) 19.
[504] R. Wike and B.J. Grim, 'Widespread Negativity: Muslims distrust Westerners more than vice versa' (*Pew Research Center*, 30 October 2007) <https://www.pewresearch.org/global/2007/10/30/widespread-negativity-muslims-distrust-westerners-more-than-vice-versa/> accessed 5 June 2022.

counterparts,[505] and Muslims generally are represented as being either oil barons or terrorists.[506] Media discourses often connect terrorism, Islam, and Muslims, suggesting Islam is antithetical to democracy.[507] Such claims instil and encourage fear in the recipient public, which also feed into pre-existing social and political concerns and 'institutionalize fear of the enemy as the constitutive principle for society'.[508] The 'suspect community' is constructed in the imaginations and fears of its non-members. The individuals do not have an essential bond, beyond perhaps an arbitrary characteristic, as membership is defined in the imagination of non-members.[509] Akin to propaganda, 'messages about fear are repetitious' employing stereotypes of 'outside "threats"' and 'suspect and "evil Others."'[510] The existence of the (imaginary) 'suspect community' shapes the nature and content of transactions between those informed by the securitised imagination and those they imagine to be "suspect".'[511]

An audience is more likely to accept claims of existential threat made by securitising actors if these can be substantiated through their own experience,[512] of which the media forms a part.[513] Experiencing terrorism through the media induces a 'fear effect' that goes beyond the immediate victims[514] and can lead to broader social ramifications. News articles on

[505] A. Saeed, 'Media, Racism and Islamophobia: the representation of Islam and Muslims in the media' (2007) 1/2 Sociology Compass 443, 451.
[506] E. Said, *Covering Islam* (Routledge 1981) 26.
[507] A. Cherney and K. Murphy, 'Being a "Suspect Community" in a Post 9/11 World: the impact of the war on terror on Muslim communities in Australia' (2015) 49(4) Australia and New Zealand Journal of Criminology 480, 484.
[508] C. Aradau and R. van Munster, 'Exceptionalism and the "War on Terror": criminology meets international relations' (2009) 49 British Journal of Criminology 686, 689.
[509] M. Breen-Smyth, 'Theorising the "Suspect Community": counterterrorism, security practices and the public imagination' (2014) 7(2) Critical Studies on Terrorism 223, 231.
[510] D.L. Altheide, 'Terrorism and the Politics of Fear' in U. Linke and D. Taana Smith (eds), *Cultures of Fear: a critical reader* (Pluto Press 2009) 64.
[511] M. Breen-Smyth, 'Theorising the "Suspect Community": counterterrorism, security practices and the public imagination' (2014) 7(2) Critical Studies on Terrorism 223, 232
[512] T. Balzacq, 'The Three Faces of Securitization: political agency, audience and context' (2005) 11(2) EJIR 171, 174, 181.
[513] D.L. Altheide, 'Terrorism and the Politics of Fear' in U. Linke and D. Taana Smith (eds), *Cultures of Fear: a critical reader* (Pluto Press 2009) 57.
[514] A. Aly, 'Terrorism, Fear, and Individual and Community Well-Being' in D. Webb and E. Willis-Herrera (eds), *Subjective Well-Being and Security* (Springer 2011) 41.

terrorism suggesting the number of potential terrorists is significant can invoke increased levels of fear and demands for anti-Muslim policies.[515] Post-9/11, there was a significant increase of news reports associating fear and terrorism, reflecting 'a foundational politics of fear that promoted a new public discourse and justification for altering everyday life and social interaction.'[516] For example, despite the absence of international terrorist events on US soil since 9/11, protecting the nation against terrorism remains a key priority for US citizens.[517] In 2018, 73% of Americans held terrorism to be a top priority.[518] Similarly, and again despite the objectively low risk, Australians have a high level of subjective threat perception, consequently demanding a counterterrorism response from government.[519] In 2017, 79% of people in the UK were concerned about Islamic extremism, with 87% people over 50 and on the right of the ideological spectrum holding those fears.[520] However, the risk from being killed in a terrorist attack fell from 1:600k pre-2001, to 1:8.8m per year between 2001 and 2017.[521] Although a high proportion of Western citizens fear falling victim to terrorist violence, the actual risk is negligible.[522]

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[515] J. Matthes, D. Schmuck, C. von Sikorski, 'Terror, Terror Everywhere? How terrorism news shape support for anti-Muslim policies as a function of perceived threat severity and controllability' (2019) 40(5) Political Psychology 935, 937 and 946.
[516] D.L. Altheide, 'Terrorism and the Politics of Fear' in U. Linke and D. Taana Smith (eds), *Cultures of Fear: a critical reader* (Pluto Press 2009) 64.
[517] Pew Research Centre, 'Public's Top Priority for 2022: strengthening the nation's economy' (*Pew Research Center*, 16 February 2022) <https://www.pewresearch.org/politics/2022/02/16/publics-top-priority-for-2022-strengthening-the-nations-economy/> accessed 27 March 2023.
[518] J. Gramlich, 'Defending Against Terrorism Has Remained a Top Policy Priority for Americans Since 9/11' (*Pew Research Center*, 11 September 2018) <https://www.pewresearch.org/short-reads/2018/09/11/defending-against-terrorism-has-remained-a-top-policy-priority-for-americans-since-9-11/> accessed 27 March 2023.
[519] C. Michaelsen, 'Australia and the Threat of Terrorism in the Decade after 9/11' (2010) 18(3) Asian Journal of Political Science 248, 264.
[520] J. Poushter, 'Majorities in Europe, North America Worried About Islamic Extremism' (*Pew Research Center*, 24 May 2017) <https://www.pewresearch.org/short-reads/2017/05/24/majorities-in-europe-north-america-worried-about-islamic-extremism/> accessed 13 May 2020.
[521] A. Nowrasteh, 'Fatalities and the Annual Chance of Being Murdered in a European Terrorist Attack' (*Cato Institute*, 21 June 2017) <https://www.cato.org/blog/european-terrorism-fatalities-annual-chance-being-murdered#:~:text=For%202016%20and%202017%20(so,attack%20in%20the%20same%20year> accessed 27 August 2022.
[522] J. Mueller and M.G. Stewart, 'Terrorism and Bathtubs: comparing and assessing the risks' (2021) 33(1) Terrorism and Political Violence 138, 139.

Fear is usually connected to the objective of achieving safety when face with a threatening situation.[523] The responses to fear, such as the implementation of counterterrorism legislation or security measures, act to reaffirm the sense that there is something to be afraid of, creating a self-perpetuating fear loop.[524] Fear of terrorism is multi-dimensional and not centred on the fear of victimisation or of terrorists as such. It is 'more broadly associated with a perceived state of terror in which insecurity, suspicion and the manipulation of fear for political purposes are the norm,' implicating political responses to terrorism as significant factors in promulgating community fear.[525] Public fear levels are often exploited by politicians,[526] assisting in securitisation, and levels of political trust can decrease or amplify perceived threats.[527] In creating a shadowy, external[528] enemy capable of infiltrating communities and schools unseen and undetected,[529] the State is able to justify the implementation of exceptional measures to protect the public from this enemy hiding within. Security perspectives overrule 'mere law'[530] and

[523] J. Matthes, D. Schmuck, C. von Sikorski, 'Terror, Terror Everywhere? How terrorism news shape support for anti-Muslim policies as a function of perceived threat severity and controllability' (2019) 40(5) Political Psychology 935, 940.
[524] D.L. Altheide, 'Terrorism and the Politics of Fear' in U. Linke and D. Taana Smith (eds), *Cultures of Fear: a critical reader* (Pluto Press 2009) 57.
[525] A. Aly, 'Terrorism, Fear, and Individual and Community Well-Being' in D. Webb and E. Willis-Herrera (eds), *Subjective Well-Being and Security* (Springer 2011) 40.
[526] D.L. Altheide, 'Terrorism and the Politics of Fear' in U. Linke and D. Taana Smith *Cultures of Fear: a critical reader* (Pluto Press 2009) 55.
[527] D. Abrams and G.A. Travaglino, 'Immigration, Political Trust, and Brexit: testing an aversion amplification hypothesis' (2018) 57 British Journal of Clinical Psychology 310, 312.
[528] In the sense that it does not adhere to the values and commitments by which the society in question is defined by its leaders. E.g., UK Prime Minister David Cameron's speech in Munich. D. Cameron, 'Speech on Radicalisation and Islamic Extremism' at the Munich Security Conference (5 February 2011) <webarchive.nationalarchives.gov.uk/20130109092234/http://number10.gov.uk/news/pms-speech-at-munich-security-conference/> accessed 20 February 2021; S. Pickering, J. McCulloch and D. Wright-Neville, *Counter-Terrorism Policing* (Springer 2008) 5 on how non-integrated Muslims (those on the outside) are considered to pose a threat as they are innately hostile to 'Western values'.
[529] See, e.g., UK media coverage on the so-called 'Trojan Horse' plot to infiltrate UK schools with Islamic extremism. E.g., C. Moore, 'A Weak Establishment is Letting Islamists Threaten British Freedoms' *The Telegraph* (18 April 2014) <www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/10775118/A-weak-establishment-is-letting-Islamists-threaten-British-freedoms.html> accessed 27 March 2023; Telegraph View, 'We Must Confront the Challenge of Islamism' *The Telegraph* (20 April 2014) <www.telegraph.co.uk/news/religion/10775651/We-must-confront-the-challenge-of-Islamism.html> accessed 27 March 2022.
[530] M. Hornqvist, 'The Birth of Public Order Policy' (2004) 46(1) Race and Class 30, 39.

proactive action against terrorism is conceptualised as a 'public good' as it is seen as weakening the terrorist organisation, reducing its capacity to present a threat.[531]

Assigning the terrorism moniker delegitimises an act, a group, and any connected ideology – be it political, religious or a combination of both. The terrorist becomes an 'other' and viewed as being 'wrong'[532] and presenting a dangerous and pervasive threat, requiring measures that stretch or ignore previous standards.[533] Post-9/11 terrorism is described as being rooted in religious fundamentalism, which serves to further delegitimise the actors through the depoliticisation, decontextualization, and dehistoricisation of their motivations. [534] Additionally, it also allows mainstream political discourse to ignore and dismiss any assertions that terrorists may have legitimate grievances and a basis for their anger and frustration.[535] Thus, existing social divisions are utilised in the securitisation of terrorism, which operates to legitimise extraordinary responses to defend the State. Consequently, those viewed as 'other' are also constructed as the 'suspect community' through the application of counterterrorism measures and are delegitimised as political actors. Public fears regarding the 'other' facilitate audience acceptance of the securitisation.

[531] B.P. Rosendorf and T. Sandler, 'Too Much of a Good Thing? The proactive response dilemma' (2004) 48(5) Journal of Conflict Resolution 657, 658.
[532] S. Marks and A. Clapham, *International Human Rights Lexicon* (OUP 2005) 346.
[533] Views of the terrorist threat being exceptional/especially dangerous are used to justify normally prohibited responses. International Commission of Jurists, 'Assessing Damage, Urging Action: report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights' (ICJ 2009) 18–27.
[534] Representing the reason for the attacks as being rooted in the basic nature and identity of the terrorists and not in any socio-political basis, is an essential rhetorical move, removing the need for discussion, diplomacy, or negotiation. R. Jackson, *Writing the International War on Terrorism: language, politics, and counterterrorism* (MUP 2005) 421.
[535] S. Pickering, J. McCulloch and D. Wright-Neville, *Counter-Terrorism Policing* (Springer 2008) 4.

4.4. Self-Defence

> 'Justifiable self-defence is no breach of the treaty of peace. It is a natural right which we cannot renounce: and in promising to live in peace, we only promise not to attack without cause, and to abstain from injuries and violence.'[536]

At the heart of the idea of sovereign States is the right of self-defence – as a common-sense principle, a sovereign State cannot be sovereign unless it has the right to defend itself against attack and potential annihilation,[537] which is to be distinguished from the obligation on all states to protect the citizenry.[538] As a result, international law is constructed around the need for States to maintain and preserve their existence. The State, like any other being, has survival and self-preservation as its foundational principle[539] and so the use of force to preserve existence is not inconsistent 'with the first principles of nature.'[540] In defending itself, the State has a wide margin of appreciation[541] and acts that would otherwise be unlawful, are rendered lawful if taken in conformity with the UNC.[542]

Self-defence is not punishment,[543] it is one of the 'just' causes of war[544] and the foundation of Statehood.[545] A State has an obligation to protect itself and its citizens as part of the social contract, the provision of security is the

[536] E. de Vattel, *The Law of Nations* (J. Chitty (ed), CUP 2011) 448 §43.
[537] Ibid., §35.
[538] R. Nozick, *Anarchy, State and Utopia* (Blackwell 1974).
[539] E. de Vattel, *The Law of Nations* (J. Chitty (ed), CUP 2011) §14.
[540] S.C. Neff (ed), *Hugo Grotius on the Law of War and Peace* (OUP 2012) 35.
[541] 'In war everything is lawful which the defence of the common weal requires… the end and aim of war is the defence and preservation of the State.' Francisco de Vitoria quoted in J. Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (Lawbook Exchange 2000) 430.
[542] Article 21 Responsibility of States for Internationally Wrongful Acts (Annex) UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83.
[543] G.P. Fletcher and J.D. Ohlin, *Defending Humanity* (OUP 2008) 57.
[544] Although the idea of a 'just' war is arguably fictitious or simply fanciful thinking aimed at soothing the restless conscience. S.C. Neff (ed), *Hugo Grotius on the Law of War and Peace* (OUP 2012) 81-83.
[545] Ibid.

central justification for a State's monopoly of the use of force.[546] According to Vattel, the right to self-defence against an 'unjust' attack is 'not only the right but the duty of a nation, and one of her most sacred duties'[547] and politicians often frame the use of force as the fulfilment of the State's duty to protect its citizens.[548] Whereas individuals have the *right* to protect themselves and vindicate their autonomy, this is broader than a duty as there is no *obligation* to act.[549] However, a State breaks the social contract if it allows its people to be subjugated by an external aggressor.[550] Self-defence, then, can be viewed as a manifestation of sovereignty and exercise of personhood and the language of duty suggests States have no option but to act.

Thus, self-defence remains the only exception to the prohibition on the unilateral use of force by a State recognised in the UNC[551] and a State is not permitted to use force to protect perceived security interests outside the scope of Article 51.[552] The ICJ in the *Nicaragua Case* confirmed the 'inherent'[553] right to use force in self-defence exists in CIL alongside the provisions of the UNC,[554] albeit the rules are not identical,[555] reaffirming its position in *Oil Platforms*.[556] There are different views as to whether the UNC

[546] J. Locke, *Two Treatises of Government and a Letter Concerning Toleration* (I. Shapiro (ed), YUP 2003) §219
[547] E. de Vattel, *The Law of Nations* (J. Chitty (ed), CUP 2011) 304 §35.
[548] See, e.g., Prime Minister David Cameron 'My first duty as a Prime Minister is to keep the British people safe.' HC Deb 7 September col 27; Secretary of State for Defence Michael Fallon MP, preventing loss of life is the 'primary duty of government' JCHR, *Oral Evidence* (HC 2015-16, 574) 7.
[549] G.P. Fletcher and J.D. Ohlin, *Defending Humanity* (OUP 2008) 53.
[550] J. Locke, *Two Treatises of Government. In the Former, the False Principles and Foundation of Sir Robert Filmer, and his Followers, are Detected and Overthrown: the Latter is an Essay Concerning the Original, Extent, and End, of Civil Government* (1823 McMaster University Archive of the History of Economic Thought) 200 [217], <https://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf> accessed 27 March 2020.
[551] T.H.L. McCormack, *Self-defence in International Law: the Israeli raid on the Iraqi nuclear reactor* (Palgrave 1996) 119.
[552] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 [148].
[553] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [94].
[554] Ibid., [193].
[555] Ibid., [175].
[556] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 161, [51].

has superseded CIL on the issue. However, even if CIL on self-defence remains separate to the UNC, the likelihood of an NSA acting independently of any State being able to launch an armed attack that would satisfy the requirements for the right to use force is extremely low and the Charter would require the affected State to seek UNSC approval for any action.[557] Therefore, it can be said that whilst issues of self-defence are regulated by both CIL and treaties,[558] the ICJ has taken the position that the Charter reflects CIL.[559]

Article 51 UNC provides,

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

As with human rights instruments recognising each person's inherent dignity,[560] the use of the word 'inherent' signifies that the right to self-defence is an essential characteristic of a State. The inclusion of collective self-defence was shocking to some as previously self-defence had been conceptualised as operating only within a State's territory.[561] Additionally, the terminology was criticised at the time of drafting as being 'too vague' and members of the US delegation remembered that Germany had invaded Poland on the grounds that it had attacked first.[562] Thus, demonstrating that

[557] UNGA, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' (28 May 2010) UN Doc A/HRC/14/24/Add.6 [40].
[558] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 34.
[559] See, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [87].
[560] See Chapter 3 at 3.4.
[561] T.M. Franck, *Recourse to Force: state action against threats and armed attacks* (2002 CUP) 49.
[562] Ibid., 48.

claims of self-defence need to be scrutinised and not simply taken on face value.[563]

4.4.1. Development of Self-defence

Locke and Kant promoted an individualist approach to self-defence, underpinned by the imperative to vindicate individual autonomy, which means the defending act can be termed justifiable rather than excusable.[564] This framing of self-defence relies on viewing the State and the individual human as analogous – just as the State is sovereign over its territory, so a person is sovereign over their being.[565] Consequently, using force to defend against an armed attack on the territorial integrity of a state, which would diminish its political independence,[566] is lawful. However, if the aggressor has justice on their side, then they are exercising their lawful right and any resistance 'is an act of injustice.'[567] The receiving State in that situation can only offer the wronged party just satisfaction. If they refuse, the hostilities become unjust and can be rightfully resisted.[568] The articulation of self-defence as a legal principle in international law developed through the Caroline case. In that case, 'self-defence was changed from a political excuse to a legal doctrine.'[569]

4.4.1.1. Caroline Case

The *Caroline* incident is one of the most famous in international law and provides the basis for a discussion on the rules of self-defence. During the Canadian rebellion of 1837, American citizens were working to support the rebels, including through joining their forces and supplying arms and

[563] Chapter 8: Reyaad Khan examines the UK's claims of self-defence as the justification for its use of force against an individual.
[564] G.P. Fletcher and J.D. Ohlin, *Defending Humanity* (OUP 2008) 59.
[565] Ibid., 59.
[566] These acts are forbidden under Article 2(4) UNC.
[567] E. de Vattel, *The Law of Nations* (J. Chitty (ed), CUP 2011) 304 §35.
[568] Ibid., 304 §36.
[569] R.Y. Jennings, 'The Caroline and McLeod Cases' (1938) 32 AJIL 82, 83.

ammunition.[570] The British commander decided to destroy US ship *Caroline*, which was being used as a supply vessel, to stop further supplies and reinforcements reaching the rebels.[571] British forces boarded the vessel at night and attacked the people on board, whom it was claimed were not armed and did not resist, although members of the boarding party were wounded.[572] The British then set fire to the *Caroline* and set it adrift. It was later established that at least one person was killed in the incident.[573] The incident stirred anti-British sentiment and America was on the verge of a third Anglo-American war.[574] The US government declared the attack on the vessel constituted an attack against American territory. The British government responded by claiming the right to self-defence.[575] The British position amounted to one of preventative defence as they were seeking to avert attacks that may happen at an indeterminate point in the future by frustrating the ability of the rebels to carry them out.[576] The subsequent diplomatic correspondence contains an outline of the customary international law on self-defence.

In his letter to Mr Fox dated 24 April 1841, Daniel Webster, US Secretary of State, wrote that both States and individuals can assert 'a just right of self-defence', which is 'equally necessary for the preservation of both.'[577] Thus demonstrating an acknowledgement that the right to self-defence existed in

[570] Ibid., 82.
[571] H. Jones, 'The Caroline Affair' (1976) 38(3) The Historian 485, 490.
[572] Ibid., 491.
[573] R.Y. Jennings, 'The *Caroline* and *McLeod* Cases' (1938) 32 American Journal of International Law 82, 84.
[574] H. Jones, 'The Caroline Affair' (1976) 38(3) The Historian 485, 495.
[575] R.Y. Jennings, 'The *Caroline* and *McLeod* Cases' (1938) 32 American Journal of International Law 82, 87.
[576] See Lord Ashburton's examples of legitimately preventing an attack. 'No.2 Lord Ashburton to Mr Webster. Washington, July 28, 1842' British and Foreign State Papers, Vol.30 1841/42 197ff. <https://babel.hathitrust.org/cgi/pt?id=mdp.35112103940203&seq=224> accessed 27 July 2023.
[577] 'No.2 Mr Webster to Mr Fox. Washington, April 24, 1841' British and Foreign State Papers, Vol.29 1840/41, 1132-3.
<https://babel.hathitrust.org/cgi/pt?id=mdp.39015019751299&seq=1159> accessed 27 July 2023.

international law and attached to States.[578] He continued to assert that the alleged exercise of this right is to be judged according to the specific circumstances and 'nothing less than a clear and absolute necessity can afford ground of justification.'[579] He further went on to contend that it was for the British Government to demonstrate a 'necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation.'[580] This provides the first criterion of necessity. Further, the requirement of proportionality was posited – the need to show the force was reasonable and not excessive 'since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it.'[581] The practical application of these criteria was explained by reference to the events, demonstrating the US Government's position that every aspect of the operation needed to be justified by necessity and proportionality.

This statement of law was included in a later letter dated 27 July 1842, from Daniel Webster to Lord Ashburton,[582] as the situation remained unresolved. In his response, Lord Ashburton agreed that international law protects the territory of independent States and recognised the reciprocal duty of each State to respect this principle. However, demonstrating a willingness to act outside the normal sphere when considered necessary for State interest, he also acknowledged 'a strong overpowering necessity may arise when this

[578] As highlighted by Jennings, there is a difference between self-defence and self-preservation, which is interesting from a historical development perspective. However, the concept in modern law is self-defence. R.Y. Jennings, 'The *Caroline* and *McLeod* Cases' (1938) 32 American Journal of International Law 82, 91-2.
[579] 'No.2 Mr Webster to Mr Fox. Washington, April 24, 1841' British and Foreign State Papers, Vol.29 1840/41, 1133.
<https://babel.hathitrust.org/cgi/pt?id=mdp.39015019751299&seq=1159> accessed 27 July 2023
[580] Ibid., 1138.
[581] Ibid.
[582] 'No.1 Mr Webster to Lord Ashburton. Washington, July 27, 1842' British and Foreign State Papers, Vol.30 1841/42, 193.
<https://babel.hathitrust.org/cgi/pt?id=mdp.35112103940203&seq=224> accessed 27 July 2023.

great principle may and must be suspended.'[583] The necessity was self-defence, which he described as being 'the first law of our nature' that 'must be recognized by every code which professes to regulate the condition and relations of man.'[584] Webster's response to this letter noted the agreement between the Governments regarding the principle of non-intervention and the limitations on the self-defence exception.[585] Thus, the foundational principles of territorial sovereignty and self-defence were agreed upon and asserted by both sides.

In the modern epoch, communications allow for more advanced warning of an attack. However, the spirit of the *Caroline* concept is that the attack must be in motion, even if it can be thwarted at an earlier stage, to justify self-defence. Whilst it has been argued that the *Caroline* doctrine's application is limited to the circumstances of the case,[586] or even that it should be viewed only as part of the historical development of international law on self-defence,[587] it remains central to understandings and applications of self-defence in international law.[588] It also reveals an early propensity by the British to use lethal force against non-State armed groups (now known as terrorists).[589]

[583] 'No.2 Lord Ashburton to Mr Webster. Washington, July 28, 1842' British and Foreign State Papers, Vol.30 1841/42, 196. <https://babel.hathitrust.org/cgi/pt?id=mdp.35112103940203&seq=224> accessed 27 July 2023.
[584] Ibid.
[585] 'No.3 Mr Webster to Lord Asburton. Washington, August 6, 1842.' British and Foreign State Papers, Vol.30 1841/42, 201. <https://babel.hathitrust.org/cgi/pt?id=mdp.35112103940203&seq=224> accessed 27 July 2023.
[586] T. Kearley, 'Raising the *Caroline*' (1999) 17 Wisconsin International Law Journal 325.
[587] M.B. Occelli, '"Sinking" the *Caroline*: why the *Caroline* doctrine's restrictions on self-defense should not be regarded as customary international law' (2003) 4 San Diego International Law Journal 467.
[588] See, e.g., UNGA, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' (28 May 2010) UN Doc A/HRC/14/24/Add.6 referencing the incident.
[589] Discussed in Chapter 8.

4.4.1.2. Further Development

Over the course of the nineteenth century, legal commentators began to view war as being entirely within the purview of an individual State's uninhibited sovereignty – finally rejecting the historical notions of just and unjust wars.[590] However, The Hague Conferences, which resulted in the 1899 and 1907 Conventions, were a manifestation of a peace movement that sought to move away from the use of force to settle disputes. Along with the establishment of the Permanent Court of Arbitration in 1899 and other international agreements, these Conventions demonstrated a desire to relegate the right to resort to war as an action of last resort.[591]

As the international community moved away from the concept of an unlimited right to the use of force, legitimate self-defence was retained as an accepted exception (and also the use of force authorised by an authoritative body – the League of Nations and later the UN).[592] The Covenant of the League of Nations was unsuccessful in prohibiting the resort to was as a conflict resolution mechanism, which was addressed by the Kellogg-Briand Pact – Article 1 provided for the renunciation of war as a means to resolve disputes and as an instrument of national policy. Thus, 'the absolute illegality of war in pursuit of national policies' was categorically stated.[593] Unfortunately, the Pact did not provide for the use of force in self-defence and so it was necessary for the matter to be visited by the Nuremberg Tribunal at the end of WWII, which came to the conclusion that the Pact had outlawed aggressive war and that wars of aggression were not only illegal, but also criminal under international law at the time of the

[590] S.A. Alexandrov, *Self-defense Against the Use of Force in International Law* (Kluwer 1996) 9-11.
[591] M. Williamson, *Terrorism, War and International Law* (Routledge 2009).
[592] E.g., The Locarno Treaties (adopted 1 December 1925, entered into force 14 September 1926) 54 LNTS 289.
[593] J.L. Brierly, *The Law of Nations* (OUP 1963) 408-9.

outbreak of WWII.[594] The right of self-defence was preserved and, as today, States sought to demonstrate that their actions were within the realms of legitimate self-defence. It is interesting to note that, unlike the UNC, the Covenant of the League of Nations did not mention the right to self-defence or seek to preserve or restrict it. However, for Brownlie, 'it was universally agreed that the "right of legitimate defence" was impliedly reserved by members.'[595]

4.4.2. Elements of Self-defence

In English law, there are two forms of defence – public and private. Public defence protects D who uses force to effect a lawful arrest or prevent the commission of a criminal offence[596] under English law, it does not apply to crimes in other jurisdictions or international law.[597] Incorporating the *Caroline* criteria,[598] but allowing for a more detailed analysis, self-defence in international law can be describe as having six elements relating to the nature of the attack and to the permissible response. The attack must be: a) overt; b) unlawful, and; c) imminent. The action taken in defence must be: d) necessary; e) proportionate, and; f) in response to the attack.[599]

4.4.2.1. Overt

Fletcher and Ohlin state that there must be clear displays of hostile intentions.[600] In the international arena, the traditional view is that a State must demonstrate that it has been the victim of an intentional attack, for

[594] International Military Tribunal (Nuremberg) (Judgment) [1946] 22 IMT 203 [235]-[8].
[595] I. Brownlie, *International Law and the Use of Force by States* (OUP 1963) 61.
[596] S.3 Criminal Act 1967
[597] *Jones* [2005] Crim LR 122.
[598] Chapter 4: The State and Security at 4.4.1.1.
[599] G.P. Fletcher and J.D. Ohlin, *Defending Humanity* (OUP 2008) 86-7.
[600] Ibid., 88.

which another State is responsible, that qualifies as an 'armed attack' under customary international law.[601]

4.4.2.1.1. Attributable to a State

Traditionally, the State relying of the doctrine of self-defence must show the relevant armed attack is attributable to a State.[602] The use of force by NSAs could raise the right to use force in self-defence if they are supported by a State.[603] In *Armed Activities*, Uganda claimed it had been subjected to an armed attack from a rebel group and this raised its right to self-defence. However, there was insufficient evidence of the direct or indirect involvement of the DRC, meaning the right of self-defence had not been activated.[604] In the case of Khan,[605] the UK did not assert that his acts were attributable to a State and so arguably circumvented this criterion. Alternatively, it has been asserted that as self-defence is an inherent right to repel attacks, it does not require armed attacks committed by terrorists from within a State's territory be attributable to that State under the rules of State responsibility.[606] This is a logical proposition as should a terrorist group acquire the ability to launch an armed attack on a State, the lack of another State's involvement should not restrict the inherent right of the victim State to defend itself.[607] However, there must still be an attack that reaches the 'armed attack' threshold, however that is defined.[608]

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[601] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 161, 187 [57].
[602] Ibid., [51].
[603] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14.
[604] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168.
[605] Chapter 8, 8.4.
[606] L.J. van den Henrik and N.J. Schrijver, 'Leiden Policy Recommendations on Counter-terrorism and International Law' (2010) 57(3) Netherlands International Law Review 531 [42].
[607] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 (Dissenting Opinion of Judge Jennings) 543-4.
[608] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (Separate Opinion of Judge Kooijmans) 230[35]; T. Ruys, *'Armed Attack' and Article 51 of the UN Charter* (CUP 2010) 545.

4.4.2.1.2. Armed Attack

A State must show it has been the victim of an attack that satisfies the level of 'armed attack' under Article 51 and CIL,[609] and has the burden of proof.[610] Not all attacks against a State will constitute an armed attack for the purposes of Article 51, only the gravest forms of attack will qualify.[611] Attacks on personnel, military installations,[612] and diplomatic missions and representatives[613] can all constitute aggression. For the UNGA, an act must be of sufficient gravity to qualify as aggression.[614] However, as Article 51 refers to 'armed attack' and as Article 39 references 'aggression', it can be assumed these terms are not synonymous although it is generally accepted that an armed attack will qualify as aggression.[615]

In the *Nicaragua Case*, the ICJ held that not every use of force will amount to an armed attack justifying a use of force in response.[616] It also rejected the idea that an armed attack can include 'not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of provision of weapons or logistical or other support.'[617] Judge Schwebel, in his dissenting opinion, was of the view that Article 51 does not limit the right to self-defence to armed attacks and suggested that the customary right goes beyond the confines of the Charter.[618]

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[609] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 161, [51]; see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, [176] and [195].
[610] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 161, [57]
[611] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, [191].
[612] UNGA Res 3314 (14 December 1974) UN Doc A/1974/3314, Art. 3
[613] *United States Diplomatic and Consular Staff in Tehran* (Judgment) [1980] ICJ Rep 3 [57].
[614] UNGA Res 3314 (14 December 1974) UN Doc A/1974/3314, Annex Art 2.
[615] B. Simma, D-E. Khan, G. Nolte, A. Paulus, N. Wessednorf (eds), *The Charter of the United Nations: a commentary, Vol. I* (3rd edn, OUP 2012) 1293.
[616] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [195].
[617] Ibid., [195]
[618] Ibid., (Dissenting opinion of Judge Schwebel) [173].

Reading Articles 2(4) and 52 together, States are required to forgo the use of forcible self-defence until an armed attack occurs, only then is it able to act unilaterally.[619] It could be argued that by only referencing armed attacks in the context of self-defence, the UNC makes it clear that forcible response to small-scale uses of force is not permissible.[620] The ICJ held that low-intensity, sporadic attacks do not meet the armed attack threshold and each incident needs to be viewed separately.[621] As the UNC rules on the use of force do not require the employment of a particular weapon for an action to qualify as an armed attack, each incident would be judged on its own merits.[622] Due to the scale of the event, the US classified 9/11 as an armed attack and asserted the 'inherent right of individual and collective self-defence' in embarking on its invasion and subsequent occupation of Afghanistan in response.[623]

4.4.2.2. Unlawful

In English law, individual (private) defence developed at common law and applies where a person uses force to protect themselves or another from physical harm.[624] Any intentional or reckless[625] non-consensual touch,[626] or the threat of non-consensual touch,[627] outside the realms of everyday activity[628] is unlawful and a criminal offence. Thus, in both the international

[619] B. Simma, D-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (eds), *The Charter of the United Nations: a commentary, Vol. II* (3rd edn, 2012 OUP) 1401.
[620] Ibid., 1403.
[621] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14; *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 161; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168.
[622] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [39].
[623] Letter dated 7 October 2001 by the permanent representative of the United States to the President of the Security Council (7 October 2001) UN Doc S/2001/946
[624] *Duffy* [1967] 1 QB 63.
[625] *R v Venna* [1976] QB 421.
[626] *Faulkner v Talbot* [1981] 3 All ER 468.
[627] *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439.
[628] *Collins v Wilcock* [1984] 3 All ER 374; *Wood v DPP* [2008] EWHC 1056.

and domestic spheres, unlawful force can be described as that which does not have a sufficient justification.

Aquinas' criteria for a 'just war' are that it must be waged by a sovereign authority, it must have a just cause, which must be accompanied by the right intention.[629] A State that violated the rules was subject to a 'just war' to punish the transgression and enforce the rules. Rooted in Greek, Roman and Catholic philosophy, just war theory enabled the justification of armed conflict against another.[630] The purpose of a just war was to reclaim the 'res' that had been unjustly taken, such as territory, and so the war was over at the point this aim was achieved.[631] The original 17th century tripartite conceptions of just war theory involved Vitoria's jus vitoriae, which directed the victor's actions and prevented an assumption of unlimited rights over the defeated territory and/or people.[632] However, the third stage was consumed by the bipartite conception that gained dominance during the 19th century. Victorian legal positivism preferred to focus on jus ad bellum, jus in bello, and then a form of victor's justice.[633]

The development of international law significantly reduced the occasions where a State may resort to the use of force. Under the 1919 League of Nations Covenant, states were required to submit inter-State disputes for arbitration or seek other forms of judicial settlement, whilst retaining the right to use force. In the 1928 Kellogg-Briand Pact, States renounced the use of force as an 'instrument of national policy' in inter-State relations.[634]

[629] B. Davies, *Thomas Aquinas's Summa Theologiae: a guide and commentary* (OUP 2014) 245 [14].
[630] M. Walzer, *Arguing About War* (YUP 2004) 3.
[631] S.C. Neff, 'Conflict Termination and Peace-Making in the Law of Nations: a historical perspective' in C. Stahn and J.K. Kleffner, *The Jus Post Bellum: towards a law of transition from conflict to peace* (TMC Asser Press 2008) 79.
[632] Ibid., 79.
[633] Ibid., 81-83
[634] Article 1.

The 1945 UNC confirmed the illegitimacy of the use of force in any situation outside that authorised by the UNSC for the purposes of maintaining international peace and security[635] and in self-defence[636] through prohibiting the use of force as a tool of international relations,[637] permitting force only in self-defence or through UNSC authorisation.[638]

4.4.2.3. Imminent

Under IL, imminence is a contested concept. In 1981, under the auspices of self-defence, Israel conducted airstrikes on a nuclear reactor site being built by French and Italian engineers in Iraq[639] on the basis that Iraq was on the verge of developing nuclear weapons capability.[640] The UNSC did not accept Israel's reasoning or self-defence claim and condemned the action as a violation of the UNC.[641] The use of 'occurs' in Article 51 suggests that the right to self-defence is triggered *only* when an armed attack has happened.[642] Interestingly, in the drafting process this limitation on self-defence was questioned by a US State Department legal advisor as being a qualification on the right. The response by the US team replied that the limitation was sound as it would be undesirable to have the right exercised prior to an armed attack, although a State could make the necessary preparations in readiness for an attack and the consequent defence. Thus, it

[635] Article 39.
[636] Article 51.
[637] Article 2(4).
[638] Article 51.
[639] B. Daragahi, 'Israel's 1981 Bombing of Iraq Nuclear Reactor may have Fuelled Saddam's Nuclear Ambitions' *Independent* (7 June 2021) <https://www.independent.co.uk/news/world/israel-iraq-nuclear-osirak-military-b1861255.html> accessed 14 July 2023.
[640] National Security Archive, 'Israeli Attack on Iraq's Osirak 1981: setback or impetus for nuclear weapons?' (*National Security Archive*, 7 June 2021) <https://nsarchive.gwu.edu/briefing-book/iraq-nuclear-vault/2021-06-07/osirak-israels-strike-iraqs-nuclear-reactor-40-years-later> accessed 14 July 2023.
[641] UNSC Res 487 (19 June 1981) UN Doc S/RES/487.
[642] Y. Dinstein, *War, Aggression and Self-defence* (CUP 2001) 167.

is indisputable that anticipatory self-defence was excluded by the original parameters of Article 51.[643]

However, it is generally accepted that a threatened State may act where an attack is '*imminent*, no other means would deflect it and the action is proportionate' [644] or 'the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, no moment of deliberation.'[645] Under both the UNC and Rome Statute, either an actual attack or the beginnings of one is needed to justify the defensive force as killing a person is too serious to be permitted purely based on a belief.[646] Where there is a real but not imminent threat, the State can ask the UNSC to authorise the use of preventative force as 'in a world full of perceived potential threats' allowing States to act preventatively without UNSC authorisation risks undermining the global order.[647] According to US Senator Edward Kennedy, preventative uses of force are actions against a target 'before it has developed a capability that could someday become threatening… the coldly premeditated nature of preventative attacks… makes them anathema to well-established international principles against aggression.'[648]

[643] T.M. Franck, *Recourse to Force: state action against threats and armed attacks* (CUP 2002) 50.
[644] UNSG Kofi Anan, 'In Larger Freedom: towards development, security and human rights for all' (21 March 2005) UN Doc A/59/2005 [188] (emphasis in original); see also, T.M. Franck, *Recourse to Force: state action against threats and armed attacks* (CUP 2002) 107; T.M. Franck, 'What Happens Now? The United Nations After Iraq' (2003) 97 American Journal of International Law 607, 619.
[645] R.Y. Jennings, 'The *Caroline* and *McLeod* cases' 92; see also, C.J. Tams, 'The Use of Force Against Terrorists' (2009) 20 European Journal of International Law 359 378-83.
[646] G.P. Fletcher and J.D. Ohlin, *Defending Humanity* (OUP 2008) 89.
[647] UNSG Kofi Anan, 'In Larger Freedom: towards development, security and human rights for all' (21 March 2005) UN Doc A/59/2005 [190]-[191].
[648] Senator Edward M. Kennedy, 'The Bush Doctrine of Pre-emption' Delivered on the Floor of the US Senate (7 October 2002) <https://universityofleeds.github.io/philtaylorpapers/vp01ca2f.html> accessed 14 July 2023.

UNSC Resolution 1368 recognised the 'inherent right of individual or collective self-defence in accordance with the Charter.'[649] This could be interpreted to mean there is no requirement for a State to be the source of an armed attack. However, it does not provide a general determination that States may assert a right to self-defence against an individual person. Resolution 1373 reaffirmed the inherent right of self-defence and also that States have the duty to prevent terrorists from operating within their territory, requiring all States to 'take the necessary steps to prevent the commission of terrorist acts…'[650] The Resolution is concerned with the financing and support of terrorism and includes preparatory behaviour as well as the acts themselves.[651] In connecting the recognition of the inherent right to self-defence with the identification of terrorism as a threat to international peace and security, the Resolution arguably created the condition in which States can assert a right of self-defence against not only acts of terrorism, but also the presence of a threat. This could be interpreted as providing an almost unlimited mandate to use force against terrorist groups, regardless of the existence of an actual threat. Although the Resolutions refer to the right being recognised by the Charter, and so presumably subject to the limitations of Article 51, subsequent state practice has attempted to stretch the parameters of the right in response to terrorism. The US administration adopted a security strategy based on the asserted right to pre-emptive self-defence, which assumed the right to use force without international authorisation in order to prevent the development of a possible future attack against the US. The USA's 2002 National Security Strategy stated that 'as a matter of common sense and self-defense,

[649] UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368.
[650] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.
[651] The Resolution repeats phrases such as 'financing, planning, preparation or perpetration' in various forms, making it clear that activities prior to the execution of the terrorist act are caught within its scope.

America will act against such emerging threats before they are fully formed.'[652]

In English law, the individual needs to have a genuine belief that an attack is imminent.[653] The Rome Statute provides that an individual is excluded from criminal liability if they acted reasonably in defence of themselves or another 'against an imminent and unlawful use of force in a manner proportionate to the degree of danger.'[654] This differs to the English law on self-defence as it suggests that there must exist an actual threat, rather than the mere belief of a threat. For the purposes of non-fatal offences against the person,[655] determining imminence has both subjective and objective elements. Firstly, it is determined what V believed regarding the facts and nature of the threat,[656] and then whether, based on the facts V was caused to believe, this belief amounted to an apprehension of imminent force. The actual meaning of imminence has been interpreted broadly and includes threats from outside a person's flat,[657] looking at V through their window,[658] making silent phone calls,[659] a campaign of harassment involving sending letters and stealing washing.[660] Although the Courts have taken a broad approach in not requiring D to be in V's physical vicinity, there is still a sufficiently proximate interaction between the two. The imminence requirement would not be satisfied if D was at home and considering how they may visit unlawful violence upon V's person. This would then not permit

[652] White House, *The National Security Strategy of the United States of America* (September 2002) <https://2009-2017.state.gov/documents/organization/63562.pdf> accessed 14 July 2023.
[653] See, e.g., D. Ormerod and K. Laird, *Smith and Hogan's Criminal Law* (16th edn, OUP 2021) 401.
[654] Rome Statute Article 31(1)(c)
[655] It is suggested that these offences are analogous to the situation Cameron was claiming existed and gave rise to the right of State self-defence as they involve the unlawful threat or application of force against the individual.
[656] *Logdon v DPP* [1976] Crim LR 121.
[657] *Lewis* [1970] Crim LR 647.
[658] *Smith v Chief Superintendent of Woking Police Station* (1983) 76 Crim App R 234.
[659] *Ireland* [1998] AC 147.
[660] *Constanza* [1997] 2 Cr App R 492.

V to use force to repel an attack by D that may or may not occur at an indeterminate point in the future. Similar to a State having the option of alerting the UNSC to the emerging threat, in that situation, V has the option of alerting the police to the danger.

Just how imminent an attack needs to be to justify the defending force is a matter of debate. Brownlie argues that using anticipatory force requires making impossible assessments of the situation, such as establishing the certainty of the future attack and gauging the proportionality of the response.[661] It is unlikely that the situation would meet the anticipatory self-defence test outside an armed conflict and applying a similar thought experiment approach as the 'ticking-time bomb'[662] 'threatens to eviscerate the human rights law prohibition against the arbitrary deprivation of life.'[663] After 9/11, the US asserted a right to pre-emptive/preventative self-defence,[664] which is not supported by the text of the UNC and the global community. For example, the UK did not accept it as the basis for intervention in Iraq, preferring instead to argue UNSC authorisation.[665] Nevertheless, the Government Memorandum to the JCHR confirmed the UK position that force may be used before an armed attack in underway.[666]

The language of pre-emptive, preventative, and anticipatory self-defence is confusing and not used consistently in national and international law. In English law, it has been acknowledged in that 'circumstances may justify a

[661] I. Brownlie, *International Law and the Use of Force by States* (OUP 1963) 259.
[662] This approach is demonstrated by the JCHR in its acceptance that an anticipatory use of lethal force on an individual terrorist suspect may be HRL compliant. JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 55[3.72].
[663] UNGA, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' (28 May 2010) UN Doc A/HRC/14/24/Add.6 [86].
[664] White House, *The National Security Strategy of the United States of America* (September 2002) <https://2009-2017.state.gov/documents/organization/63562.pdf> accessed 14 July 2023.
[665] Attorney General Lord Goldsmith HL Deb 21 April 2004 vol 660 col 371.
[666] JCHR, *Government Memorandum to the JCHR* (2015-16, HL 141, HC 574) 2.

pre-emptive strike' in self-defence.[667] However, the situation involved the chase of an identified suspect believed to be in possession of a firearm and so despite the use of 'pre-emptive' it could more accurately be described as anticipatory self-defence. Similarly, it has been held that force may be used to 'ward off or prevent an attack' that is anticipated and imminent.[668] Although the word 'prevent' is used, the addition of anticipation and imminence demonstrates that there must be proximity between V and D and the attack must be about to occur. Looking at the language, anticipate means 'to foresee and deal with in advance; to look forward to as certain.'[669] Anticipatory means to expect something to happen soon.[670] It 'refers to the ability to foresee consequences of some future action and take measures aimed at checking or countering those consequences.'[671] Prevent means 'to stop something from happening'[672] and pre-empt means to act before another to make their actions unnecessary or ineffective.[673] Therefore, using force in anticipation of an attack suggests that there is an identified act about to occur and the force is being used to intervene before the effects of the act are felt by V. Using force preventatively or pre-emptively suggests there is less certainty that the attack will occur and so a lack of imminence. States are not individual humans and cannot excuse aggression on the basis they felt afraid of some future attack, self-defence is a justification, not a concession to human frailty,[674] such as duress or necessity.[675] The Leiden

[667] *Beckford v R* [1987] 1 AC 130, per Lord Griffiths 144.
[668] *Devlin v Armstrong* [1971] NI 13, 33.
[669] 'Anticipate' (*Merriam Webster*, 2023) <https://www.merriam-webster.com/dictionary/anticipate#:~:text=%3A%20to%20look%20forward%20to%20as,any%20problems%20during%20the%20construction.> accessed 23May 2023.
[670] 'Anticipatory' (*Collins Dictionary*, 2023) <https://www.collinsdictionary.com/dictionary/english/anticipatory> accessed 23May 2023.
[671] C.C. Joyner and A.C. Arend, 'Anticipatory Humanitarian Intervention: an emerging legal norm' (1999) 10 US Air Force Academy Journal of Legal Studies 27, 32.
[672] 'Prevent' (*Cambridge Dictionary*, 2023) <https://dictionary.cambridge.org/dictionary/english/prevent> accessed 23 May 2023.
[673] 'Pre-empt' (*Cambridge Dictionary*, 2023) <https://dictionary.cambridge.org/dictionary/english/pre-empt> accessed 23 May 2023.
[674] G.P. Fletcher and J.D. Ohlin, *Defending Humanity* (OUP 2008) 58.
[675] See, D. Ormerod and K. Laird, *Smith, Hogan and Ormerod's Criminal Law* (14th edn, OUP 2015).

Policy makes a similar linguistic distinction, noting that States have a right of self-defence against an imminent threatened attack, when armed force is necessary and proportionate, which should be designated anticipatory self-defence and distinguished from 'pre-emptive' or 'preventive' force taken before a threat has manifested and only lawful under UNSC authorisation.[676]

The idea of anticipatory self-defence is controversial as it arguably goes against the core principles of international law regulating the use of force. The UNC allows for the use of force only in extreme circumstances, as a means of last resort once all peaceful means have been exhausted. Furthermore, the use of force in circumstances where there is a lack of an armed attack questions the necessity and proportionality of an act conducted under the auspices of self-defence.

4.4.2.4. Necessary

In English law, necessity operates as a separate defence in exceptional cases to justify the acts taken that would otherwise be criminal, such as jettisoning cargo to save the lives of those on board the ship,[677] force feeding prisoners,[678] and sterilising a psychiatric patient to prevent pregnancy.[679] It is not accepted in all situations where a person has felt compelled to act, such as to justify the taking of illegal drugs to relieve pain[680] or assist suicide.[681] It is also generally not a defence to murder.[682] However, in *Re A*[683] the separation of twins that would result in the almost immediate death of one was permitted on the basis that it was needed to avoid the 'inevitable

[676] L.J. van den Henrik and N.J. Schrijver, 'Leiden Policy Recommendations on Counter-terrorism and International Law' (2010) 57(3) Netherlands International Law Review 531 [45].
[677] *Mouse's Case* (1608) 12 Co Rep 63.
[678] *Leigh v Gladstone* (1909) 26 TLR 139.
[679] *F v West Berkshire Authority* [1989] 2 All ER 545.
[680] *Quayle* [2005] EWCA Crim 1415.
[681] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.
[682] *Dudley and Stephens* (1884) 14 QBD 273.
[683] *Re A (Children)* [2000] 4 All ER 961.

and irreparable evil' of the death of both twins, no more was done than reasonably necessary for the purpose of saving life, and the 'evil inflicted' was not 'disproportionate to the evil avoided.'[684] Thus, necessity can be viewed as a defence of last resort for those hard situations where the rules are not applicable or would lead to a result many would find manifestly unjust. It operates to bridge the gap between the positive law and societal notions of fairness.[685]

In the context of counterterrorism, necessity operates as a criterion of legitimate self-defence and is determined by the nature of the attack and whether a lesser alternative is available in the circumstances.[686] Lethal force used too late is an illegal reprisal or punishment, force used too early is also illegal, even where experience and behaviour suggests future attacks are planned.[687] Force used in punishment is not acceptable[688] as it is extra-juridical, and individuals do not have the authority to punish each other as this is the remit of the State through the criminal law. Similarly, in the international arena, the equal sovereignty of States makes force used in punishment illegitimate.[689] Thus, the CIL requirement that 'measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion".'[690] The criterion stipulates that action against territory of another State must be the only available method of averting the attack.[691] The use of force must be the last resort when there are no other realistic options. Force is not necessary,

[684] *Re A (Children)* [2000] 4 All ER 961.
[685] T.M. Franck, *Recourse to Force: state action against threats and armed attacks* (CUP 2002) 177.
[686] G. Fletcher, *Basic Concepts in Criminal Law* (OUP 1998) 92.
[687] Ibid., 133.
[688] In English law, an exception is made for the lawful chastisement of children by their parents where the force used is no more than reasonable and proportionate in the circumstances and results in no harm, s.58 Children Act 2004.
[689] C. Chinkin and M.Kaldor, *International Law and New Wars* (CUP 2017) Ch 2.
[690] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 161, [73].
[691] E. Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-defence' (2006) 55(4) ICLQ 963 971.

for example, if the terrorist acts can be dealt with by measures of law enforcement. [692] Ideally, a State would request assistance from the government of the host State before using force against a private actor located in their territory.[693] However, in international law necessary and proportionate action may be taken against NSAs residing in the territory of another state where the host State is unable or unwilling to act to prevent attacks.[694]

4.4.2.5. Proportionate

According to Fletcher and Ohlin, the prevailing approach to the use of force in defence of a State's territorial integrity is not restrained by proportionality.[695] However, the ICJ confirmed a rule of proportionality in self-defence under CIL[696] and held it applies equally to Article 51 UNC.[697] The criterion requires States to use force only defensively and only to the extent necessary to meet identified defensive objectives.[698] Thus, a State exercising force in self-defence must respect the limits of both necessity and proportionality.[699] As stated by Vattel, 'the doing of harm to an enemy is no further authorised by the law of nature, than in the precise degree which is necessary for justifiable self-defence, and reasonable security for the time to come.'[700] The ICJ held that 'self-defence would warrant only measures

[692] L.J. van den Henrik and N.J. Schrijver, 'Leiden Policy Recommendations on Counter-terrorism and International Law' (2010) 57(3) Netherlands International Law Review 531 [41].
[693] T. Ruys, *'Armed Attack' and Article 51 of the UN Charter: evolutions in customary law and practice* (CUP 2010) 111.
[694] E. Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-defence' (2006) 55(4) ICLQ 963 970.
[695] G.P. Fletcher and J.D. Ohlin, *Defending Humanity* (OUP 2008) 60.
[696] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, [176].
[697] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [41].
[698] Ibid., (Dissenting opinion of Judge Higgins) [5].
[699] L.J. van den Henrik and N.J. Schrijver, 'Leiden Policy Recommendations on Counter-terrorism and International Law' (2010) 57(3) Netherlands International Law Review 531 [40].
[700] E. de Vattel, *The Law of Nations* (J. Chitty (ed), CUP 2011) 388 §201.

which are proportional to the armed attack and necessary to respond to it.'[701] Thus, proportionality means the response to an armed attack must reflect the scope, nature, and gravity of the initial attack. The lawfulness of an act in self-defence depends on its compatibility with the necessity and proportionality criteria.[702]

Hurting another can be justified in legitimate self-defence, but not if it is caused by vengeance or goes beyond 'the restraint called for.'[703] The concept of proportionality balances the interests of the defender against those of the aggressor.[704] It is particularly important in an anticipatory self-defence situation as there is no initial attack against which to measure the requisite level of response to prevent further attack or an escalation.

There are different approaches proportionality. For example, the individualist approach allows the individual person to employ any means necessary to defend their home against external aggression.[705] In an inter-personal situation, this is more defensible as the individual is automatically limited by their physical capabilities and available weaponry. However, in England it would not be considered reasonable (proportionate) for the defender to fire a gun at a potential burglar when there was no threat.[706] The domestic approach requires the jury[707] to determine if the degree of force employed by the defender was objectively reasonable in the circumstances they subjectively believed themselves to be in.[708] This is the case even where the

[701] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, [176].
[702] Ibid., [194].
[703] B. Davies, *Thomas Aquinas's Summa Theologiae: a guide and commentary* (OUP 2014) 245 [15].
[704] G. Fletcher, *Basic Concepts in Criminal Law* (OUP 1998) 96.
[705] G.P. Fletcher and J.D. Ohlin, *Defending Humanity* (OUP 2008) 60.
[706] See, e.g., *Martin* [2001] EWCA Crim 2245. The burglars were shot whilst effecting their escape.
[707] *AG's Reference (No 1 of 1975)* [1976] 2 All ER 937 947.
[708] *Owino* [1996] 2 Cr App R 128; *Harvey* [2009] EWCA Crim 469.

defender is mistaken as to the situation.[709] The jury must consider all the relevant circumstances, which includes the ability of the defender to measure the degree of force required whilst in a highly pressurised situation.[710] Additionally, although there is no duty to retreat,[711] the possibility of retreat is to be considered (insofar as it is relevant) when assessing whether the degree of force applied was reasonable. The focus of the question is on the reasonableness of the force being employed, not the resulting harm. Consequently, where the use of reasonable force to repel the attack results in an unforeseen and unreasonable degree of harm to the aggressor, the defender's defence is not compromised.[712] However, utilising force involving an obvious risk of death or serious injury will probably render the force unreasonable.

In contrast, the society-based approach recognises the interdependence of individuals who co-operate for mutual advantage and conceptualises the aggressor as a member of that society, with interests that cannot be discounted. Consequently, in defending, the humanity of the aggressor must be considered.[713] This approach accords with the recognition of each person's human dignity in the human rights instruments[714] and also with philosophical understandings of society comprising individuals who collectively form the unit for their shared benefit.[715] Although every person is equal and independent in the law of Nature,[716] humans naturally want to live in society with each other.[717] As a result, the defender may suffer some

[709] Criminal Justice and Immigration Act (CJIA) s.76(3)-(4).
[710] CJIA s.76(7); *Palmer* [1971] AC 814; *Reed v Wastie* [1972] Crim LR 221.
[711] CJIA s.76(6)(A).
[712] *Keane* [2010] EWCA Crim 2514.
[713] G.P. Fletcher and J.D. Ohlin, *Defending Humanity* (OUP 2008) 60.
[714] See Chapter 3.
[715] See, e.g., J. Locke, *Two Treatises of Government and a Letter Concerning Toleration* (I. Shapiro (ed), YUP 2003) §95 and T. Hobbes, *Leviathan* (Lerner 2018) 127.
[716] J. Locke, *Two Treatises of Government and a Letter Concerning Toleration* (I. Shapiro (ed), YUP 2003) §6.
[717] Ibid., §77.

loss as the alternative cost to the aggressor of losing their life is too great and would disregard their human interests.[718] Locke acknowledged that 'self-defence is part of the law of nature'[719] allowing a person to kill an aggressor where there is no alternative in that moment.[720] However, this was inter-personal self-defence and predicated on the fact that there was no other choice. The killing an individual by a State in response to a remote threat currently being contained through the employment of the security services is arguably disproportionate and ignores the role of the individual in society. Also, acting against the trust of the citizenry through the arbitrary disposal 'of the lives, liberties, or fortunes of the people' undermines the legitimacy of government.[721] In individual self-defence, the difference between a person confronted in their home and a potential confrontation in the street is recognised, in the latter instance the option of retreat may be important in determining whether the use of any force was reasonable.[722]

4.4.2.6. *In response to the attack*

The force used in self-defence must be motivated by a belief that is reasonable, based on publicly available evidence, and is a reaction to an actual or threatened attack.[723] Self-defence cannot be an excuse for aggression. However, the securitisation of terrorism has arguably permitted a stretching of this criterion. For example, France embarked on an aerial bombing campaign against ISIL in Syria in response to the Paris attacks in

[718] G.P. Fletcher and J.D. Ohlin, *Defending Humanity* (OUP 2008) 61.
[719] J. Locke, *Two Treatises of Government and a Letter Concerning Toleration* (I. Shapiro (ed), YUP 2003) §233.
[720] Ibid., §19.
[721] J. Locke, *Two Treatises of Government. In the Former, the False Principles and Foundation of Sir Robert Filmer, and his Followers, are Detected and Overthrown: the Latter is an Essay Concerning the Original, Extent, and End, of Civil Government* (1823 McMaster University Archive of the History of Economic Thought) 201 [221], <https://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf> accessed 27 March 2020.
[722] *Ray* [2017] EWCA Crim 1391.
[723] G. Fletcher, *Basic Concepts in Criminal Law* (OUP 1998) 103-6.

November 2015[724] based on self-defence, whilst utilising the language of retribution and retaliation.[725] Although ISIL claimed responsibility for the attack, there was a lack of evidence at the time demonstrating a sufficient level of co-ordination or direction to make the acts attributable to the group.[726]

4.5. Conclusion

This Chapter built on the outlining of the security concession in Chapter 3 through a discussion of the State as a human construct that exists for the purpose of protecting the collective from external threats, thus addressing the second subsidiary research question.[727] Further, the elements of self-defence as an exception to the international prohibition on the use of force and natural consequence of the existence of a State were outlined and the issues of interpretation and preventative force highlighted. Self-defence is relevant to the examination of the use of force in the context of counterterrorism as it is a corollary of the securitisation of terrorism, which justifies exceptional measures in the face of an existential threat. This is returned to in the Case Studies Chapters.

Additionally, securitisation theory and its application to terrorism was outlined. The understanding of terrorism as a construct that facilitates the disregarding of normal legal rules through the assertion of security, which is the primary purpose of the State, illuminates the contradiction at the heart of HRL. The concept of security is an empty one that can be utilised, through

[724] A.J. Rubin and A. Barnard, 'France Strikes ISIL Targets in Syrian in Retaliation for Attacks' *The New York Times* (15 November 2015) <https://www.nytimes.com/2015/11/16/world/europe/paris-terror-attack.html> accessed 14 July 2023.
[725] B. Doherty, 'France Launches 'Massive' Airstrike on ISIL Stronghold of Raqqa' *The Guardian* (16 November 2015) <https://www.theguardian.com/world/2015/nov/16/france-launches-massive-airstrike-on- ISIL-stronghold-in-syria-after-paris-attack> accessed 14 July 2023.
[726] BBC News, 'Paris Attacks: who were the attackers?' *BBC News* (27 April 2016) <https://www.bbc.co.uk/news/world-europe-34832512> accessed 14 July 2023.
[727] Chapter 2: 2.2.

securitisation, against any group articulated as being ‘other’ and a threat, which countermands the purpose of human rights as a means by which human dignity is respected and so international peace and justice can be obtained.

Chapter 5: Pan Am Flight 103

5.1. Introduction

The Montreal Convention (MC)[728] was the third significant international anti-terrorism treaty[729] enacted to suppress the increase in terrorist and violent activities by various political groups and NSAs and is one of the UN Conventions on Terrorism.[730] The creation of a legal framework to confront terrorism created a legitimate legal mechanism centred on State consent. However, the MC became the centre of a dispute between the US, UK, and Libya and demonstrates the ineffectiveness of law in controlling and restricting State power when those wielding that power refuse to be so bound. The Lockerbie bombing case presents an early example of the securitisation of terrorism in the international sphere and consequent disregarding of established legal rules. The UK and US chose to bypass the MC, which provides an international legal mechanism for States to deal with the criminal use of explosives on aircraft, and instead pursue political action through the UNSC.

This Chapter bridges the gap between the foundational Chapters 3 and 4, and the Case Studies in Chapters 6-8. A comprehensive account of the 1988 incident and consequent international action is outside the purview of this thesis. Instead, the focus is on the actions by the UK and US in response to the Lockerbie bombing, which demonstrate a circumventing of rules through

[728] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (with Final Act of the International Conference on Air Law held under the auspices of the International Civil Aviation Organization at Montreal in September 1971) (adopted 23 September 1971, entered into force 26 January 1973) (Montreal Convention) 974 UNTS 177.
[729] The first two being the Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969) 704 UNTS 219 and Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105 and its Protocol (adopted 10 September 2010, entered into force 1 July 2018) 3302 UNTS.
[730] Eleven other treaties have been agreed aimed at confronting terrorism and are listed in the Bibliography: Treaties.

the successful securitisation of both the terrorist incidents and Libya. Both States arguably abused their position as Permanent Members to the UNSC and relative outsider status of Libya, whose legal arguments were dismissed as cynical attempts to avoid the issue. Additionally, the concept of a threat to international peace and security was expanded to include a past event and hypothetical future action. This expansion of threat has persisted into the WoT and is most clearly seen in the justifications for the killing of Khan in Syria in 2015.[731] The incident provides an interesting counterpoint to current UK and US action as they were not prepared to allow Libya to try the suspects itself and were keen to see the suspects prosecuted. More recent practice suggests a tendency to visit deliberately lethal force upon individual suspects. Further, the event demonstrates the exceptionalist approach of the UK and US and willingness to move beyond the normal legal framework when confronting terrorism.

As with the preceding chapters, the approach is essentially positivist utilising the MC, UN documentation, and ICJ materials. Further, the securitisation theory is employed to assist in understanding the development of the situation and interdisciplinary approach outlined above.[732] The Chapter begins with an outline of the concept of the Lockerbie bombing incident, which is followed by a discussion of the UNSC action taken after the release of criminal indictments against two Libyan suspect in Section 5.3. The next Section traces the generalisation of the threat of terrorism from specific incidents, to becoming the meta security narrative. Section 5.5 discusses the consequences for individuals labelled 'other' and so fall outside the normal sphere. This is discussed in more depth in the following three chapters. The Chapter demonstrates that certain States are willing to prioritise security

[731] Chapter 8.
[732] See Chapter 2: 2.5.3.

over law, which has significant implications for HRL as a central mechanism for respecting human dignity, thereby contributing to the maintenance of international peace and security. The functional relationship of HRL to security, as highlighted in the preceding chapter, permits the subordination of its protections when confronting terrorist threats.

5.2. Lockerbie Bombing

On 21 December 1988, Pan Am Flight 103, bound for New York, exploded mid-air over the southern Scottish town of Lockerbie,[733] killing all 243 passengers and 16 crew members on board, plus 11 people on the ground.[734] On 13 November 1991, the Lord Advocate of Scotland and US Attorney General obtained warrants for the arrest of Libyan nationals Abdelbaset Ali al-Megrahi and Lamin Khalifa Fhima on charges of murder, conspiracy to murder, and contravention of the Aviation Security Act 1982 (UK).[735] The Libyan Government denied any involvement in the incident and was not willing to surrender the accused citing a 'lynch mob atmosphere' in the UK and US and seeking to rely on its right to prosecute under the MC.[736] The Western media had essentially tried the case through the publication of official opinions, forensic reports, and assertions of connections between Lockerbie and other terrorist events, leading to increasing calls for Gaddafi to be punished.[737]

[733] 'Aircraft Accident Report' (Department of Transport 1990) <https://reports.aviation-safety.net/1988/19881221-0_B741_N739PA.pdf> accessed 29 August 2022.
[734] 'Clipper Maid of the Seas: Flight 103 Lockerbie, Scotland' (*PanAmAir*, 2005) <https://web.archive.org/web/20080326232104/http://www.panamair.org/accidents/lockerbievictims.htm> accessed 29 August 2022.
[735] C. Boyd, 'The Lockerbie Trial' (International Society for the Reform of Criminal Law, 15th International Conference, Canberra, 26-30 August 2001) 6 <https://web.archive.org/web/20081217192311/http://www.isrcl.org/Papers/Boyd.pdf> accessed 29 August 2022.
[736] M.P. Scharf, 'Terrorism on Trial: the Lockerbie Criminal Proceedings' (2000) 6 ILSA Journal of International and Comparative Law 355, 356.
[737] E. Zubel, 'The Lockerbie Controversy' (1991) 5(1) Annual Survey of International and Comparative Law 259, 260-2.

On 27 November 1991, the UK and US issued a joint declaration, circulated to the UNGA and UNSC, stating that 'Libya must surrender for trial all those charged with the crime'.[738] The UK, US, and France then issued a declaration on 20 December 1991 reaffirming 'their complete condemnation of terrorism' and commitment 'to put an end to terrorism.'[739] They demanded that Libya 'surrender for trial all those charged with the crime;… accept responsibility for the actions of Libyan officials; disclose all it knows of this crime… [and] pay appropriate compensation' They further requested that Libya 'cease all forms of terrorist action' and 'prove its renunciation of terrorism.'[740] The rhetoric of the three States was emotive, with Foreign Secretary Douglas Hurd labelling Lockerbie 'fiendishly wicked.'[741] Libya was definitively declared a terrorist State and its guilt asserted through the demand for compensation. The juxtaposition of the Western States (against terrorism) with Libya (a terrorist) was arguably aimed at encouraging the international community to support their position without examination of facts or consideration of alternative options. In this way, the Western States sought to securitise Libya as presenting a threat that needed to be dealt with outside the usual mechanisms of the UN and ICJ.

5.3. UN Action

Libya denied any involvement in the incident and 'reaffirmed its condemnation of terrorism in all its forms,' whilst asserting its right 'to

[738] 'Joint Declaration of the United States and United Kingdom' reproduced as Annex to 'Letter dated 20 December 1991 from the Permanent Representative of the United States to the United Nations addressed to the Secretary General' (31 December 1991) UN Doc A/46/827-S/23308.
[739] 'Statement Issued by the US Government on 27 November 1991' reproduced as Annex III to 'Letter Dated 20 December 1991 from the Permanent Representatives of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the Secretary-General' (31 December 1991) UN Doc A/46/828-S/23309.
[740] Ibid.
[741] 'Statement by the Foreign Secretary, The Rt. Hon. Douglas Hurd, in the House of Commons 14 November 1991' reproduced as Annex II to 'Letter Dated 20 December 1991 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the Secretary-General' (31 December 1991) UN Doc A/46/826-S/23307.

legitimate self-defence before a fair and impartial jurisdiction' and urging the US and UK 'to be governed by the logic of the law.'[742] It further expressed the concern that the statements of the US and UK stemmed from 'a pre-meditated intention… to undertake aggression' against Libya.[743] This was further elaborated upon in a letter on 20 November in which it was claimed the US had consistently sought to effect regime change in Libya and the current accusations formed part of a 'premeditated intention of and carefully considered plan for aggression against the Libyan people.'[744] Such claims were not unfounded given the US' antipathy towards non-capitalist regimes[745] and the ideologically oppositional relationship between the US and Libya,[746] alongside US President Reagan's 'pre-emptive' bombing of Tripoli in 1986 following claims of Gaddafi's involvement in the bombing of a West Berlin discotheque and alleged plans to attack US installations,[747] and both the UK and US' involvement in the Persian Gulf.[748]

On 2 January 1992, the UK and US began to seek support for a UNSC resolution calling on Libya to comply with their demands. On 8 January, Libya reiterated its willingness to co-operate with an inquiry into the incident,

[742] 'Communiqué issued by the People's Committee for Foreign Liaison and International Cooperation' reproduced as Annex to 'Letter Dated 15 November 1991 from the Permanent Representatives of the Libyan Arab Jamahiriya to the United Nations Addressed to the Secretary-General' (16 November 1991) UN Doc S/23221.
[743] 'Letter from the Secretary of the People's Committee of the People's Bureau for Foreign Liaison and International Cooperation to the Secretary General' reproduced as Annex to 'Letter dated 17 November 1991 from the Permanent Representatives of the Libyan Arab Jamahiriya to the United Nations Addressed to the Secretary-General' (20 November 1991) UN Doc A/46/660-S/23226.
[744] 'Letter from the Secretary of the People's Committee for Foreign Liaison and International Cooperation of the Libyan Arab Jamahiriya addressed to the Secretary General' reproduced as Annex to 'Letter dated 20 November 1991 from the Permanent Representatives of the Libyan Arab Jamahiriya to the United Nations Addressed to the Secretary-General' (13 January 1992) UN Doc A/46/844-S/23416.
[745] See, e.g., N. Klein, *The Shock Doctrine: the rise of disaster capitalism* (Penguin Books 2007); M. Grow, *US Presidents and Latin American Interventions* (University Press of Kansas 2008)
[746] V. Nmoma, 'Power and Force: Libya's relations with the United States' (2009) 26(2) Third World Problems and Issues: Past and Present 137, 139.
[747] L. Cannon, 'Reagan Acted Upon "Irrefutable" Evidence' *Washington Post* (15 April 1986) <https://www.washingtonpost.com/archive/politics/1986/04/15/reagan-acted-upon-irrefutable-evidence/61170c59-b355-4e0a-8ab5-411bba4879e8/> accessed 29 August 2022.
[748] M. Ray, 'Persian Gulf War (*Britannica*, 8 April 2022) <https://www.britannica.com/event/Persian-Gulf-War> accessed 29 August 2022.

outlined its attempt to initiate domestic judicial proceedings against the accused, which had not been co-operated with by the UK or US, and restated its acceptance of an international inquiry or referral to the ICJ of the incident.[749] Alert to the securitisation attempt, Libya further accused the Western States of 'politicizing the issue' by submitting it to the UNSC and denied that organ's competence to consider a judicial matter.[750] Additionally, in an attempt to reassert the normal sphere, Libya stated that the UNC does not 'endorse aggression or the threat of aggression but rather calls for the resolution of differences by peaceful means.'[751] In an answer to the accusations being made by the US and UK, Libya further asserted that it was a victim of terrorism by the US, through the 1986 bombing and its arming and training of terrorists.[752] Thus, both sides asserted the terrorist character of the other to gain support for its position. However, whilst Libya sought to invoke established legal rules and principles of the UNC, the UK and US refused to engage and stipulated only compliance with their demands.

On 9 January, Libya attempted to call a special assembly of the UNGA to agree an international definition of terrorism, a programme for the destruction of Weapons of Mass Destruction (WMDs), and to revisit the UNC so as to give the UNGA decision-making authority and reconsider the UNSC right to veto.[753] Libya also highlighted several international incidents involving the killing of civilians, including the 1986 US airstrikes against Libya that resulted in 400 civilian casualties.[754] The Council of the Arab League

[749] 'Letter Dated 17 November 1991 from the Permanent Representatives of the Libyan Arab Jamahiriya to the United Nations Addressed to the Secretary-General' (9 January 1992) UN Doc A/46/841-S/23396, Annex.
[750] Ibid.
[751] Ibid.
[752] Ibid.
[753] 'Memorandum for the Secretary of the People's Committee for Foreign Liaison and International Cooperation of the Libyan Arab Jamahiriya addressed to the Secretary General' reproduced as Annex to 'Request for the Convening of a Special Session of the General Assembly' (9 January 1992) UN Doc A/46/840.
[754] Ibid., Annex III.

adopted Resolution 5158 on 16 January 1992, calling for the establishment of a joint commission to assist in devising a peaceful settlement and urge the UNSC to act in accordance with Article 33 UNC.[755] On 18 January, Libya requested arbitration under Article 14(1) MC through an application to the ICJ requesting the indication of provisional measures 'to preserve the rights of Libya,'[756] which was rejected.[757] In the later hearing, both the UK and US objected to the jurisdiction of the Court. In what can be seen as a reassertion of the securitising move, the US claimed that the matter was not one of 'bilateral differences' but of 'a threat to international peace and security resulting from State-sponsored terrorism.'[758]

5.3.1. UNSC Resolution 731

In the meeting of the UNSC on 21 January, Libya complained that the UK and US indictments were 'intended as final, unequivocal judgments… [as] the two Libyan nationals were declared guilty', which amounted to 'a new rule of law' resulting in the accused being 'considered guilty until proved innocent.'[759] Libya asserted that it had addressed the matter 'in accordance with its valid legislation and with established international law and norms.'[760] Accordingly, the issue was a 'conflict of jurisdiction, a dispute over the legal determination to be made in connection with a request for extradition' and the appropriate forum was the ICJ, in accordance with Article 36(3) UNC.[761]

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[755] League of Arab States 'Resolution 5158' reproduced as Annex to 'Letter Dated 17 January 1992 from the Permanent Representatives of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council' (17 January 1992) UN Doc S/23436.
[756] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* and *(Libyan Arab Jamahiriya v. United States)* (Provisional Measures) [1992] ICJ Rep 3 [8].
[757] Ibid., [46].
[758] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)* Judgment [1998] ICJ Rep 746 [23].
[759] Mr Belgasem El-Talhi, UN Permanent Representative for the Libyan Arab Jamahiriya, UNSC 'Provisional Verbatim Record of 3033rd Meeting of UNSC' (21 January 1992) UN Doc S/PV.3033, 6.
[760] Ibid., 11.
[761] Ibid., 12-5.

It further posited that the matter should be dealt with through 'arbitration and due legal process' and not within the political sphere of the UNSC.[762] Libya concluded by stating the UNSC had two choices: to respect the UNC and 'follow moral principles and international law' or permit the US and UK's 'unjust request' made as a 'cover for military and economic aggression' against Libya.[763] Sudan also urged the UNSC to allow 'the rule of law' to be applied to the issue.[764] Yemen called for the matter to be addressed 'within a legal framework… [and] the purposes and principles of the [UNC] and international law.' [765] In contrast, Canada supported the resolution, demonstrating an acceptance of the Western States' securitising move by expressing the view that 'attacks against civilian targets are abhorrent threats to international peace and security.'[766] UNSC Resolution 731, urging Libya to provide a 'full and effective' response to the 'requests' of the UK and US[767] was passed unanimously.

Following the vote, the US stated that the situation was one 'to which standard procedures are clearly inapplicable. The effects of such conduct on international peace and security are clear and inescapable.'[768] Further, it asserted that the issue was not suitable for negotiation as it was conduct presenting a direct 'threat to international peace and security.'[769] France similarly claimed that 'the exceptional gravity of these attacks and the considerations connected with the restoration of law and security justify this action.'[770] China, who voted in favour of the resolution, took a different perspective stating itself 'in favour of conducting earnest, fair, objective and

[762] Ibid., 21.
[763] Ibid., 25.
[764] Ibid., 33
[765] Ibid., 56
[766] Ibid., 48
[767] UNSC Res 731 (21 January 1992) UN Doc S/RES/731.
[768] Ibid., 78.
[769] Ibid., 79.
[770] Ibid., 82.

thorough investigations… in accordance with the [UNC] and the principles of international law.' Similarly, India stressed that the 'unprecedented' resolution 'with juridical implications, cannot be a precedent.'[771] Thus revealing acceptance of the securitising move, but signalling its limits.

The UK expressed its hope that Libya would 'now see reason and comply fully and effectively' with the extradition request.[772] It denied the matter was a legal one, but contending the question was 'the proper reaction of the international community to the situation arising from Libya's failure, thus far, to respond effectively to the most serious accusation of State involvement in acts of terrorism.'[773] The difficulty for Libya of course being that the existence of the accusation was sufficient to render it illegitimate as, according to the UK, 'in the circumstances… it must be clear to all that the State which is itself implicated in the acts of terrorism cannot try its own officials.'[774] This claim seems to confuse what may be felt to be politically 'right' with the legal process and arguably involves a value judgment regarding the validity of a particular State's criminal process. Further, as shown in the Case Studies below, States are considered able to try their own representatives in circumstances of alleged human rights violations occurring in the context of counterterrorism. This seems to be a double standard when the violation results from State action and factors within the State's control.

Resolution 731 was not explicitly enacted under Chapter VII and the text does not contain a determination that the situation represented a 'threat to

[771] Ibid., 96. France and Venezuela made similar statements limiting the Resolution to its circumstances, 82, 101.
[772] Ibid., 103.
[773] Ibid., 104.
[774] Ibid., 106. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)* Judgment [1998] ICJ Rep 746 (Dissenting Opinion of Judge Bedjaoui) [10].

international peace and security.' The provisions are contextualised by the UNSC being determined to 'eliminate international terrorism.' It 'implicates' the State of Libya and 'deplores' Libya's lack of co-operation with the Western States' requests, which are referenced in the preambular paragraphs.[775] It further urges Libya 'to provide a full and effective response' to those requests. Thus, the UNSC was requiring Libya to take an action it was not legally required to do and expressly supporting the declaration of guilt by requiring Libya to comply with the compensation request. This seems to undermine the preceding request to extradite the suspects for criminal trial through prejudicially prejudging the matter. The Resolution does not indicate what 'concrete action' the UNSC was expecting Libya to take.

5.3.2. Following Resolution 731

The UNSG, acting pursuant to the Resolution, submitted two reports to the UNSC following discussions with Libya. The first outlined that Gaddafi was unwilling to breach the Libyan Constitution through extraditing the suspects but was willing to comply with the Resolution through other means. Trial proceedings were underway, which required the co-operation of the US and UK, and an offer was made for the States to send their own judges to assist in the process.[776]

The second report provides the response of the Western States, which ignored the suggestions made by Libya and asked for details relating to the extradition of the two suspects and information requested, along with information on the measures Libya will take 'to end support for terrorism in all its forms.'[777] Libya reiterated that the Constitution prevented extradition

[775] Outlined above at 5.3.
[776] 'Report by the Secretary-General Pursuant to Paragraph 4 of Security Council Resolution 731 (1992)' (11 February 1992) UN Doc S/23574.
[777] 'Further Report by the Secretary-General Pursuant to Paragraph 4 of Security Council Resolution 731 (1992)' (3 March 1992) UN Doc S/23672, 2(c).

in the absence of a treaty, although there was a possible administrative solution. It expressed fair-trial concerns[778] and raised the possibility of handing the suspects over to France or a third country, once the Constitutional obstacles had been removed, and stated itself prepared to sever all ties with terrorist groups targeting innocent civilians and to punish offenders.[779] This was not acceptable to the Western States and negotiations began within the UNSC on a sanctions resolution.

Before the ICJ, Libya requested a determination that the MC should govern the dispute and preclude the resorting to other measures, such as sanctions or action within the UNSC that would preclude the ICJ's jurisdiction in hearing the case.[780] It emphasised the lack of legal basis for the extradition of the suspects due to the absence of a specific treaty and the provisions of Article 8(2) MC.[781] The US asserted a lack of urgency and warned that Libya's seeking of provisional measures 'could be misconstrued.'[782] Nevertheless, three days after the ICJ completed oral hearings on Libya's request for provisional measures, the UNSC, acting under its Chapter VII powers, passed Resolution 748[783] determining the failure of Libya to comply with the (non-binding) Resolution 731 constituted 'a threat to international peace and security' and imposing broad ranging international sanctions. This move could be viewed as a pre-emption of the granting of Provisional Measures by the Court. Ironically, at the 3064th UNSC meeting, members had pledged

[778] As noted by Judge El-Kosheri, the UK had been found to have violated the Article 3 ECHR rights of terrorist suspects, rendering any suspicions regarding the limits of fairness in this case. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* and *(Libyan Arab Jamahiriya v. United States)* (Provisional Measures) [1992] ICJ Rep 3 (Dissenting Opinion of Judge El-Kosheri) [62].
[779] Ibid.
[780] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* and *(Libyan Arab Jamahiriya v. United States)* (Provisional Measures) [1992] ICJ Rep 3 [32]-[3].
[781] Ibid., [2].
[782] Ibid., [14].
[783] UNSC Res 748 (31 March 1992) UN Doc S/RES/748.

'their commitment to international law and the [UNC],'[784] yet were willing to impose sanctions based on *suspicion* and without waiting for the ICJ to hear the case.[785] The use of the UNSC's Chapter VII powers in this context is additionally questionable as the bombing had already occurred and there was no concrete evidence or real suggestion that another was imminent.[786] In the 1998 Judgment, Judge Bedjaoui (dissenting), although accepting the UNSC's exercise of its Chapter VII powers, questioned the validity of asserting a threat to international peace and security in 1992 when the Lockerbie bombing had occurred in 1988.[787] This assertion of a threat necessitating immediate action, despite the absence of an actual danger, is echoed in more recent counterterrorism rhetoric.[788]

Through seeking a UNSC resolution, the UK and US circumvented the established treaty regime through the operation of Article 103 UNC.[789] The ICJ found that Libya's options under the MC had been curtailed through the UNSC action as it is a Member of the UN and so 'obliged to accept and carry out the decisions of the Security Council in accordance with Article 25' UNC.[790] The Charter obligation extended to Resolution 748 and so, in accordance with Article 103, 'the obligations of the Parties in that respect prevail over their obligations under any other international agreement,' including the MC.[791] However, although Article 103 UNC gives UNSC

[784] 'Note by President of the Security Council' (31 January 1992) UN Doc S/23500.
[785] The US argued that Libya should comply with the UNSC Resolutions while the ICJ was proceeding, which would have undermined the relevance of the case. Mr Richardson UN Permanent Representative for the United States, UNSC 'Provisional Record of 3864th Meeting of UNSC' (20 March 1998) UN Doc S/PV.3864,12.
[786] Article 39 UNC provides for an invocation of Chapter VII powers if there is a threat to international peace and security.
[787] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)* Judgment [1998] ICJ Rep 746 (Dissenting Opinion of Judge Bedjaoui) [21].
[788] See Case Studies, Chapters 6-8.
[789] Obligations under the UNC prevail over international treaty obligations. Article 25 UNC obliges States to accept and carry out the decisions of the UNSC in accordance with Charter obligations.
[790] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* and *(Libyan Arab Jamahiriya v. United States)* (Provisional Measures) [1992] ICJ Rep 3 [39].
[791] Ibid.

resolutions primacy over pre-existing international obligations in terms of obligations, it does not provide that such resolutions are supreme and unquestionable. UNSC resolutions are not equivalent to a treaty obligation under the UNC, instead, it is the duty to comply with a UNSC resolution that may be an obligation.[792] The UNSC does not have unlimited competence and its powers are limited by the UNC provisions. As held by the ICJ in 1948, the UNSC's 'political character… cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.'[793] In his dissenting opinion, Judge El-Kosheri, quoting Hans Kelsen,[794] noted that 'doctrinal authorites' maintain that UN Members 'are not "obliged" to carry out all decisions of the [UNSC],' which finds support in ICJ practice.[795] Consequently, States would not be under an obligation to comply with a resolution taken ultra vires.[796] Thus, it could be argued that the UNSC had acted beyond its competency by politicising what was a legal issue, meaning Libya was not under an obligation to comply. However, the successful securitisation of the issue by the Western States and general negative view of Libya and Gaddafi, meant arguments made along these lines were not accepted.[797] A further resolution was passed following Libyan non-compliance instituting additional sanctions.[798]

[792] D. Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures' (1994) 5 EJIL 89, 92.
[793] *Conditions of Admission of a State to Membership in the United Nations* (Advisory Opinion) [1948] ICJ Rep 57, 64.
[794] H. Kelsen, *The Law of the United Nations: a critical analysis of its fundamental problems* (1950) 95, 293.
[795] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* and *(Libyan Arab Jamahiriya v. United States)* (Provisional Measures) [1992] ICJ Rep 3 (Dissenting Opinion of Judge El-Kosheri) [23]-[6].
[796] A. Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 EJIL 59, 69.
[797] See, e.g., UNSC 'Provisional Verbatim Record of 3033rd Meeting of UNSC' (21 January 1992) UN Doc S/PV.3033.
[798] UNSC Res 883 (11 November 1993) UN Doc S/RES/883.

As the UNSC is not subject to judicial review,[799] influential States appear able to disregard legal provisions according to their purposes, arguably undermining the process of international law. Consequently, the case of Lockerbie highlights the weaknesses of the international legal regime in responding to terrorism and exposes how political constructions of justice and threat can be prioritised over the maintenance and application of established legal mechanisms. Assertions by the Western States that Libya was directly responsible for the bombing became accepted as fact and action proceeded from that basis. Despite determining to bring to justice 'those responsible for the acts of international terrorism,'[800] the UNSC avoided invoking the MC provisions through consistently using the term 'terrorism,' thereby justifying its involvement. The MC was seen as being an 'ineffective'[801] and 'cumbersome'[802] method of confronting state-sponsored terrorism and for extraditing the suspects. A political solution was applied, thereby circumventing the stricter judicial requirements of evidence, adversary proceedings, and respect for the due process of law.[803] Ultimately, the sanctions did little to force Libya's compliance and it continued to maintain its position.[804] International support for and compliance with the sanctions began to wane, leading to the UK and US' acceptance of a trial by Scottish law in a neutral country.[805] Thus, demonstrating the crucial role of audience acceptance in the process of securitisation. The international

[799] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, [89].
[800] UNSC Res 883 (11 November 1993) UN Doc S/RES/883.
[801] J.A. Frank, 'A Return to Lockerbie and the Montreal Convention in the Wake of the September 11th Terrorist Attacks: Ramifications of Past Security Council and International Court of Justice Action' (2002) 30(4) Denver Journal of International Law and Policy 532, 544.
[802] N.D. White, 'Terrorism, Security and International Law' in A. Hehir, N. Kuhrt, and A. Mumford, *International Law, Security and Ethics* (Routledge 2011) 11.
[803] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)* Judgment [1998] ICJ Rep 746 (Dissenting Opinion of Judge Bedjaoui) [5].
[804] T. Niblock, 'The Regional and Domestic Political Consequences of Sanctions Imposed on Iraq, Libya and Sudan' (2001) 23(4) Arab Studies Quarterly 59, 61.
[805] M.P. Scharf, 'Terrorism on Trial: the Lockerbie Criminal Proceedings' (2000) 6 ILSA Journal of International and Comparative Law 355, 357.

community no longer accepted the threat construction and the UK and US had to agree to the return to the normal legal sphere.

5.4. From Specific to General Threat

Prior to 9/11, terrorism was dealt with on a more case-by-case basis, as with Lockerbie, and international instruments were enacted to respond to specified threats. The international community dealt with apparent issues and specific problems, rather than abstracts.[806] However, the UNSC, as a political body, has leaned more towards a generalising approach. For example, UNSC Resolution 579 condemned 'all acts of hostage taking and abduction' as 'manifestations of international terrorism.'[807] Similarly, UNSC Resolution 638 condemned hostage-taking and urged States to sign relevant treaties and prevent, prosecute, and punish 'all acts of hostage-takings and abductions as manifestations of terrorism.'[808] The language included *all* acts of hostage taking, regardless of motive and methods, yet did not encroach into the legal sphere, instead pressing upon States the need to agree to the relevant treaties. The 1989 Resolution 635 saw a broadening of language raising the 'implications of acts of terrorism for international security' in the context of plastic explosives detection and called on States to 'prevent all acts of terrorism'. Again, the implication was that the method used was the definitive point for the act to be regarded as terrorism. Additionally, the legal sphere remained separate with the International Civil Aviation Organisation being encouraged to draft a new treaty. The 1991 Iraq 'Permanent Ceasefire' Resolution, in language echoed in the later Libyan Resolutions outlined above, required Iraq to commit to not supporting 'any act of international terrorism' and unequivocally condemn and 'renounce all acts, methods and

[806] See, e.g., the treaties on hijacking from the 1970s–80s listed in the Bibliography under Treaties.
[807] UNSC Res 579 (18 December 1985) UN Doc S/RES/579.
[808] UNSC Res 638 (31 July 1989) UN Doc S/RES/638.

practices of terrorism.'[809] Further, the Resolution referenced the 1979 Hostages Convention, designating this act as terrorism as opposed to being a violation of IHL.[810] This was despite the invasion of Kuwait being an act of State aggression and an armed conflict.

UNSC action on Lockerbie crossed the Rubicon, elevating the political over the legal sphere through the securitisation of terrorism and consequent need for an exceptional response and laying the foundation for the current general and all-encompassing approach. The UNSC regularly repeats the assertion that 'terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security,'[811] thereby maintaining its securitisation status. This is manifested in two central ways, firstly, through the justification of the use of force. Secondly, through the requirement for additional, terrorism specific criminal legislation.

The Lockerbie case demonstrates that a criminal justice approach is unenforceable in the face of political power wielded by Western states and the successful securitisation of a terrorist event. The States involved were able to utilise the Chapter VII power of the UNSC to implement sanctions that caused suffering for the Libyan people and were, according to Libya, 'without a legal basis', in violation of Articles 27, 33, and 36 UNC, and a human rights violating form of collective punishment.[812] The decision to not pursue the process laid out by the MC provided a foundation for a tougher, more universal legislative response in the form of UNSC resolutions compelling all States to act within the preferred framework and politically

[809] UNSC Res 687 (3 April 1991) UN Doc S/RES/687.
[810] E.g., Common Article III(1)(b) Geneva Conventions.
[811] E.g., UNSC Res 2199 (12 February 2015) UN Doc S/RES/2199.
[812] Mr Muntasser UN Permanent Representative for the Libyan Arab Jamahiriya, UNSC 'Provisional Record of 3864th Meeting of UNSC' (20 March 1998) UN Doc S/PV.3864, 4, 6, 8.

justifying military responses in the face of non-compliance.[813] These resolutions have required States to amend their domestic legislation and go beyond the obligations consented to in counterterrorism treaties,[814] potentially restricting State sovereignty and undermining human rights standards.

UNSC Resolution 1373[815] legislates for all forms of terrorism, broadening the approach from specific threats to all acts of terrorism being considered threats to international peace and security. Theoretically, this absolves States and the UNSC from making judgements that some events are, but others are not, threats to peace. However, there still needs to be a political determination that an act or event is terrorist in nature. In passing Resolution 1373, the UNSC is here performing a general, legislative function. Although provisions in the UNC[816] arguably give the UNSC this power, it bypasses the normal creation of international law and conscious consent of States. The broad provisions and lack of definitions allow States to interpret the provisions of Resolution 1373 in ways suited to their own domestic policies and concerns, raising fundamental human rights concerns. As the UNSC does not define terrorism or the constituent parts of the criminal offences States are required to enact, States have considerable latitude to define terrorism and the related offences, leading to a significant level of divergence.

[813] UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368 declared 'international terrorism as a threat to international peace and security.' UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 required all States to enact domestic legislation criminalising the financing of terrorism. This was a significant turning point in the UNSC's response to terrorism, which has since made over forty decisions on terrorism.
[814] See, e.g., UNSC Res 2178 (24 September 2014) UN Doc S/RES/2187 requiring States to 'prevent and supress' terrorist recruitment; and UNSC Res 2396 (21 December 2017) UN Doc S/RES/2396, which reiterates the requirements of UNSC Resolution 2178 to create criminal offences, along with the implementation of other measures, such as the development of 'watchlists or databases of known and suspected terrorists.'
[815] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.
[816] Articles 25 and 103.

UNSC resolutions post-2004 recall that domestic counterterrorism legislation must accord with international law, including HRL.[817] However, broad interpretations available to States leaves individuals exposed to risk of abuse. Additionally, as outlined above,[818] HRL provides for the limitation of rights for security purposes. Thus, as a minimum, the human rights of terrorist suspects can be limited through the enactment of stricter criminal legislation. The necessity for new offences is questionable, particularly given the potential threat to human rights. For example, in the UK numerous pre-existing domestic legal instruments provide for the outlawing of a range of behaviours that could endanger other citizens. The behaviour of those wishing to support or promote terrorism has been legislated for since the 1861 Accessories and Abettors Act (as amended).[819] This covers behaviour such as supplying the information, equipment, or weaponry for the performance of a criminal act[820] or the instigation, incitement,[821] or encouragement[822] of an offence. A person is considered an accessory to the offence if they have persuaded the perpetrator to commit the act.[823] Thus, it can be seen that, in the UK at least, the criminal law already provided for situations such as where A purchases the requisite equipment to enable B to build a bomb and plant it/explode themselves in a public place, or where A encourages B to commit an offence by persuading them of its necessity within a wider campaign. However, despite the existence of numerous domestic statutes covering an array of offences generally committed by

[817] See, e.g., UNSC Res 1535 (26 March 2004) UN Doc S/RES/1535.
[818] Chapter 3: 3.5.
[819] Section 8 'Whosoever shall aid, abet, counsel or procure the commission of an indictable offence is liable to be tried, indicted and punished as a principle offender.'
[820] Which would come under 'aiding', *R v Bainbridge* [1960] 1 QB 129.
[821] Which would fall under 'abetting' and may include acts as innocuous as demonstrating support or approval, *Wilcox v Jeffrey* [1951] 1 All ER 464.
[822] Which is covered by 'counselling' and need not be significant, *R v Giannetto* [1997] 1 Cr App R 1.
[823] A causal link between the persuasion (in whatever form) and the offence committed is required, *Attorney General's Reference (No. 1 of 1975)* [1975] QB 773.

terrorists,[824] the WoT has allowed the UK Government, and others, to categorise the criminal law as being insufficient to tackle and defeat the emerging threat,[825] requiring broader legislation granting security services greater powers[826] and including the motivating ideology in the establishment of the requisite mens rea.[827]

Using the criminal justice legal framework to confront terrorism ostensibly pays due regard to human rights, and so human dignity. However, several criminal law measures, such as the offence of merely viewing information 'of a kind likely to be useful to a person committing… terrorism,'[828] severely curtail human rights provisions and narrows the legitimate public and private spheres in which individuals are permitted to operate. The language of fear is used to justify increasingly draconian measures as necessary and essential to ensure the safety of civilians and increase national and international security.[829] There is a general consensus that national and international actions are both necessary to contain and eradicate the threat of terrorism[830] and 9/11 has come to be defined and seen as a crime against humanity.[831] This has led to the acceptance of domestic legislation curtailing individual

[824] E.g., hostage-taking, Taking of Hostages Act 1982; various acts relating to the endangerment of aircraft and hijacking, Aviation Security Act 1982; racially-aggravated arson (endangering life), Crime and Disorder Act 1998; aggravated criminal damage, aggravated arson and arson, Criminal Damage Act 1971; hijacking of ships, Aviation and Maritime Security Act 1990; possession of a firearm with intent to endanger life and/or cause fear of violence, Firearms Act 1968; genocide, crimes against humanity, war crimes and related offences, International Criminal Court Act 2001; offences against the international protection of nuclear material, Nuclear Material Offences Act 1983.
[825] B. Dickson, 'Law Versus Terrorism: can law win?' (2005) 1 European Human Rights Law Review 11.
[826] Terrorism Act 2000; Anti-terrorism, Crime and Security Act 2001; Criminal Justice Act 2003; Civil Contingencies Act 2004; Prevention of Terrorism Act 2005; Terrorism Act 2006; Counterterrorism Act 2008.
[827] HM Government (UK), 'Countering International Terrorism: The United Kingdom's Strategy' (July 2006) 10.
[828] S.58 Terrorism Act 2000 (as amended).
[829] A. Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 EJIL 993, 993.
[830] J. McCulloch and S. Pickering, 'Pre-Crime and Counterterrorism: Imagining Future Crime in the 'War on Terror'' (2009) 49 *British Journal of Criminology* 628, 629 and 636; C. Pantazis and S. Pemberton, 'From the "Old" to the "New" Suspect Community: examining the impacts of recent UK counterterrorism legislation' (2009) 49 British Journal of Criminology 646, 650–51.
[831] A. Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 EJIL 993, 994–95.

rights and extraordinary international responses, such as military invasion, targeted killings, drone strikes, arbitrary detention, and torture.

5.5. The Destruction of 'One'

Current discourse legitimises the view that destabilising the US, a superpower, destabilises the world.[832] That there has not been an international outcry or protest over the broadening and militarisation of the response to the perceived threat of terrorism cannot be said to be evidence of a consensus. Silence is not necessarily agreement and acceptance,[833] especially when the political rhetoric of the US and UK administrations[834] have rendered proper debate over the most appropriate and effective response virtually impossible. Operating outside the normal sphere undermines the concept of law as a standard to which all are held equally and the purpose of creating internationally agreed human rights norms aimed at protecting citizens from the State abuse. The concept of human dignity is the underlying principle upon which the international community stands – the articulation of the value of one, that each individual counts. HRL serves to protect the individual as a check to State power and a means by which State action can be scrutinised and held accountable. However, the securitisation of terrorism allows for the application of a consequentialist

[832] J. Derrida, 'Autoimmunity: real and symbolic suicides: a dialogue with Jacques Derrida' in G. Borradori, *Philosophy in a Time of Terror: dialogues with Jürgen Habermas and Jacques Derrida* (trans. P-A. Brault and M. Naas, University of Chicago Press 2003) 93.
[833] N.D. White, 'Terrorism, Security and International Law' in A. Hehir, N. Kuhrt, and A. Mumford, *International Law, Security and Ethics* (Routledge 2011) 11.
[834] See, e.g., Former US President GW Bush stating to the world 'Either you are with us, or you are with the terrorists' and 'nations are either with us or against us in the war on terror,' thereby asserting that any opposition to US counterterrorism action amounted to support for terrorism. Respectively, J.W. Dietrich, *The George W. Bush Foreign Policy Reader: Presidential speeches with commentary* (Taylor Francis 2005) 51ff and 'Full text of George Bush's speech on Israel and a Palestinian state' *The Guardian* (25 June 2002) <www.theguardian.com/world/2002/jun/25/israel.usa> accessed 29 August 2022. More recently, politicians have portrayed the threat as being such that demands immediate action, or risk 'a terrorist caliphate on the shores of the Mediterranean', N. Morris, 'MPs' Iraq vote: Cameron warns ISIL air strikes not enough to defeat "bunch of psychopathic terrorists"' *The Independent* (27 September 2014) <www.independent.co.uk/news/uk/politics/mps-iraq-vote-cameron-warns- ISIL-air-strikes-not-enough-to-defeat-bunch-of-psychopathic-terrorists-9757715.html> accessed 29 August 2022; R. Jackson, L. Jarvis, J. Gunning, and M. Breen-Smyth, *Terrorism: a critical introduction* (Red Globe Press 2011) 2, 92.

cost/benefit analysis, as opposed to a deontological viewing of individuals as an end in themselves.

In the legal realm, a judgement needs to be made as to whether the units being counted are of equal value, or whether some units are worth more than others. This is relevant to the analysis of the security approach taken by individual States and the international community in their attempt to combat terrorism. The war in Iraq is estimated to have caused more than 400,000 civilian deaths,[835] compared to 2,823 killed in the Twin Towers incident.[836] Nearly 390,000 civilians have died as a direct result of US post-9/11 operations in Iraq, Afghanistan, Yemen, Syria, and Pakistan, alongside an estimated 3.7million who died as an indirect consequence.[837] Thus, it appears that not all lives are considered equal in dignity and rights, which is arguably a regression to the pre-WWII situation where human lives were categorised, and some were denied the right to exist.

Labelling those of a different political and theological ideology as the 'enemies of democracy' (the automatic implication being that to disagree with the implementation and continuation of a particular democratic system is to hold an unacceptable view[838]), by describing them as 'psychopaths' incapable of reason, and persons following 'a perverted form of Islam',[839] as opposed to disaffected members of the middle classes in middle-income

[835] 'Iraq Study Estimates War-related Deaths at 461,000' *BBC News* (16 October 2013) <www.bbc.co.uk/news/world-middle-east-24547256> accessed 29 August 2022.
[836] T Templeton and T Lumley, '9/11 in Numbers' *The Observer* (18 August 2002) <www.theguardian.com/world/2002/aug/18/usa.terrorism> accessed 29 August 2022.
[837] Watson Institute for International and Public Affairs, Brown University, 'Civilians Killed and Wounded' (*Costs of War*, May 2023) <https://watson.brown.edu/costsofwar/costs/human/civilians#:~:text=The%20U.S.%20post%2D9%2F11,a%20result%20of%20the%20wars.> accessed 3 August 2023.
[838] See, e.g., UK Prime Minister David Cameron's speech in Munich. D. Cameron, 'Speech on Radicalisation and Islamic Extremism' at the Munich Security Conference (5 February 2011) <webarchive.nationalarchives.gov.uk/20130109092234/http://number10.gov.uk/news/pms-speech-at-munich-security-conference/> accessed 20 February 2021.
[839] M.P. Hazel Blears speaking on 'Today Programme' *BBC Radio Four* (4 June 2014).

States,[840] successfully 'others' and homogenises a large group of individuals. This has now evolved to include anyone considered a 'subversive'[841] and puts the group on the outside of the normal sphere, meaning the usual rules do not apply and none of those individuals count as 'one.' The clear danger is that at each legislative step the rights of the individual are increasingly and irreversibly eroded[842] and individuals can have significant limitations placed on their rights by virtue of being suspected.

5.6. Conclusion

The UNSC's response to the Lockerbie bombing represents a significant turning point in the international community's response to terrorism and elevation of the political over the legal sphere. As an example of securitisation, it serves to demonstrate the need for an existential threat to be asserted and for the relevant audience to accept that exceptional measures are necessary. From that point, the UNSC continued to broaden what fell within the scope of terrorism. After 9/11, the UNSC adopted a legislative and quasi-judicial role, requiring States to make changes to their domestic legislation and circumventing the established international law-making processes. This has had the effect of creating an overarching threat of terrorism, the metasecuritisation of terrorism, and justifying increasing restrictions on human rights. As HRL allows for restrictions for security purposes, limitations that are accepted as necessary for this purpose largely go unchallenged. Concurrently, the 'othering' of persons suspected of terrorism has had the effect of placing them outside the normal sphere,

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[840] R. Jackson and N. Howe, *The Graying of the Great Powers: Demography and Geopolitics in the Twenty-first Century* (Center for Strategic and International Studies 2008) 117.
[841] C. Gearty, 'Terrorism and Morality' (2003) 4 EJIL 377, 380.
[842] It is accepted and acknowledged that the erosion of civil liberties is not linear and there have been efforts to halt it, e.g., Lord Hoffman in *Belmarsh Case* (*A and others v Secretary of State for the Home Department* [2004] UKHL 56 [96] 'Terrorist violence, serious as it is, does not threaten our institutions or our existence as a civil community.' However, as the courts are willing to defer to the political assessment of threat when derogating from IHRL obligations, it is arguable that the political agenda and discourse will ultimately override legal safeguards, e.g., *Lawless v Ireland* [1961] ECHR 2; Lord Hope in *Belmarsh Case* (*A and others v Secretary of State for the Home Department* [2004] UKHL 56 [116] 'The questions whether there is an emergency and whether it threatens the life of the nation are pre-eminently for the executive and for Parliament'.

meaning extraordinary measures can be employed against them to counter the threat they are said to present.

Chapter 6: *McCann* Case

6.1. Introduction to the Case Studies

The right to life is arguably the primary human right and stems from the concept of human dignity. ICCPR Article 6 declares 'Every human being has the inherent right to life.' The terminology, the use of the word 'inherent' and present tense of the verb to have, highlights the 'special significance' of this right and gives 'expression to the natural law basis of the right to life.'[843] It also indicates that the provision codifies an existing customary rule.[844] Thus, the arbitrary deprivation of life can be seen as the ultimate and complete violation of *all* human rights as without life there can be no other rights – all other rights would be 'devoid of meaning.'[845] Along with freedom from torture, the right to life is considered essential[846] and constituting 'the irreducible core of human rights.'[847] To arbitrarily deprive a person of their life is to assert that their 'value' is less and they do not possess inherent dignity, so do not possess human rights.

The Human Rights Committee (HRC)'s General Comment No.36[848] describes the right to life as being 'supreme', 'basic to all human rights', and 'should not be interpreted narrowly.' It additionally notes that the right 'has crucial importance both for individuals and for society… It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right whose effective protection is the prerequisite for the

[843] M. Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary* (2nd edn, NP Engel 2005) 122 [2].
[844] Casey-Maslen (2021) (n.)17[1.20].
[845] M. Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary* (2nd edn, NP Engel 2005) 121 [1].
[846] T. van Boven, 'Categories of Rights' in D. Moeckli, S. Shah, and S. Sivakumaran (eds), *International Human Rights Law* (OUP 2010) 181.
[847] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 (Dissenting opinion of Judge Weeramantry) 506, 507.
[848] HRC, 'General Comment No.36: right to life' (3 September 2019) UN doc CCPR/C/GC/36 [1].

enjoyment of all other human rights.'[849] Thus, the right to life has a functional dimension in relation to other rights.

Consequently, the deprivation of life by State authorities is 'a matter of utmost gravity' and the law 'must strictly control and limit the circumstances in which a person may be deprived' of their life by State agents.[850] Importantly, the HRC has found that 'arbitrary' is broader in scope than 'unlawful', meaning a killing can be within the law but still arbitrary. The qualifier signifies 'that life must not be taken in unreasonable or disproportionate circumstances.'[851]

HRL applies to all situations and the categorisation of a person as 'terrorist' does not legal diminish their human rights,[852] although it seems to in practice. The State killings of the Gibraltar three, Jean Charles de Menezes, and Reyaad Khan provide illustrative examples of the subordination of human dignity and human rights to security concerns. Each killing occurred in circumstances where there was in fact no imminent threat to either the State or State agent yet was justified through self-defence. The counterterrorism context and interpretation of HRL appears to enable a State to consciously kill individuals based on suspicion alone, in violation of their rights to life.

The following chapters provide detailed facts of each case to assist in the evaluation of HRL in practice. As each set of facts is unique, the detail mirrors the approach of the ECtHR and is essential to understanding the approach taken by the Court when assessing compliance with Article 2. Whereas

[849] Ibid., [2].
[850] HRC General Comment 6: the right to life (1982) [3].
[851] S. Joseph and M. Castan, *International Covenant on Civil and Political Rights: cases, materials, and commentary* (OUP 2013) 459[8.04].
[852] L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP 2011) 127.

domestic courts make findings of fact, the ECtHR utilises existing fact accounts, usually provided through the exhaustion of domestic remedies, rather than seeking to determine the facts for itself[853] and almost creating an impression of acceptable force through the contextualising of incidents within the security context and lack of rigorous application of Article 2. It has shown itself willing, particularly in relation to Northern Ireland (NI), to take account of the 'special nature of terrorist crime, the threat it poses to democratic society and the exigencies of dealing with it.'[854]

In contrast, the Court does not appear to consider the oppression of the 'othered' community, or the political context in which domestic courts operate, for example, by taking the judge's view of witnesses as evidence of unreliability, or the fact that national courts are an organ of the State.[855] It seems willing to excuse intentional killing by the State if it can be brought under domestic law on self-defence, without considering the question whether a self-confessed intentional killing by the State is ECHR compliant. The Court has held that, in the context of terrorism, 'a proper balance' needs to be struck 'between the defence of the institutions of democracy in the common interest and the protection of individual rights.'[856] What becomes clear is that the discussion around the legitimacy of taking life in each situation occurs on the edges of legal debate where shades of grey and differences in interpretation operate to excuse State behaviour and justify action.

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[853] This is considered beneficial as it substantially reduces the workload of the Court and facilitates its examination of the case. Council of Europe, 'Guide to Good Practice in Respect of Domestic Remedies' (18 September 2018) <https://www.echr.coe.int/documents/d/echr/pub_coe_domestics_remedies_eng> accessed 24 April 2022.
[854] *Murray v United Kingdom* App no 14310/88 (ECHR, 28 November 1994) [47].
[855] As mentioned above, the inappropriateness of a State being able to judge its own behaviour was stated as an objection by the UK and US to Libya's trying of the Lockerbie suspects. Chapter 5: 5.3.1.
[856] *Brogan and Others v United Kingdom* App nos 11209/84; 11234/84; 11266/84; 11386/85 (ECHR, 29 November 1988) [48].

Each Chapter takes a predominantly doctrinal approach, utilising relevant legal instruments and caselaw. Additionally, the socio-legal and interdisciplinary approaches are utilised to contextualise the law and its implementation and facilitate an examination of the effectiveness of HRL in protecting the individual terrorist suspect.

6.2. Introduction

On 6 March 1988, Seán Savage, Mairéad Farrell, and Daniel McCann were shot and killed in Gibraltar by soldiers from the British Special Air Service (SAS) as part of Operation Flavius.[857] All three were allegedly members of the Provisional Irish Republican Army (IRA) [858] planning to detonate explosives at the changing of the guard ceremony of the Royal Anglian Regiment.[859] An inquest held into the killings returned a verdict of lawful killing for all three victims. [860] The relatives of the victims lodged an application under Article 25 ECHR against the UK alleging a violation of Article 2 ECHR. The ECtHR held that whilst there was no evidence the British State had conspired to kill the three victims, the planning and implementation of the operation was significantly flawed and made the use of lethal force by the SAS soldiers inevitable, which amounted to a breach.[861]

[857] C. Brennan, '30 years ago a trio of killings sparked one of the darkest, most bizarre, fortnights of The Troubles' *The Journal* (6 March 2018) <https://www.thejournal.ie/gibraltar-killings-30-years-3885830-Mar2018/> accessed 27 June 2023.
[858] B. O'Brien, *The Long War: the IRA and Sinn Féin, 1985 to Today* (Syracuse University Press 1995) 151.
[859] M. Kennedy and D. Hearst, 'From the archive, 8 March 1988: fourth IRA bomber on the run' *The Guardian* (8 March 2011) <https://www.theguardian.com/theguardian/2011/mar/08/archive-ira-gibraltar-bomber> accessed 27 June 2023.
[860] D. Pallister, D. Sharrock, and R. Norton-Taylor, 'From the archive, 1 October 1988: SAS killings of IRA members "lawful"' *The Guardian* (1 October 2015) <https://www.theguardian.com/uk-news/2015/oct/01/ira-killings-gibraltar-sas-1988> accessed 27 June 2023.
[861] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995).

The killing of the three is an example of the deliberate use of lethal force, with the intention to kill, by State agents. Whilst the Court made a significant step in holding that the planning of the operation fell within the scope of Article 2, it declined to directly challenge either the intentional killing of a suspect by the State or intentionally killing in a situation that lacked imminence of threat.

This Chapter follows the approach outlined above in Section 6.1 and begins with an exploration of Article 2 ECHR, which protects the right to life. This legal analysis forms the foundation for the ensuing discussion in all three case studies. Section 6.4 moves to the NI context, providing background to the killings and illustrating the 'othering' of the Catholic community and use of violence by the British State. Following on from this, Section 6.5 investigates the alleged shoot-to-kill policy in operation in NI. The UK denied such a policy existed and it was widely recognised that this would be illegal. However, as explored in Chapter 7: Jean Charles de Menezes at 7.4.1.2, the intervening securitisation of terrorism generally has allowed a change in approach. In Sections 6.6-6.9, the Chapter moves into an examination of the killings themselves, using the chronology of the events to drive the narrative.

The Chapter demonstrates that HRL does not operate to protect the right to life of persons suspected of being about to commit a terrorist act, despite the absence of an actual threat. Further, the judgment of the ECHR did not address the admissions by the soldiers that they shot with the intention to kill and subsequent impact on State obligations under Article 2, preferring instead to focus on the breach of the procedural obligation. This omission arguably permitted an interpretation of Article 2 that allows a State to intend to extrajudicially kill a terrorist suspect where it can lay claim to self-defence.

6.3. Article 2 ECHR

Article 2 ECHR provides that,

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
   a) in defence of any person from unlawful violence;
   b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 2 does not permit any derogation and States are not permitted the same margin of appreciation of interference 'necessary in a democratic society in the interests of national security…' as exists in Articles 8–11. This Section provides a discussion of both paragraphs and subsections a) and b). Subsection c) falls outside the purview of this thesis as it was not raised as a justification in any of the case studies and none of the killings occurred in a riot or insurrection context.

6.3.1. Article 2(1)

Violations of Article 2(1) can occur through omission, by the State failing to act to protect the rights of another.[862] The first sentence of Article 2 obliges States Parties to make appropriate legal provisions to protect the lives of

[862] M.P. Perry *Towards a Theory of Human Rights: religion, law, courts* (CUP 2007) 34-5.

persons who are within their respective jurisdictions.[863] This gives rise to a positive obligation on the State to establish a suitable regulatory framework, alongside enforcement measures, which include policing and criminal justice systems (CJS), and to take 'preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual.'[864] The requirement to take such measures arises whenever the right to life may be threatened, regardless of the activity,[865] which includes where the criminal acts of another person threatens the life on an individual[866] and so would apply in a potential terrorist situation.

However, the State is not expected to prevent *any* manifestation of a risk to the lives of individuals within its jurisdiction. Rather, the requirement is that the State takes those measures that are reasonable in the circumstances, in accordance with constraints on resources, and considering other policing objectives.[867] This positive obligation arises where it is demonstrated that the relevant authorities had knowledge, or even where they ought to have had knowledge, of a real and impending threat to the life of an identified person (or group of persons) emanating from the criminal acts of a third party, and reasonably expected appropriate measures to avoid the risk were not taken.[868] The ECtHR makes the assessment of knowledge based on the

[863] *LCB v United Kingdom* App no 23413/94 (ECHR, 9 June 1998) [36]; *Câmpeanu v Romania* App no 47848/08 (17 July 2014) [130].
[864] *Osman v United Kingdom* App no 23452/94 (28 October 1998) [115]. The ICCPR similarly requires States Parties to 'ensure the right to life and exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities whose conduct is not attributable to the State.' HRC, 'General Comment No.36: right to life' (3 September 2019) UN doc CCPR/C/GC/36 [7].
[865] *Câmpeanu v Romania* App no 47848/08 (17 July 2014) [130].
[866] *Osman v United Kingdom* App no 23452/94 (28 October 1998) [115]; *Branko Tomašić and Others v Croatia* App no 46598/06 (15 January 2009) [50].
[867] *Osman v United Kingdom* App no 23452/94 (28 October 1998) [116]; *Choreftakis and Choreftaki v Greece* App no 46846/08 (17 January 2012) [46].
[868] *Bromiley v United Kingdom* App no 33747/96 (ECHR, 23 November 1999); *Edwards v United Kingdom* App no 46477/99 (ECHR, 14 March 2002) [55]; *Mastromatteo v Italy* App no 37703/97 (ECHR, 24 October 2002) [68].

circumstances[869] and from the perspective of the State authorities at the relevant time.[870]

The HRC has taken a similar approach by finding the obligation under Article 6 ICCPR includes measures to prevent and punish deprivations of life by the criminal acts of third parties as well as to prevent arbitrary killing by State security forces. [871] In determining the meaning of arbitrary, the Committee viewed police killing of suspected kidnappers after it had been determined their captive was not present to be 'disproportionate to the requirements of law enforcement' in the circumstances and constituted an arbitrary deprivation of life.[872] The lack of warning made to the victims, depriving them of an opportunity to surrender, and their suspect status, meaning the killing denied them the due process protections provided in the Covenant, were viewed as being contrary to the provisions.[873] Similarly, in *Burrell v Jamaica* the victim was shot after the hostages had been released and so there was no longer a need for the use of force. Consequently, the State had failed to take adequate measures to protect his life in violation of Article 6(1).[874] Had the *McCann* case[875] come before the HRC, it may well have resulted in a clearer judgment condemning the use of deliberately lethal force.

In 1988, the British authorities knew of an IRA plot to detonate an explosive device in Gibraltar and the potential threat to the lives of civilians in the locality and within the blast radius at the time of detonation. Consequently,

[869] *Osman v United Kingdom* App no 23452/94 (28 October 1998) [116].
[870] *Kurt v Austria* App no 62903/15 (15 June 2021) [160].
[871] *General Comment 6: Article 6* UN Doc HRI\GEN\1\Rev.1 (1994) [3].
[872] *Camargo v Columbia* Communication 45/1979 UN Doc CCPR/C/15/D/45/1979 (1982) [13.3].
[873] Ibid., [13.2]
[874] *Burrell v Jamaica* Communication 546/1993 UN Doc CCPR/C/80/D/888/1999 (2004) [9.5]. The State acknowledged the warders panicked at seeing their colleagues being threatened by inmates.
[875] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995).

there was an obligation to act to prevent harm. Had there been a bomb in Gibraltar that then exploded and had the authorities not done all they could reasonably be expected to do to avoid any loss of life, the UK would have arguably been in breach of the Article 2(1) right to life of the victims. Thus, the argument is not that State action against potential terrorist actions is unnecessary or inappropriate. Rather, the issue is the *intentional* killing of a suspect in lieu of other more appropriate action.

6.3.1.1 Intentional Killing

The second sentence of Article 2 provides that States are enjoined to refrain from the *intentional* taking of life except in the very specific circumstance of carrying out a properly delivered death sentence. When the Convention was drafted, several member States, including the UK, still imposed the death penalty for serious criminal offences. However, the last execution in the UK took place on 13 August 1964,[876] twenty-four years prior to the Gibraltar incident, and the Murder (Abolition of Death Penalty) Act 1965 abolished the death penalty as the punishment for murder, replacing it with life imprisonment. [877] Consequently, had the three suspects caused death through the successful detonation of a bomb in Gibraltar and then been convicted of murder, their punishment would have been life imprisonment – they would not have been condemned to death. Thus, from this perspective, the legitimacy of the State intentionally killing a person *suspected* of attempting murder through a terrorist act, or otherwise, is highly questionable as it essentially amounts to the passing and carrying out of a death sentence based on suspicion and the subjective view of the relevant State agent, without due process. Under HRL, 'suspicion is not enough to

[876] D. Leatherdale, 'Gwynne Evans and Peter Allen: the last men to be hanged' (*BBC News*, 13 August 2014) <https://www.bbc.co.uk/news/uk-england-cumbria-28687221> accessed 21 September 2022.
[877] S.1(1).

justify a resort to lethal force'[878] and there is a distinct lack of coherence in holding that HRL permits States to intentionally kill civilians in this context, whilst also maintaining the abolition of the death penalty.

The UK signed the Sixth Protocol of the ECHR in 1999,[879] abolishing the death penalty in peacetime, and ratified the Second Optional Protocol to the ICCPR,[880] which provides that 'No one within the jurisdiction of a State Party… shall be executed' and that 'Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction'.[881] In 2003, the UK ratified the Thirteenth Protocol of the ECHR,[882] which abolished all recourse to capital punishment, including in peacetime. The preamble states that,

> Everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings.

In *Ocalan*, the Court commented that the imposition of the death penalty in peacetime is unacceptable and contrary to the overall abolitionist trend in Europe.[883] In *Al-Saadoon and Mufdhi v UK*, the Court expressed the view that 'the imposition and use of the death penalty negates fundamental human rights'[884] and held that State practices had amended the provisions on the right to life, resulting in the prohibition of the death penalty in all

[878] ESC, 'Extrajudicial, Summary or Arbitrary Executions Report of the Special Rapporteur, Philip Alston' (8 March 2006) UN Doc E/CN.4/2006/53 [50].
[879] COE, 'Chart of Signature and Ratifications of Treaty 114' (*Council of Europe*, 2023) <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=114> accessed 16 February 2023.
[880] OHCHR, 'Status of Ratification' (*United Nations Human Rights Office of the High Commissioner*, 2014) <https://indicators.ohchr.org/> accessed 16 February 2023.
[881] Article 1(1) and (2).
[882] COE, 'Chart of Signature and Ratifications of Treaty 187' (*Council of Europe*, 2023) <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=187> accessed 16 February 2023.
[883] *Ocalan v Turkey* App no 46221/99 (ECHR, 12 May 2005) [163]-[165]
[884] *Al-Saadoon and Mufdhi v United Kingdom* App. no. 61498/08 (ECHR, 2 March 2010) [115].

circumstances. The prohibition also operates to prevent States Parties from deporting a person to a jurisdiction where they may face the death penalty.[885] Both the ICCPR Second Optional Protocol and Thirteenth Protocol to the ECHR connect the abolition of the death penalty with the recognition of human dignity, meaning the use of capital punishment is not compatible with human dignity and so also conflicts with human rights principles. Consequently, due to the abolition of the death penalty in Europe and subsequent nullifying of the only exception to the prohibition on the intentional deprivation of life, it would be logical to conclude that, prima facie, Article 2(1) ECHR prohibits States Parties from *intentionally* killing any person within their jurisdiction *in any circumstance*. Additionally, given the view that State execution of persons convicted of a capital offence after the application of the CJS 'negates fundamental human rights,' to permit a State to deliberately kill in any other circumstances would be absurd.

6.3.2 Article 2(2)

Thus, prima facie, since the abolition of the death penalty a State cannot intentionally kill a person, meaning the legitimate objective of the use of force cannot be to deprive a person of their life. The death can only result from force used in pursuit of one of the legitimate aims provided in (a)-(c) and not as an aim per se of the use of force. Additionally, the force is not qualified and so *any* level of force must be justified and no more than necessary in the circumstances.

In other words, whilst Article 2 is not an absolute right, the provisions in Article 2(2) are not exceptions to the general prohibition of intentional killing when a State is permitted to aim to kill. Rather, they are instances where an

[885] *Al-Saadoon and Mufdhi v United Kingdom* App. no. 61498/08 (ECHR, 2 March 2010); *Al Nashiri v Poland* App no 28761/11 (ECHR, 24 July 2014); *AL (XW) v Russia* App no 44095/14 (ECHR, 29 October 2015).

instance of necessary and proportionate force used for a legitimate purpose that results in an unintended death may not amount to a violation of the right to life of the victim. The rule of law requires the criminalisation of the intentional taking of life to apply equally to agents of the State.

It is submitted that this straightforward interpretation of the provision accords with the underlying principles of the Convention and with general principles of HRL, being to facilitate respect for human dignity, thereby ensuring international peace and security. Additionally, given that States alone have the ability to categorise a person and their beliefs, opinions, and behaviour as a suspect and threat to State security, to permit a State to intentionally kill extrajudicially is to ignore the historical context of the drafting of the UDHR and subsequent HRL instruments and opens the door for the very abuse that HRL aims to protect individuals from. Therefore, in a case where it is accepted by those State agents applying force that their intention in that moment was to kill, this would appear to be a direct breach of Article 2(1) and so not covered by the exceptions outlined in Article 2(2). It is suggested that this interpretation is to be preferred as it provides maximum protection for individuals from State uses of lethal force and makes it clear that the State, via its agents, is not permitted to ever *intend* to kill a person outside an armed conflict situation.

In the context of the whole Article, the second paragraph prima facie defines occasions where a State uses force that results in the loss of life as an *unintended* consequence[886] and has been applied where lethal force was used without the intention to kill.[887] However, there is a lack of clarity and legal reasoning on this subject in the ECtHR case law. The Court appears to

[886] *Stewart v United Kingdom* App no. 10044/82 (Commission, 10 July 1984) [15].
[887] See, e.g., *Huohvanainen v Finland* App no 57389/00 (ECHR, 13 March 2007) [97].

suggest that Article 2(2) provides three circumstances in which a State may intentionally extrajudicially kill a civilian in peacetime, on the condition that the deliberately lethal force was no more than necessary in the circumstances yet provides no justification for this position or consideration of its compatibility with Article 2 as a whole or the aims of the ECHR and HRL.

In *Stewart v United Kingdom*,[888] the Commission found Article 2(2) goes beyond intentional deprivation of life to include *unintentional* killings, thereby indicating that it encompasses intentional killings. The Court in *McCann* stated that it 'considers that the exceptions delineated in [Article 2(2)] indicate that this provision extends to, but is not concerned exclusively with, intentional killing.'[889] It is not clear whether this means that the exceptions grant States the right to intentionally extrajudicially kill civilians in the provided circumstances, or whether it is simply indicating that intentional killing falls under the purview of the provision and so can be adjudicated on. The Court then repeated the language of *Stewart* that 2(2) 'does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, *as an unintended outcome*, in the deprivation of life.'[890] However, the use of 'primarily', meaning 'principally; chiefly; mainly',[891] again adds an element of ambiguity as there is impliedly room for the paragraph to indeed define instances where the State is allowed to intentionally kill.[892]

[888] App no. 10044/82 (Commission, 10 July 1984).
[889] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [148].
[890] Ibid., (emphasis added).
[891] 'Primarily' (*Collins Dictionary*, 2022) <https://www.collinsdictionary.com/dictionary/english/primarily> accessed 30 May 2022.
[892] This view is taken by some commentators, see, e.g., J.A. Hessbruegge, *Human Rights and Personal Self-Defense in International Law* (OUP 2017) 94, citing several ECtHR cases that allegedly establish 'law enforcement agents may shoot with the *intent* to kill where absolutely necessary to defend their lives or that of others' (emphasis added).

The lack of clarity here is unhelpful, particularly as the Court in *McCann* went on to find no violation of Article 2 on the acts of the soldiers alone, despite their admission that they shot to kill the suspects.[893] Further, in a later case the Court held that the second paragraph extends to *intentional* killing,[894] which would seem to undermine the entire purpose of the Article and the motivations behind the abolition of the death penalty, yet again does not provide justification for its apparent ignoring of the clear wording of Article 2 that explicitly prohibits intentional killing. It also stands in contrast to decisions holding that subparagraphs (a) and (c) make violence 'a condition that will justify the use of *potentially* lethal force.'[895] Given that under the first paragraph a State is not permitted to intentionally kill outside the application of the judicial process and conviction of a capital offence, it is not logical to allow an intent to kill to be read into the provisions of the second paragraph. Additionally, in the context of the securitisation of terrorism, sanctioning State killing on the basis of a perceived threat by a suspected terrorist significantly contributes to the reduction of HRL standards in the counterterrorism context.

Permitting the use of force that may, as an unintended and unforeseen consequence, result in death is a more coherent approach that does not give the State undue latitude to kill in peacetime. It is recognised that there may be incidents where a suspect poses an imminent threat to life and a State agent may have no option but to apply potentially lethal force in order to prevent the individual from visiting violence on other civilians, thereby upholding and protecting the human rights of those persons. However, the

[893] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [120].
[894] *Ramsahai and Others v The Netherlands* App no 52391/99 (ECHR, 15 May 2007) [286].
[895] *Nachova and Others v Bulgaria* (Judgment) App no 43577/98 43579/98 (ECHR, 6 July 2005) [104] (emphasis added).

State has a concurrent duty towards the suspect and 'there is no conflict between… the human right not to be blown up by terrorists and the human right not to be arbitrarily shot by the police.'[896] Thus, although the force required to avert the incident may be potentially lethal, and indeed result in the death of the suspect, this is qualitatively different to intentionally applying lethal force. The former aims to preserve life, whereas the latter aims to end it. Unfortunately, the crucial distinction between the two is lost in loose language[897] and an absence of explicit judicial direction.

Another crucial aspect is the provision that the force used must no more than 'absolutely necessary' to achieve a permitted purpose,[898] meaning the degree of force employed must be 'strictly proportionate' to the achievement of the permitted aims.[899] This adds an additional support to the argument that a State cannot intend to kill as the *aim* of the use of force is limited to those provided, which does not include the aim of depriving a person of their life. However, States have used the latitude provided in ECtHR judgments to interpret Article 2(2) so as to permit the intentional taking of life in the three circumstances listed (a)-(c), i.e., if a State agent is in the position where they are ostensibly aiming to arrest a person, prevent escape, prevent harm to another, or quell a riot or insurrection, they can resort to deliberately lethal force and intentionally deprive the individual of their life. It is

[896] ESC, 'Extrajudicial, Summary or Arbitrary Executions Report of the Special Rapporteur, Philip Alston' (8 March 2006) UN Doc E/CN.4/2006/53 [47].
[897] E.g., despite explicitly criticising the use of 'shoot-to-kill' rhetoric, UN Special Rapporteur Philip Alston uses the term 'shooting to kill' when referencing legitimate applications of lethal force by State agents in a law enforcement context. This is unfortunate and also risks undermining clear legal standards. It is suggested that the better approach, which centres the right to life of all involved, is to reference recourse to potentially lethal force – meaning that the force has the ability to produce death but is not being deployed with that intention as the aim of the force is defensive. Ibid., [59].
[898] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [148]; *Yüksel Erdoğan and Others v Turkey* App no 57049/00 (15 February 2007) [86]; *Ramsahai and Others v The Netherlands* App no 52391/99 (ECHR, 15 May 2007) [286];
[899] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [148]-[149]; *Bubbins v United Kingdom* App no 50196/99 (ECHR, 17 March 2005) [135]; *Ramsahai and Others v The Netherlands* App no 52391/99 (ECHR, 15 May 2007) [287]; *Giuliani and Gaggio v Italy* App no 23458/02 (ECHR, 24 March 2011) [176].

submitted that this position does not accord with the provisions and subsequent legal development, i.e., the abolition of the death penalty, and undermines the protection of life under the Convention.

Arguably, a State agent forming the intent to kill is de facto unlawful and a breach of the Convention. It would then be inconsistent to claim that the unlawful lethal force used by S to kill V (in the context of preventing V from visiting unlawful violence upon X), with the intention to kill V, is then made lawful. V is also someone the State must protect from unlawful violence. Similarly, shooting to kill a suspect with the ulterior aim of preventing them from manifesting as a threat is still an intention to kill[900] that undermines the victim's right to life and core principle that each person possesses human dignity, meaning their life cannot be disposed of as a means to an end. Further, using deliberately lethal force with the knowledge that death is a virtually certain consequence would amount to an intent to kill for the purposes of criminal law.[901] Thus, a State agent acting in the course of their duties that shoots a suspect in the head for the purpose of defending another from unlawful violence, but knowing that death is a virtually certain result, has intended the death. Consequently, the State has violated the victim's right to life.

To maximise the protection of Article 2 ECHR and give effect to its purpose, the two paragraphs should be read in conjunction with each other and the prohibition of the first paragraph on the intentional taking of life should be read into the second. Additionally, in the context of counterterrorism, the

[900] And would be sufficient mens rea to satisfy the offence of murder as the intention includes the ends as well as the means. *Hyam v DPP* [1975] AC 55.
[901] *Woollin* [1998] 4 All ER 103.

long-term negative impact of overly repressive tactics outweighs any immediate benefits,[902] such as may be gained by the killing of suspects.

In the context of counterterrorism, this provision is arguably the most important as terrorist violence threatens civilians and the State is under a duty to protect those within its jurisdiction.[903] As part of their role, the police are legitimately able to use force in ways unavailable to ordinary citizens.[904] Putting aside situations where the perpetrator is plainly about to visit lethal violence upon another, the intention to kill is arguably always going to be more than absolutely necessary in the circumstances. It also leaves no room for mistakes, which, as the case law of the ECtHR and these case studies demonstrate, has happened more than once in the context of counterterrorism.

6.3.2.1 (a) in defence of any person from unlawful violence

The violence the other people are to be protected from needs to be real and present, not a possible future event. Allowing for a State to kill based on a possible future event affords the State an unwarranted degree of latitude in determining the nature and presence of a threat, and further undermines the content and coherence of the right. The principle of strict proportionality cannot be disassociated from the purposes of the provision, which is to protect the right to life.[905]

Shooting a suspect to prevent them from committing an act of violence is not equivalent to shooting to kill them. Given that the death penalty has

[902] M. Matassa and T. Newburn, 'Policing and Terrorism' in T. Newburn (ed), *Handbook of Policing* (2003, Taylor and Francis) 481.
[903] See Chapter 8.
[904] P.A.J. Waddington and M. Wright, 'Police use of Force, Firearms and Control' in Newburn (2008) T. Newburn (ed), *Handbook of Policing* (Willan 2008) 465.
[905] *Nachova and Others v Bulgaria* (Judgment) App no 43577/98 43579/98 (ECHR, 6 July 2005) [104].

been eradicated from Europe, it cannot make sense to allow states to intentionally kill in the absence of any trial or passing of a sentence and purely based on the subject view of a State agent in the heat of the moment. As an exercise in logic, Article 2(1) explicitly prohibits intentional killing, thus intentional killing is precluded from being a legitimate aim of the application of any level of force and so cannot be said to have a legal justification. Where an officer employs lethal force with the intent to kill, any additional legitimate defensive aim is undermined as the killing becomes an objective of the use of force. The intent to kill cannot be a corollary to the legitimate aim as this would provide a significant loophole for States, undermining HRL protections. As States have a duty to refrain from acts that will cause death, the intent of the officer in a situation where an individual suspect presents an imminent danger to the right to life of others must be solely defensive and aimed at preserving the lives of all involved.

In *Giuliani and Gaggio v Italy*,[906] an officer shot the applicants' relative whilst he was in the process of attacking a vehicle containing three officers.[907] The officer had drawn his weapon and warned the protestors to leave in case they were killed.[908] When they did not, he fired two shots, one of which killed the victim.[909] The Court held the defence exception applied in this situation as the officer was under sustained attack that showed no signs of abating, despite the warning.[910] Although it can be questioned as to whether shooting towards people without firearms or equivalent weapons is appropriate, the officer had not aimed at any person in particular as a defensive action against a second fire extinguisher being thrown,[911] leading the Court to find the use

[906] App no. 23458/02 (ECHR, 24 March 2011).
[907] Ibid., [191].
[908] Ibid., [190].
[909] Ibid., [192].
[910] Ibid., [191] and [194].
[911] Ibid., [193].

of lethal force was absolutely necessary in the circumstances.[912] The situation can be distinguished from *McCann* where the suspects were not only walking away from the soldiers but had been given no warning or instructions. Similarly, Menezes was being held down by officers at the time of his shooting and Khan was not in the process of remotely launching an attack.

6.3.2.2. (b) in order to effect a lawful arrest or prevent the escape of a person lawfully detained

Civil policing aims to secure the arrest and prosecution of offenders, meaning even armed suspects should receive a warning they have encountered armed police and given the opportunity to surrender.[913] If a State agent is shooting with the intent to kill, then they are not shooting in order to effect an arrest. In *Nachova and Others v Bulgaria*,[914] the Court held that,

> 'balanced against the imperative need to preserve life as a fundamental value, the legitimate aim of effecting a lawful arrest cannot justify putting human life at risk where the fugitive has committed a non-violent offence and does not pose a threat to anyone. Any other approach would be incompatible with the basic principles of democratic societies, as universally accepted today.'[915]

This case involved the escape of conscripts who were unarmed and had not been convicted of a violent offence. Logically, if risking human life cannot be justified in a situation where the person has been convicted of an offence and is currently serving their sentence, it cannot be justified where there has been no conviction and the arrest is being attempted at the beginning of the

[912] Ibid., [194].
[913] P.A.J. Waddington and M. Wright, 'Police use of Force, Firearms and Control' in Newburn (2008) T. Newburn (ed), *Handbook of Policing* (Willan 2008) 477.
[914] *Nachova and Others v Bulgaria* (Judgment) App no 43577/98 43579/98 (ECHR, 6 July 2005).
[915] Ibid., [103]

criminal justice process. Arguably, the most successful policing strategies in combating terrorism are those that utilise normal methods.[916]

In sum, strictly read and in accordance with the prohibition of the death penalty, Article 2 does not permit the State to extrajudicially intentionally take life. Under English law, this would include situations where the outcome of death is virtually certain.[917] However, it does provide that death resulting from State use of necessary and proportionate force to achieve one of three legitimate aims is not a violation. Those aims do not include death.

6.4 Background

This section serves to contextualise the killings in Gibraltar, rather than supply an analysis of the colonisation of Ireland by the English.[918] The British Government repeatedly used military or military-style force in a domestic, non-armed conflict situation, justified by the 'exceptional' situation. In pursuing the political aim of retaining control over NI, the right to life of those in opposition to English rule were subordinated to the security of the State. Thus, it could be argued that the British State was acting in its own interests, rather than in the interests of the collective from which it was formed.

England declared sovereignty over Ireland in the 12th Century, [919] implementing policies restricting trade that resulted in the virtual destruction of Irish industry.[920] Property confiscation and legislation preventing Catholics

[916] M. Matassa and T. Newburn, 'Policing and Terrorism' in T. Newburn (ed), *Handbook of Policing* (2003, Taylor and Francis) 486.
[917] *Woollin* [1998] 4 All ER 103.
[918] G.A. Hayes-McCoy, 'The Tudor Conquest: 1534-1603' in T.W. Moody, F.X. Martin, and D. Keogh with P. Kiely (eds), *The Course of Irish History* (5th edn, Roberts Rinehart Publishers 2012) 175.
[919] B. Brandon, 'Terrorism, Human Rights and the Rule of Law: 120 years of the UK's legal response to terrorism' (2004) Criminal Law Review 981, 982.
[920] M. Wall, 'The Age of the Penal Laws: 1691-1778' in T.W. Moody, F.X. Martin, and D. Keogh with P. Kiely (eds), *The Course of Irish History* (5th edn, Roberts Rinehart Publishers 2012).

from buying land[921] and, in Ulster, Catholics 'othered' through systematic disenfranchisement and viewed as Nationalist enemies of the British government.[922]

In 1800, the Irish Parliament was abolished[923] and over the century the campaign for the devolution of Ireland increase with significant opposition from the Unionist minority residing mainly in Ulster.[924] The Ulster Protestant community took measures against the re-establishment of a Dublin Parliament, including enrolling an Ulster Volunteer Force (UVF) for political and military service, forming a provisional government, and amassing arms.[925] The unrest in NI led to the establishment of an armed police force, in contrast to the policing by consent model practiced on the mainland, and government reliance on the British army for assistance[926] to supress and control the population.

In an early example of the securitisation of terrorism, the 1922 Civil Authorities (Special Powers) Act (Northern Ireland) suspended normal legal processes, introducing sweeping powers of search, arrest, and detention, which were employed only against the Catholic Community,[927] along with the ability to supress political opposition.[928] There was systematic discrimination

[921] Ibid., 189.
[922] A. Clarke, 'The Colonisation of Ulster and the Rebellion of 1641: 1603-1660' in T.W. Moody, F.X. Martin, and D. Keogh with P. Kiely (eds), *The Course of Irish History* (5th edn, Roberts Rinehart Publishers 2012).
[923] Union of Ireland Act of 1800 and Act of Union (Ireland) Act of 1800.
[924] D. Torrance, 'The Anglo-Irish Treaty 1921' (UK Parliament Research Briefings, 5 December 2022) <https://researchbriefings.files.parliament.uk/documents/CBP-9260/CBP-9260.pdf> accessed 29 March 2023.
[925] J.L. McCracken, 'Northern Ireland: 1921-66' in T.W. Moody, F.X. Martin, and D. Keogh with P. Kiely (eds), *The Course of Irish History* (5th edn, Roberts Rinehart Publishers 2012) 273.
[926] Ibid., 275.
[927] J. Loughlin, *The Ulster Question since 1945* (2nd edn, Red Globe Press 2004).
[928] P. Wilkinson, *Terrorism versus Democracy: the liberal state response* (Taylor Francis 2011) 28.

directed towards the Catholic community within NI,[929] with most police activity directed towards them.[930]

1922 also saw the establishment of the Royal Ulster Constabulary (RUC), which viewed itself as an emanation of the State.[931] The recruitment of paramilitary UVF[932] into the RUC led to the perception that NI had 'institutionalised violence'[933] and was consequently illegitimate. Throughout its existence, the RUC was 'at war' with the IRA and many officers viewed themselves as soldiers.[934] The 'othering' of Catholics continued and the community still experienced political, economic, and social discrimination, including in matters of law enforcement, and were viewed by the general Protestant population as being 'disloyal to the State.'[935]

The British government sought to 'normalise' the political violence through the use of the criminal law, whilst at the same time recognising the 'abnormality' of the situation with the introduction of legislation giving the RUC special powers to proactively combat the terrorist violence.[936] A significant portion of the Irish Nationalist community viewed the Detention of Terrorists (Northern Ireland) Order 1972 as oppressive and the increasing feeling of injustice, alongside the aggressive tactics employed by the police, contributed to disturbances.[937]

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[929] M-T. Fay, M. Morrissey, and M. Smyth, *Northern Ireland's Troubles: the human cost* (Pluto Press 1999); P. Wilkinson, *Terrorism versus Democracy: the liberal state response* (Taylor Francis 2011) 28.
[930] M. Farrell, *Northern Ireland: the Orange state* (Pluto Press 1980)
[931] J. Stalker, *Stalker* (Harrap 1988) 11.
[932] M. Farrell, *Northern Ireland: the Orange state* (Pluto Press)
[933] C. Townshend, *Political Violence in Ireland: government and resistance since 1848* (1983, Clarendon) 384.
[934] J. Stalker, *Stalker* (Harrap 1988) 11.
[935] J.H. Whyte, 'Ireland: 1966-82' and J.L. McCracken, 'Northern Ireland: 1921-66' in T.W. Moody, F.X. Martin, and D. Keogh with P. Kiely (eds), *The Course of Irish History* (5th edn, Roberts Rinehart Publishers 2012) 300.
[936] M. Matassa and T. Newburn, 'Policing and Terrorism' in T. Newburn (ed), *Handbook of Policing* (2003, Taylor and Francis) 482.
[937] The Cameron Report, 'Official Conclusions on Causes of the 1968-69 Disorders' (1980) 10(1) International Journal of Politics 38.

The region was viewed by many as an apartheid state with a completely disenfranchised minority population due to the exercise of sectarian power and privilege, and widespread use of discrimination and oppression as methods of control.[938] The prioritising of State security over all other factors demonstrates that, even in the early phases of the human rights movement, States were not willing to reconsider and re-evaluate their approach to dissent and persons considered 'other'.

The failure of political activity to establish equality resulted in violence being seen as the only realistic mechanism for effecting change in the region.[939] Consequently, to the extent that policing by consent had been in operation in the region, it became significantly difficult during the 1970s.[940] A renewed campaign by the IRA in 1971 prompted Northern Irish Prime Minister Brian Faulkner to reinstall internment to address the growing violence.[941] However, its implementation, including its indiscriminate use against Catholics and mistreatment of detainees, prompted a retaliatory increase in resentment and violence.[942]

6.4.1. Bloody Sunday

In late 1971, Londonderry clashes between the army and residents saw a series of army operations being carried out with the aim of clearing erected barricades and making arrests.[943] Why the army was used instead of police was never made clear. The community did not respond well to the military

[938] G. Adams, *The Politics of Irish Freedom* (Brandon Books 1986) 18.
[939] Fay et al (n.) 102.
[940] C. Walker, *The Prevention of Terrorism in British Law* (MUP 1992) 257.
[941] J.H. Whyte, 'Ireland: 1966-82' and J.L. McCracken, 'Northern Ireland: 1921-66' in T.W. Moody, F.X. Martin, and D. Keogh with P. Kiely (eds), *The Course of Irish History* (5th edn, Roberts Rinehart Publishers 2012) 302.
[942] Ibid., 303.
[943] Lord Widgery, *Report of the Tribunal Appointed to Inquire into the Events on Sunday 30 January 1972, which led to loss of life in connection with the procession in Londonderry on that day* (HM Stationery Office 1972) 47.

operations[944] and the violence increased and continued into 1972 when the authorities learnt of a planned protest march organised by the NI Civil Rights Association for Sunday 30 January.[945] It was decided to allow the march to go ahead, but to keep it contained so as to minimise the opportunity for rioting and commercial damage.[946] However, in a foreshadowing of the inappropriate decision to use military personnel in Gibraltar, the British army entered the Bogside and occupied it as though it were hostile territory.[947] Electing to use soldiers in a non-armed conflict situation, within the normal human rights sphere, demonstrates the centring of security considerations, the absence of human rights concerns, and a willingness to utilise lethal force as an early, if not first, option. As a result of a confrontation between the protesters and army, 13 unarmed civilians were shot dead, and 15 others seriously wounded.[948]

The British government set up a public inquiry, which exonerated the soldiers and claimed the army fired at gunmen who initiated the action.[949] Although there was some acknowledgement that the actions of some soldiers 'bordered on the reckless',[950] the Report placed the blame for the entire incident on the march organisers, concluding that the deaths would not have occurred were it not for the march.[951]

The Inquiry is widely viewed as propaganda as it lacked any exploration of the impact of British policy and how the legalised discrimination and

[944] Ibid.
[945] Ibid., 48.
[946] Ibid., 49.
[947] P.A.J. Waddington and M. Wright, 'Police use of Force, Firearms and Control' in Newburn (2008) T. Newburn (ed), *Handbook of Policing* (Willan 2008) 475.
[948] G. Dawson, 'Trauma, Place and the Politics of Memory: Bloody Sunday, Derry, 1972–2004' (2005) 59 History Workshop Journal 151.
[949] Lord Widgery, *Report of the Tribunal Appointed to Inquire into the Events on Sunday 30 January 1972, which led to loss of life in connection with the procession in Londonderry on that day* (HM Stationery Office 1972).
[950] Ibid., 53.
[951] Ibid., 53.

oppression of the Catholic community contributed to the incident.[952] The use of an aggressive paratrooper unit to effect arrests during a peaceful march was questioned and criticised, along with the perceived need to fire at unarmed civilians.[953] The killing of unarmed, peaceful protesters, the lack of an impartial inquiry into the event, and the unwillingness of the State to hold itself and its agents to account, led to a further fracturing of relations between the Nationalist community and the British government.[954] Through its failure to protect and uphold the rights and interests of the Catholic population, the UK arguably broke the civil contract [955] and some consequently viewed the unpunished killings as a justification for violence against a State unwilling to safeguard its citizens.[956]

The British government recognised that the use of the military as the primary policing method had contributed to the deterioration of the situation and so moved to a 'primacy of the police' position from 1976.[957] However, the operation of an alleged shoot-to-kill policy, the continued involvement of the military, and use of lethal force in response to perceived threats maintained an atmosphere of conflict.

6.5 Alleged shoot-to-kill policy

In late 1982, six fatal shootings within a five-week period in Armagh by RUC specialist anti-terrorist units led to allegations of an active shoot-to-kill policy

[952] G. Dawson, 'Trauma, Place and the Politics of Memory: Bloody Sunday, Derry, 1972–2004' (2005) 59 History Workshop Journal 151.
[953] Dash, S., *'Justice Denied: a challenge to Lord Widgery's Report on Bloody Sunday* (International League for the Rights of Man 1972).
[954] M. Sutton, 'Political Reconciliation in Northern Ireland and the Bloody Sunday Enquiry' in B. Schwelling (ed), *Reconciliation, Civil Society, and the Politics of Memory: transnational initiatives in the 20th and 21st century* (Columbia University Press 2012).
[955] J-J Rousseau, *The Social Contract and the First and Second Discourses* (S. Dunn (ed), YUP 2002) 214.
[956] A. Hegarty, 'The Government of Memory: public inquiries and the limits of justice in Northern Ireland' (2002) 26 Fordham International Law Journal 1148.
[957] M. Matassa and T. Newburn, 'Policing and Terrorism' in T. Newburn (ed), *Handbook of Policing* (2003, Taylor and Francis) 481-2.

operating in NI against IRA suspects.[958] The shooting of six people within a short period, by the same police unit, and by several of the same officers[959] were condemned locally and internationally[960] and suggested an 'inclination' towards shooting alleged suspects without warning or prior engagement instead of attempting an arrest.[961] Secretary for NI Jim Prior denied the existence of a 'shoot-to-kill policy,' saying there was, 'a policy of capturing and dealing with terrorists,' but persons who do not stop at a road block and are suspected of being armed, 'must accept the security forces have to take the necessary action.'[962] Thus, the willingness of the State to shoot based on suspicion reveals the absence of the right to life in policy considerations and the victim-blaming of individuals.

The rhetoric surrounding each killing of terrorist suspects frames the event as occurring within the context of terrorist violence.[963] In line with the securitisation theory, this has the effect of legitimising almost any forceful response as the State is perpetually considered to be under threat – individual officers are continually required to be hyper-vigilant and any activity is interpreted within a defence and security framework, rather than law enforcement. Consequently, the application of the law serves to categorise the victims as persons who can be lawfully killed, as opposed to

[958] K. Asmal, *Shoot to Kill? International Lawyers' Inquiry into the Lethal use of Firearms by the Security Forces in Northern Ireland* (Mercier Press 1985); A. Jennings, '"Shoot to Kill": the final courts of justice' in A. Jennings (ed), *Justice Under Fire: the abuse of civil liberties in Northern Ireland* (Pluto Press 1988).
[959] *Jordan, Re Judicial Review* [2014] NIQB 11.
[960] M. Matassa and T. Newburn, 'Policing and Terrorism' in T. Newburn (ed), *Handbook of Policing* (2003, Taylor and Francis) 484.
[961] J. Stalker, *Stalker* (Harrap 1988) 253.
[962] I. Cobain, 'Northern Ireland: when Britain fought terror with terror' *The Guardian* (9 July 2015) <https://www.theguardian.com/news/2015/jul/09/northern-ireland-terror-shoot-to-kill> accessed 20 June 2023.
[963] See, e.g., *Kelly v United Kingdom* App no 17579/90 (ECHR, 13 January 1993), the Commission stated that due to the context, the soldiers were unable to determine the victims were not terrorists.

unlawfully murdered,[964] rather than inhibit the use of deliberately lethal force by the State.

In early 1988, the Director of Public Prosecutions (DPP) (NI) had determined that statements by the police did not include all the material facts and that 'matters which were untrue and misleading… had been included.'[965] This led to the Stalker-Sampson inquiry into the alleged shoot-to-kill policy in NI.[966]

Four of those killed by the RUC had been connected by intelligence reports to the IRA killing of three police officers a few weeks earlier,[967] raising the possibility that the six killings were done in revenge.[968] The Nationalist community was cynical regarding the inquiry's ability to achieve tangible results.[969] Mr Stalker was later reported as stating that although he did not find evidence of an explicit shoot-to-kill policy,[970] 'there was a clear understanding on the part of the men whose job it was to pull the trigger that that was what was expected of them.'[971] The British Government made no arguments defending such a policy and 'emphatically denied' the allegation that such a practice was in operation,[972] thus demonstrating that, at that time, there existed broad agreement that a policy of shooting to kill terrorist suspects as a first resort would not be lawful.[973]

[964] D. Fraser, *Law After Auschwitz: towards a jurisprudence of the Holocaust* (Carolina Academic Press 2005) 17.
[965] The Attorney-General (Sir Patrick Mayhew) Royal Ulster Constabulary (Stalker-Sampson Investigations) HC Deb 25 January 1988, vol 126, col 21.
[966] J. Stalker, *Stalker* (Harrap 1988) 29.
[967] Ibid., 35.
[968] Ibid., 50.
[969] Ibid., 46-7.
[970] Members of the Stalker-Sampson inquiry team stated in June 1990 that the inquiry found no evidence of a shoot-to-kill policy. *McKerr v United Kingdom* App no 28883/95 (ECHR, 4 May 2001) [34].
[971] *The Times* of 9 February 1988, reproduced in *McKerr v United Kingdom* App no 28883/95 (ECHR, 4 May 2001) [32].
[972] Ibid., [105].
[973] In contrast to the later position demonstrated in Chapter 7: 7.4.1.2 and Chapter 8: 8.4.3.

6.5.1 First Killing

The first killing took place on 11 November 1982 when Eugene Toman, Seán Burns, and Gervaise McKerr were killed by at least 109 rounds being fired into their car.[974] The RUC officers claimed the victims had driven through a roadblock, hitting one officer, and they had come under fire from the persons inside the vehicle.[975] It was later alleged by Stalker that the police had the three suspects under surveillance, there was no serious attempt to attract the attention of the driver,[976] and no officer had been struck by the car.[977] According to his autobiography, the investigation into the killings revealed significant discrepancies in the official account and absence of standard 'preservation of evidence' procedures.[978] It was later found that all the officers involved in the shootings had made false statements in accordance with a cover story delivered by senior officers.[979]

The three officers involved were later tried for the murder of Eugene Toman.[980] Lord Justice Gibson acquitted all three defendants, making clear he accepted the official version of events. The judgment found the defendants had been tasked to arrest the deceased on suspicion of terrorist offences and to prevent a murder.[981] Prior to the event, the officers were informed 'the suspects would probably be armed and… dedicated and dangerous terrorists who… would not be arrested alive… firearms would probably have to be used to effect their arrest.'[982] This echoes the information given to officers ahead of both the Gibraltar[983] and Menezes[984]

[974] *McKerr v United Kingdom* App no 28883/95 (ECHR, 4 May 2001) [11].
[975] B. Rolston, *Unfinished Business: state killings and the quest for truth* (Beyond the Pale 2000)
[976] *McKerr v United Kingdom* App no 28883/95 (ECHR, 4 May 2001) [31].
[977] J. Stalker, *Stalker* (Harrap 1988) 41.
[978] Ibid., 42.
[979] *Jordan, Re Judicial Review* [2014] NIQB 11 [50].
[980] *McKerr v United Kingdom* App no 28883/95 (ECHR, 4 May 2001) [17].
[981] Ibid., [19].
[982] Ibid., [19], per Lord Justice Gibson.
[983] Chapter 6: 6.7.
[984] Chapter 7: 7.3.1.

killings, showing the construction of an impending threat and securitisation of the individuals involved, within the overall securitisation of the NI conflict. In the event, the soldiers fired at a moving car and the ricochet from their bullets off the car apparently caused flashes that appeared to the soldiers to be gunfire.[985]

Lord Justice Gibson held that, 'at this stage each of the accused was acting lawfully in shooting at the three deceased as being the only practicable means of effecting their arrest and if need be killing them in order to stop their escape and prevent the perpetration of murder.'[986] This statement warrants analysis. Firstly, although domestic legislation provides for the use of force to prevent crime or effect an arrest, the force must be 'reasonable in the circumstances.'[987] The legitimate aim of effecting an arrest can justify the use of force that risks the life of suspects provided the force employed was no more than an 'absolute necessity' for the achievement of that aim.[988]

In *Nachova*, the ECtHR held that the use of lethal force in a lawful arrest context is not absolutely necessary 'where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost.'[989] It could be argued that as they were allegedly intending to commit murder, the suspects posed a threat to life and so fell outside the scope of this protection.

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[985] *McKerr v United Kingdom* App no 28883/95 (ECHR, 4 May 2001) [19], per Lord Justice Gibson.
[986] Ibid.
[987] Criminal Law Act (Northern Ireland) 1967, s.3.
[988] See, e.g., *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [148]; *Yüksel Erdoğan and Others v Turkey* App no 57049/00 (15 February 2007) [86]; *Ramsahai and Others v The Netherlands* App no 52391/99 (ECHR, 15 May 2007) [286]; *Giuliani and Gaggio v Italy* App no 23458/02 (ECHR, 24 March 2011) [17].
[989] *Nachova and Others v Bulgaria* (Judgment) App no 43577/98 43579/98 (ECHR, 6 July 2005) [95].

The phrasing employed by the Court of 'no threat to life' suggests that if there is *any* potential threat to life in the context of an escaped fugitive, lethal force may be utilised. However, this would be an overly broad reading of the judgment, undermining the strict reading of Article 2 advocated by the Court and allowing the use of lethal force against any fugitive convicted of a violent crime regardless of the existence of any actual threat. Further, unlike in *Nachova*, the victims had not been convicted of a criminal offence and were not escaping custody. Additionally, the situation did not involve an imminent threat to life as the suspects were allegedly *intending* to commit an offence, they were not in the midst of its commission.[990] It is argued that suspicion a person is en route to commit a crime does not make the deliberate use of lethal force absolutely necessary as the situation can be distinguished from those where the suspect and their target are in close proximity. Here, the lives of the three victims and alternative measures to protect their alleged target were not considered in the assessment of the situation.

Secondly, the assertion that a State agent may kill a person to prevent their escape and potential perpetration of a future crime appears close to an admission that pre-crime execution in the case of terrorists is not considered contrary to the law. Lord Gibson's statement that the use of force was 'reasonable in the circumstances… to prevent the commission of the contemplated murder'[991] appears to demonstrate an acceptance that officers can shoot to kill three people who were not currently engaged in any identifiable criminal activity. It also reveals a fundamental illogicality in allowing lethal force in the context of arrest as the killing undermines the

[990] Cf. *Mendy v France* App no 71428/12 (4 September 2018) [31]-[33] where the use of lethal force in a situation was considered absolutely necessary as warning shots had failed to deter the suspect from pursuing and threatening the life of their victim.
[991] *McKerr v United Kingdom* App no 28883/95 (ECHR, 4 May 2001) [19], per Lord Justice Gibson.

purpose of the force – corpses cannot be put on trial. If a person presents an imminent danger to the life of others, the relevant justification under Article 2 is 'defence of any person from unlawful violence.'[992] Thus, Lord Justice Gibson allowed for the deliberate use of lethal force despite the absence of imminent danger to the RUC officers or others and when the suspects were attempting to flee.

The learned Judge went on to find the defendants 'absolutely blameless' and appeared to consider their killing of the three men as 'bringing [them] to justice, in this case the final court of justice,'[993] apparently confirming the existence of a judicially sanctioned 'shoot-to-kill' policy in NI, leading to widespread opprobrium.[994] Subsequently, Lord Justice Gibson later made a statement in open court to clarify his views on State killings stating he did not approve of any shoot-to-kill policy by the police, that such a policy would not be lawful, and that the police are subject to the same laws regarding the use of force as civilians. Additionally, despite the wording of his judgment, he denied his words indicated that the police were entitled to deliver summary justice.[995] This importantly demonstrates that any shoot-to-kill police by the State would not fall within the provisions of the law, which would presumably include HRL as the UK was party to the ECHR at the relevant time. However, despite this repudiation of any such policy, there was a widespread view that members of the RUC were able to kill suspects with impunity.[996]

[992] Article 2(2)(a) ECHR.
[993] *McKerr v United Kingdom* App no 28883/95 (ECHR, 4 May 2001) [20], per Lord Justice Gibson.
[994] J. Stalker, *Stalker* (Harrap 1988) 38.
[995] *McKerr v United Kingdom* App no 28883/95 (ECHR, 4 May 2001) [20], per Lord Justice Gibson.
[996] J. Stalker, *Stalker* (Harrap 1988) 39.

Relying on Articles 2, 13, and 14 ECHR, Gervaise McKerr's family brought an application to the ECtHR in 1993 alleging a lack of effective investigation into his death and lack of redress.[997] As there were significant unresolved issues regarding the circumstances of the killing, including whether the use of force by the police was proportionate in the circumstances,[998] which were due to be examined via civil proceedings, and the remit of the application, the ECtHR declined to pass judgment on the substantive element of the alleged breach or whether there existed a shoot-to-kill policy.[999] It did, however, find that there had been a violation of the procedural elements of Article 2 due to the substantial and significant barriers, alongside a lack of transparency and effectiveness,[1000] to an effective and impartial investigation.[1001] It is submitted that it would have been useful and appropriate for the Court to make it clear that a shoot-to-kill policy would not be lawful or in accordance with the provisions of Article 2 as this would not have prejudiced other proceedings.

6.5.2 Second Killing

The killings on 11 November were followed, 13 days later, by the killing of 17-year-old Michael Tighe in a hay shed on 24 November 1982. He was unarmed and, according to his companion Martin McCauley, who was injured in the incident, there had been no indication that police were outside or about to fire.[1002] The police account was that they were on a routine patrol when they saw a man with a gun move into the hay shed.[1003] The officers approached the shed, shouted for occupants to throw down their weapons,

[997] *McKerr v United Kingdom* App no 28883/95 (ECHR, 4 May 2001) [3].
[998] Ibid., [116].
[999] Ibid., [117]-[120].
[1000] Ibid., [160].
[1001] Ibid., [161].
[1002] I. Cobain, 'Northern Ireland: when Britain fought terror with terror' *The Guardian* (9 July 2015) https://www.theguardian.com/news/2015/jul/09/northern-ireland-terror-shoot-to-kill> accessed 20 June 2023.
[1003] *Jordan, Re Judicial Review* [2014] NIQB 11 [54].

then saw the two occupants point their rifles at an officer, so opened fire.[1004] However, no shots were fired at the police and no ammunition was found.[1005]

A security service officer memo is reported to state that the two were shot without any option to surrender.[1006] It later emerged that the officer who claimed to have seen a gun in the hands of one of the victims had fabricated the story under instructions from superior officers.[1007] Additionally, all officers involved made false statements in accordance with the untrue version.[1008] The reason for the shooting was based on information from Special Branch[1009] and claims by the police that both boys were holding rifles towards the police were found to be false. Recordings made by MI5 of the hay shed, apparently demonstrating the falsity of police claims they shouted a warning,[1010] were not shared with the DPP.[1011] Surveillance tapes and other potential evidence relating to the incident were destroyed by the police and security services.[1012]

Despite the evidence and later admissions that the account given was false, no officers faced charges related to the killing of Tighe or for perverting the course of justice. It is difficult to understand how this killing was performed in accordance with Article 2 ECHR, which applied to NI at the time, as the

[1004] J. Stalker, *Stalker* (Harrap 1988) 63.
[1005] *Jordan, Re Judicial Review* [2014] NIQB 11 [52].
[1006] C. Kilpatrick, 'Michael Tighe shooting: the case which sparked one of the most notorious allegations of a cover-up in the history of the Troubles' *Belfast Telegraph* (15 January 2015) <https://www.belfasttelegraph.co.uk/news/northern-ireland/michael-tighe-shooting-the-case-which-sparked-one-of-the-most-notorious-allegations-of-a-cover-up-in-history-of-troubles/30908745.html> accessed 20 June 2023.
[1007] C. Young, 'RUC man failed to tell truth about alleged shoot to kill operation' *The Irish News* (24 February 2016) <https://www.irishnews.com/news/2016/02/24/news/ruc-man-failed-to-tell-truth-about-alleged-shoot-to-kill-operation-428620/> accessed 20 June 2023.
[1008] *Jordan, Re Judicial Review* [2014] NIQB 11 [53].
[1009] J. Stalker, *Stalker* (Harrap 1988) 64; *Jordan, Re Judicial Review* [2018] NICA 34 [54].
[1010] P. Taylor, 'Secrets and Lies' *The Guardian* (23 May 2000) <https://www.theguardian.com/uk/2000/may/23/northernireland.features11>
[1011] C. Kilpatrick, 'Michael Tighe shooting: RUC and MI5 in shoot-to-kill probe after tape of teen death 'sabotaged'' *Belfast Telegraph* (15 January 2015) <https://www.belfasttelegraph.co.uk/news/northern-ireland/michael-tighe-shooting-ruc-and-mi5-in-shoot-to-kill-probe-after-tape-of-teen-death-sabotaged/30908639.html> accessed 20 June 2023.
[1012] Ibid.

officers went into the hay shed of their own volition[1013] and not in response to a perceived threat. The situation did not fall under the permitted exceptions where the use of potentially lethal force is justified as it was not a defence, arrest, or quelling of a riot/insurrection situation.

6.5.3 Third Killing

Roddy Carroll and Seamus Grew were killed just over two weeks later on 12 December 1982.[1014] The two evaded their surveillance, leading to a pursuit by an unmarked car that culminated in an RUC officer shooting and instantly killing both men.[1015] The trial of Constable John Robinson for the murder of Grew revealed the police version that the victims' car had crashed through a road block erected to intercept them, injuring an officer who was not actually on duty at the time,[1016] and then later refused to stop, had been fabricated[1017] in accordance with a cover story created to conceal Special Branch's involvement.[1018] It was later admitted that the officers involved in the killing had weaved a 'web of deceit.'[1019]

Robinson claimed he identified himself as police and stopped in front of the car, jumping out. The sound of the car door slamming caused him to believe he was being fired at, so he returned fire. Forensic evidence indicated Grew had been shot at close range.[1020] Robinson claimed to have shouted a warning but opened fire when the car began to move as he believed they

[1013] They were directed to investigate noises heard through the listening device, *Jordan, Re Judicial Review* [2018] NICA 34 [54].
[1014] *Jordan, Re Judicial Review* [2014] NIQB 11 [56].
[1015] J. Stalker, *Stalker* (Harrap 1988) 52-3.
[1016] *Jordan, Re Judicial Review* [2018] NICA 34 [141].
[1017] B. Rolston, with M. Gilmartin, *Unfinished Business: state killings and the request for truth* (Beyond the Pale Publications 2000).
[1018] *Jordan, Re Judicial Review* [2014] NIQB 11 [57].
[1019] Ibid., [58].
[1020] J. Thomas, '"Shoot to Kill" Policy in Ulster? The Debate Rages' *New York Times* (12 April 1985) <https://www.nytimes.com/1985/04/12/world/shoot-to-kill-policy-in-ulster-the-debate-rages.html> accessed 7 April 2023.

were going to attempt to kill him.[1021] The prosecution alleged that Carroll was first shot from six to ten feet and Grew from just inches as he exited the car, undermining Robinson's claim that the level of force was necessary due to believing the two were armed and his life was in danger.[1022] At trial, Robinson admitted that he had lied under instruction from senior officers to hide the fact they were under surveillance, there had been no roadblock, and no officer was injured.[1023] Despite his admissions, Robinson was acquitted on the basis he had feared for his life.[1024]

In 1985, Secretary for NI Mr Douglas Hurd said, 'It's absolutely crucial that a security force operate and be seen to operate under the rule of law. That's what distinguishes it from an army of occupation.'[1025] However, no officers faced criminal charges for their role in obscuring an accurate account of the above killings. The Stalker/Sampson inquiry was completed in 1987 and never published.[1026] On receipt of the report, the DPP declined to prosecute despite 'evidence… of perverting or attempting or conspiring to pervert the course of justice.'[1027] The reasons were said to be based on national security concerns and that the prosecting authority 'must balance one harm to the public interest against another.'[1028] The 'balancing' argument is often made in the context of security to deny rights application and does not take into account the importance of rights protection in ensuring security.[1029]

[1021] B. Rolston, with M. Gilmartin, *Unfinished Business: state killings and the request for truth* (Beyond the Pale Publications 2000).
[1022] Ibid.
[1023] I. Cobain, 'Northern Ireland: when Britain fought terror with terror' *The Guardian* (9 July 2015) https://www.theguardian.com/news/2015/jul/09/northern-ireland-terror-shoot-to-kill> accessed 20 June 2023.
[1024] *Jordan, Re Judicial Review* [2014] NIQB 11 [56].
[1025] J. Thomas, '"Shoot to Kill" Policy in Ulster? The Debate Rages' *New York Times* (12 April 1985) <https://www.nytimes.com/1985/04/12/world/shoot-to-kill-policy-in-ulster-the-debate-rages.html> accessed 7 April 2023.
[1026] M. Matassa and T. Newburn, 'Policing and Terrorism' in T. Newburn (ed), *Handbook of Policing* (2003, Taylor and Francis) 484.
[1027] The Attorney-General (Sir Patrick Mayhew) Royal Ulster Constabulary (Stalker-Sampson Investigations) HC Deb 25 January 1988, vol 126, col 22.
[1028] Ibid., col 25 and 28.
[1029] See Chapter 3: 3.5.

The lack action against officers found to have deliberately hampered the post-shooting investigations is concerning, particularly as the establishment and sustaining of trust 'in the moral standing of counter-terrorism agencies are critical for effective counter-terrorism.'[1030] Additionally, the apparent lack of respect for proper procedure and the importance of all killings by State agents to be fully investigated raises serious concerns regarding the adherence to human rights protections.

6.5.4 Subsequent Killings

It is important to note that RUC officers were armed with sub-machine guns and high velocity rifles, which was considered politically preferable to using the military and was part of a policy to depoliticise the conflict and treat the terrorists as criminals.[1031] However, the policing of NI followed a well-established pattern of colonial policing,[1032] which is characterised by violence and a separation between the police and community.[1033] Although ostensibly operating under the criminal law, the situation was not normal and the 'othering' of the Catholic community rendered all members potential suspects until proven innocent.

On 13 May 1994, the father of Pearse Jordan brought an application to the ECtHR alleging he had been unjustifiably killed by police and a lack of effective investigation into, and redress for, the death.[1034] On 5 October 1995, an application was made by the families of Patrick Kelly, Patrick

[1030] M. Innes and D. Thiel, 'Policing Terror' in T. Newburn (ed), *Handbook of Policing* (Willan 2008) 554.
[1031] P.A.J. Waddington and M. Wright, 'Police use of Force, Firearms and Control' in Newburn (2008) T. Newburn (ed), *Handbook of Policing* (Willan 2008) 476.
[1032] D.M. Anderson and D. Killingray, *Policing the Empire: government, authority and control, 1830-1940* (MUP 1991).
[1033] P.T. Ahire, *Imperial Policing: the emergence and role of the police in colonial Nigeria 1860-1960* (OUP 1991).
[1034] *Jordan v United Kingdom* App no 24746/94 (4 May 2001) [1] and [3].

McKearney, Declan Arthurs, Seamus Donnelly, Eugene Kelly, Michael Gormley, Gerard O'Callaghan, James Lynagh, and Antony Hughes alleging unjustifiable killing by police, which disclosed discrimination, and lack of an effective remedy.[1035] The proceedings were conducted simultaneously with *McKerr*.[1036]

6.5.4.1. *Killing of Pearse Jordan*

On 25 November 1992, Pearse Jordan was shot and killed by an RUC officer in Belfast.[1037] The post-mortem revealed he had been shot in the back by bullets fired from behind.[1038] The RUC issued statements to the media that a police chase had successfully brought the pursued vehicle to a halt, whereupon officers had fired at the driver, fatally wounding him. No weapons, ammunition or explosives were found in the vehicle and the driver was unarmed.[1039]

At the inquests, Sergeant A, who delivered the fatal shots to Jordan, claimed he shouted at Jordan to stop who then 'spun'[1040] towards him. Thinking he was armed, and fearing for his life and the lives of his colleagues, Sergeant A shot Jordan as he was facing him.[1041] Sergeant A stated he had considered Jordan to be a danger, despite having no confirmation he was armed, because he had driven in an aggressive manner and, after colliding with unmarked police vehicles, had failed to stop when ordered.[1042] Sergeant A did not consider Jordan's actions to be of a person about to surrender.[1043]

[1035] *Kelly v The United Kingdom* App no 30054/96 (4 May 2001) [3].
[1036] *McKerr v United Kingdom* App no 28883/95 (ECHR, 4 May 2001) [6]; *Jordan v United Kingdom* App no 24746/94 (4 May 2001) [6]; *Kelly v The United Kingdom* App no 30054/96 (4 May 2001) [6].
[1037] *Jordan, Re Judicial Review* [2018] NICA 34 [12].
[1038] Ibid., [14].
[1039] Ibid., [13].
[1040] *Jordan, Re Judicial Review* [2014] NIQB 11 [40].
[1041] *Jordan, Re Judicial Review* [2018] NICA 34 [60].
[1042] Ibid., [20].
[1043] Ibid., [20].

After hearing expert testimony, the Coroner found it was possible that Jordan had been facing Sergeant A when he made the decision to fire,[1044] although objectively unlikely.[1045] He also found that Jordan's car was forced off the road by the police, he then ran from the car, was shot by RUC Sergeant A, and consequently died.[1046]

Although recognised as someone capable of lying when he felt the need arose,[1047] the Coroner accepted Sergeant A's version of events to the effect that Jordan made eye contact with Sergeant A during the car chase, yet refused to stop, which confirmed the suspicion he was on a terrorist mission and likely to be carrying munitions.[1048] However, it is submitted that it is not inconceivable that, in the context of sectarian violence, a person may run persons who have deliberately crashed into their vehicle, even if he knew they were police. Members of a 'suspect community' will not rely on the State for protection and, for the Nationalist community, the police were perceived as a source of threat.[1049] As in *McCann*, the police failed to take into consideration alternative explanations for the behaviour of the suspect. The Coroner found that Jordan was 'actively engaged in serious terrorist activities' on the day of his death.[1050] He additionally found that any person assisting PIRA at that time would have known of their complicity in bombings and associated potential loss of life and risk of injury to civilians and members of the Security Services.[1051] However, Jordan's engagement in terrorist activity does not justify his shooting as Article 2 does not provide for the use of

[1044] Ibid., [85].
[1045] A. Houston, 'Pearse Jordan Inquest Findings Delivered: summary of judgment' *The Law Society of Northern Ireland* (7 November 2016) <https://www.lawsoc-ni.org/pearse-jordan-inquest-findings-delivered> accessed 7 April 2023.
[1046] *Jordan, Re Judicial Review* [2018] NICA 34 [57].
[1047] Ibid., [76].
[1048] Ibid., [59].
[1049] M. Breen-Smyth, 'Theorising the "Suspect Community": counterterrorism, security practices and the public imagination' (2014) 7(2) Critical Studies on Terrorism 223, 233.
[1050] *Jordan, Re Judicial Review* [2018] NICA 34 [32].
[1051] Ibid., [32].

potentially lethal force in general crime prevention or counterterrorism operations – there must be an imminent threat to life that makes such force absolutely necessary.

Four civilian witnesses recounted a different version of events, which involved the police deliberately shooting and then abusing Jordan.[1052] The Coroner found their account to be coloured by prejudice towards the Security Services and, despite the bruises on Jordan's face and shin,[1053] not supported by physical evidence. This stands in stark contrast to the acceptance of Sergeant A's version of events, despite finding him to be capable of lying and that officers had misled the inquest,[1054] raising the issue of impartiality when the State is involved in a dispute, particularly in a colonial policing context.[1055]

Post-shooting, press reports claimed masks, bombs, and guns had been found in Jordan's vehicle, and that he was a former Republican prisoner.[1056] The construction of the victim as 'other' through reference to their alleged criminal behaviour and terrorist involvement encourages an interpretation of the event that exonerates the State and contributes to the centralising of security and diminishing of the human rights of those articulated as a threat.

Justice Horner delivered his Coroner's verdict stating 'the State [had] failed to discharge the onus which lies upon it under Article 2 [ECHR] to prove on the balance of probabilities that the killing of the Deceased was lawful.'[1057] The PSNI had been unable to provide 'a satisfactory and convincing

[1052] *Jordan v United Kingdom* App no 24746/94 (4 May 2001) [16].
[1053] Ibid., [14].
[1054] *Jordan, Re Judicial Review* [2018] NICA 34 [53].
[1055] P.A.J. Waddington and M. Wright, 'Police use of Force, Firearms and Control' in Newburn (2008) T. Newburn (ed), *Handbook of Policing* (Willan 2008) 477.
[1056] *Jordan, Re Judicial Review* [2018] NICA 34 [17].
[1057] Coroner Horner J [329] quoted in *Jordan, Re Judicial Review* [2018] NICA 34 [87].

explanation… for the use of lethal force.'[1058] The physical evidence proved Jordan had been shot in the back by Sergeant A but the surrounding circumstances were contested and, twenty-five years later, it was impossible to determine what actually occurred.[1059] He found that if Jordan had turned towards Sergeant A as he claimed, then, in the circumstances, Sergeant A could have feared for his life and the lives of his colleagues.[1060] The Coroner also found that members of the police unit had lied in their evidence to the inquest,[1061] been evasive regarding the circumstances preceding the killing of civilians,[1062] and that Sergeant A had been prepared to alter a police log in 1982 to provide a false narrative of events.[1063]

The verdict emphasised the recent history of NI and the impact of the violence on the minds of the police officers, stating they had 'borne witness to the difficulties of operating in the terrible times which prevailed' at that time, had had 'to live with the imminent threat to their own lives as they did their best to contain a widespread terrorist threat', and lived 'their lives on a cliff edge.'[1064] However, he made it clear that his involvement in terrorism did not amount to a forfeiting of his rights under the law and had not become an outlaw who the State could summarily execute.[1065] The framing of the events in the context of the violence in NI is useful to some extent in terms of understanding why officers may have been too quick to discharge their

[1058] A. Houston, 'Pearse Jordan Inquest Findings Delivered: summary of judgment' *The Law Society of Northern Ireland* (7 November 2016) <https://www.lawsoc-ni.org/pearse-jordan-inquest-findings-delivered> accessed 7 April 2023.
[1059] Ibid.
[1060] *Jordan, Re Judicial Review* [2018] NICA 34 [75].
[1061] 'Pearse Jordan: "impossible to reach conclusions" over IRA man's death' *BBC News* (7 November 2016) <https://www.bbc.co.uk/news/uk-northern-ireland-37898548> accessed 7 April 2023.
[1062] *Jordan, Re Judicial Review* [2018] NICA 34 [36].
[1063] A. Houston, 'Pearse Jordan Inquest Findings Delivered: summary of judgment' *The Law Society of Northern Ireland* (7 November 2016) <https://www.lawsoc-ni.org/pearse-jordan-inquest-findings-delivered> accessed 7 April 2023.
[1064] Coroner Horner J [68], quoted in *Jordan, Re Judicial Review* [2018] NICA 34 [29].
[1065] A. Houston, 'Pearse Jordan Inquest Findings Delivered: summary of judgment' *The Law Society of Northern Ireland* (7 November 2016) <https://www.lawsoc-ni.org/pearse-jordan-inquest-findings-delivered> accessed 7 April 2023.

weapons. However, it also arguably highlights a lack of appreciation by the State as to how its agents are impacted by the context of terrorism and the absence of appropriate training and personnel changes to ensure officers are performing their duties with the human rights of all citizens at the forefront of their actions. Additionally, there is an absence of understanding afforded to the suspects as a result of the context – Nationalists viewed themselves at war with the State and were also living in fear of violence from Unionist paramilitaries and State agents.

As in *McKerr*, the ECtHR found the UK in violation of the procedural aspect of Article 2 to conduct an effective official investigation[1066] but declined to adjudicate on the matters pending in civil proceedings,[1067] namely whether Sergeant A had given a warning and whether Jordan was facing him when he fired.[1068] Additionally, the Court declined to investigate the presence of a shoot-to-kill policy and practice of using disproportionate force.[1069] It appears the ECtHR was unwilling to hold the UK to account in terms of the substantive element of Article 2, the actual taking of life, preferring to focus on the procedural requirements. There was again an opportunity for the Court to articulate its views on the legality of such a policy and use of force. Although perhaps an understandable approach, especially given the UK's negative response to the judgment in *McCann*,[1070] it suggests a lack of force behind the human rights legal framework and willingness to hold States to an appropriate standard.

[1066] *Jordan v United Kingdom* App no. 24746/94 (4 May 2001) [145].
[1067] Ibid., [111].
[1068] Ibid., [110].
[1069] Ibid., [114].
[1070] See, e.g., A.W.B. Simpson, *Human Rights and the End of Empire* (OUP 2001) 13.

6.5.4.2. *Killing of Kelly and others*

In May 1987, soldiers and RUC officers were situated at and around the Loughgall RUC station following a briefing that a terrorist attack was likely.[1071] A blue van parked outside the station and men in balaclavas emerged shooting at the station. The soldiers returned fire causing the men to retreat behind and into the van, whilst the soldiers continued to shoot at the van.[1072] It is not clear whether the men were still firing at this time. Concurrently, a digger was driven through the front gate of the station and one soldier fired at the driver. The digger stopped and there was an explosion.[1073]

Several soldiers maintained their fire at the van after, the men had taken refuge inside, until there was no further movement. Soldier B checked the van for remaining threats fired one round into a man believing him to be attempting to reach a weapon.[1074] No warnings were given to the men lying injured inside the van or realistic appreciation of their ability to continue to present a threat given the amount of ammunition that had been discharged. Akin to *McCann*, the soldiers used military tactics in a civilian area, against civilians, and continued to interpret any perceived movement or human presence as an imminent threat.[1075]

A car that was behind the digger began to reverse towards a group of soldiers, who then opened automatic fire.[1076] After the vehicle stopped, Soldier U warned the passenger not to move but he emerged from the car and was almost instantaneously shot by Soldier U. The driver was dead behind the

[1071] *Kelly v The United Kingdom* App no. 30054/96 (4 May 2001) [12].
[1072] Ibid., [17].
[1073] Ibid., [18].
[1074] Ibid., [19].
[1075] Ibid., [19]-[21].
[1076] Ibid., [22].

wheel.[1077] On this account, the soldiers appeared to take no time to appreciate the reality of the threats they perceived themselves to be facing and instead relied on the overall danger presented by the incident, utilising maximum force. This arguably fails to consider each individual as a person in their own right, whose life is protected by the Convention and rule of law.[1078]

Similarly, Soldier W saw a person lying on his back in a driveway, still moving, with something metallic clenched in his hand. Without providing a warning or giving instructions, he fired two shots with the apparent belief he presented a threat to his life. The item was a cigarette lighter.[1079] Given that most of the attackers were wearing boiler suits and this body was not,[1080] the absence of any warning or attempt to investigate the assumed threat seems overly presumptuous.

Following the shooting, the van was found to have approximately 125 bullet holes in the bodywork and the car had approximately 34 bullet holes in the front, rear, and side.[1081] Nine bodies were found at the scene, all with significant wounds from bullets and fragments. Donnelly's body had a minimum of twenty separate missile wounds and a discharge abrasion on an entry would at the front of the neck, indicating the firearm was discharged close to the body and probably when it was on the ground.[1082] The soldiers fired 600 rounds in comparison to 78 fired from IRA weapons.[1083] It is submitted that the soldiers' firing of bullets at a ratio of nearly 8:1 is not 'reasonable in the circumstances in the prevention of crime' and is contrary

[1077] Ibid., [22].
[1078] See Chapter 7: 7.4.1.1.
[1079] *Kelly v The United Kingdom* App no 30054/96 (4 May 2001) [23].
[1080] Ibid., [28].
[1081] Ibid., [27].
[1082] Ibid., [28].
[1083] Ibid., [31].

to domestic law.[1084] In addition, the criminal law provisions must be read in accordance with Article 2, which does not allow for the use of force unless 'absolutely necessary.'

The ECtHR found that whilst it does not make specifications as to the exact procedures States should follow,[1085] the investigation into the use of lethal force lacked independence and public scrutiny.[1086] The subsequent inquest was unable to effectively identify or assist in the prosecution of criminal offences and so fell short of Article 2.[1087] Additionally, the absence of reasons for declining to prosecute any members of the security forces did not assist public confidence or allow the families to mount a legal challenge to the decision.[1088] The killing of nine men, one of whom was not connected to the IRA and at least two others were unarmed, required an explanation and the public needed reassurance that the rule of law had been respected.[1089] Consequently, there was a violation of Article 2's procedural aspect.[1090]

The Court found due to a failure to exhaust domestic remedies, it was precluded from examining the alleged substantive breach of Article 2 that the State used excessive force and was negligent in the planning or control of the operation.[1091] However, it also held that Mrs Hughes was precluded from being able to claim she was a victim of a substantive violation of Article 2 due to accepting civil damages.[1092] It is suggested that a settled civil remedy for a breach should not prevent the Court from examining a

[1084] s.3(1) of the Criminal Law Act (Northern Ireland) 1967.
[1085] *Kelly v The United Kingdom* App no 30054/96 (4 May 2001) [137].
[1086] Ibid., [136].
[1087] Ibid., [124].
[1088] Ibid., [117].
[1089] Ibid., [118].
[1090] Ibid., [139].
[1091] Ibid., [110].
[1092] Ibid., [107]. As Jean Charles de Menezes' family accepted a compensation payment from the British Government, this would presumably have the same effect and mean that no judicial exploration as to the proportionality of the force would be permitted.

substantive breach allegation. Nevertheless, as with the cases above, the Court declined to examine the substantive issue and whether the UK had adopted a practice of disproportionate force in the region.[1093] The British Government denied the allegation that it engaged in a practice of killing rather than arresting terrorist suspects.[1094] However, subsequent operations and information regarding the existence of the Kratos policy suggests that this is indeed case.[1095]

6.6 Before the Gibraltar killings

Prior to 4 March 1988, British, Spanish, and Gibraltarian authorities received intelligence reports that the IRA were planning to commit a terrorist attack during a military ceremony.[1096] A known IRA member had entered Gibraltar on an assumed reconnaissance mission, leading authorities to suspect the planned act would be connected to the weekly changing of the guard ceremony.[1097] The three suspects were known to the security services, with Farrell being the most senior IRA member, having been sentenced for 14 years imprisonment for her role in a 1976 bombing in Belfast, and McCann having spent two years in prison for possessing explosives.[1098]

6.6.1. Preparations in Gibraltar

The intentions of the operation were outlined as being '(a) to protect life; (b) to foil the attempt; (c) to arrest the offenders; (d) the securing and safe custody of the prisoners.'[1099] In the planning stage, it appears that the focus was on preventing a bomb from being detonated and on facilitating the

[1093] *Kelly v The United Kingdom* App no 30054/96 (4 May 2001) [104].
[1094] Ibid., [88].
[1095] Chapters 7 and 8.
[1096] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [13].
[1097] Secretary of State of Foreign and Commonwealth Affairs (Sir Geoffrey Howe) to the House of Commons HC Deb 7 March 1988, vol 129, col 21-5.
[1098] BBC, 'Gibraltar victims named' (*BBC Six O'Clock News*, 8 March 2013) <https://www.bbc.co.uk/programmes/p0162m01> accessed 26 June 2023.
[1099] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [17].

operation of the CJS. However, the suspects were not detained in Malaga, Spain, and a surveillance operation was mounted to identify their arrival in Gibraltar.[1100]

Despite the lack of armed conflict, SAS military personnel were included in the advisory group created to assist the Gibraltar Commissioner of Police in countering this threat.[1101] The UK had installed a military presence in NI, ostensibly as a peacekeeping force in response to the violence in the province, [1102] despite declining to recognise the IRA as an army or acknowledge there was a state of war.[1103] The military personnel were present to 'assist' the local police in an arrest operation if required.[1104] The Ministry of Defence (MoD) issued military rules of engagement on the permissible use of force by soldiers for use in the civilian operation, which included using weapons in self-defence and/or defence of others and stated that the force used should be no more 'than is necessary in order to protect life.' Additionally, a clear warning with instructions to surrender should be given unless delay in using force would result in death or injury to the military personnel or 'any other person'.[1105] The military instructions did not include the protection of the suspects' lives and their right to life under Article 2 ECHR as a factor to be considered when choosing to fire. Inquest evidence suggested that the soldiers understanding of the use of force in a civilian context was not clear and included a belief that the rules required the use of 'minimum force', which is what had been intended when the suspects were

[1100] Ibid., [21].
[1101] Ibid., [14].
[1102] R.W. White, 'From Peaceful Protest to Guerrilla War: micromobilization of the Provisional Irish Republican Army' (1989) 94(6) American Journal of Sociology 1277.
[1103] B.A. Jackson, 'Provisional Irish Republican Army' in B.A. Jackson, J.C. Baker, K. Cragin, J. Parachini, H.R. Trujillo, and P. Chalk (eds), *Aptitude for Destruction, Volume 2: case studies of organizational learning in five terrorist groups* (RAND Corporation 2007).
[1104] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [15].
[1105] Ibid., [16].

shot[1106] (although the soldiers shot to kill).[1107] Additionally, the language employed served to obscure and confuse the requirement that each use of force must be justified and proportionate to the aim of effecting an arrest.[1108]

6.7. The Briefings and First Sightings

The operational briefing was attended by all operation personnel. The rules of engagement, the firearms procedures, and the importance of evidence gathering to assist in any trial of the individuals were explained.[1109] The Security Services briefing included details of the suspects and their previous convictions. They were described in 'othering' language as 'dangerous terrorists who would almost certainly be armed and who, if confronted by security forces, would be likely to use their weapons.'[1110] There was no evidence to support this assertion, appearing to be based on a general view of IRA active service members. This dehumanisation of the three is echoed in both Menezes[1111] and Khan[1112] and displays the absence of human rights concerns on the part of the authorities. Their inherent dignity is not factored into their treatment as they are simply reduced to enemy threat status.

It was decided that a remote-control device would be the preferred method for bomb detonation as it was more controllable than a timer.[1113] This conclusion was based on supposition and guesswork, rather than verifiable data. The presumption of facts and proceeding based on their own reasoning, creating a feedback loop, is a foreshadowing of similar missteps being taken

[1106] H. Kitchin, *The Gibraltar Report: an independent observer's report of the inquest into the deaths of Mairead Farrell, Daniel McCann and Sean Savage, Gibraltar September 1988* (Liberty (National Council for Civil Liberties) 1989) 23[11.5].
[1107] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [120].
[1108] H. Kitchin, *The Gibraltar Report: an independent observer's report of the inquest into the deaths of Mairead Farrell, Daniel McCann and Sean Savage, Gibraltar September 1988* (Liberty (National Council for Civil Liberties) 1989) 23[11.6].
[1109] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [22].
[1110] Ibid., [23].
[1111] Chapter 7.
[1112] Chapter 8.
[1113] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [24].

in the killing of Menezes.[1114] Also similar is the amnesia displayed by officers regarding the identification of Menezes[1115] and the differing recollections of the detonation method briefing.[1116]

The soldiers claimed to believe the device would be a 'button job', meaning detonation could be achieved by pushing a button on a remote control device.[1117] At the inquest, one soldier stated that it was said 'there was more chance that they would have to shoot-to-kill in view of the very short time factor which a "button job" would impose.'[1118] This indicates that the focus had already moved from making an arrest and towards killing three people who were suspected of planning to detonate a bomb at an event in two days' time. The identification of the target as a future event, meaning it was unlikely the suspects would place and prime the bomb two days prior, does not seem to have been factored into the assessment of the necessity for lethal military force. Instead, the ruthlessness of the terrorists was emphasised, with them being described as 'highly dangerous, dedicated and fanatical.'[1119] The soldiers were briefed that they would attempt to detonate the bomb if cornered and 'would resort to whatever weapons or "button job" they carried.'[1120] This briefing does not accord with the objectives of the operation, which was to arrest the suspects alongside preventing an explosion, or the guidance regarding the use of firearms. However, it does operate to construct a self-defence situation, which only requires officers to believe there is a threat.[1121]

[1114] See Chapter 7.
[1115] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022.
[1116] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [25].
[1117] Ibid., [26] and [27].
[1118] Ibid., [26].
[1119] Ibid., [29].
[1120] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [28].
[1121] See Chapter 7: 7.4.1.1.

In what appears to be a change from the original parameters of the operation and role of the soldiers,[1122] the *police* officers are described as being on duty on the morning of 6 March 'to support the soldiers in any arrest.'[1123] This indicates that it was already decided that the soldiers, who had been briefed it was likely they would need to use lethal force against the suspects, would be the ones to engage with the three. The narrative had been constructed that the terrorists were not capable of reason and their right to life was not centred in the briefings.

The border decision to not slow the cars entering Gibraltar or examine passports [1124] was incompatible with the primary aim to prevent any detonation of a bomb in Gibraltar alongside the arrest of the suspects. Additionally, detaining the suspects at the border would have enabled the collection of available evidence and subsequent questioning to determine the location of any explosive device. The decision appears even more inconsistent given the later supposition that one of the suspects drove and parked a car packed with explosives that were capable of being detonated by the mere press of a button, which formed the basis upon which the soldiers later deprived the three of their lives.[1125]

At the inquest, Chief Inspector Ullger justified this decision by stating, 'we are talking about dangerous terrorists. We were talking about a very, very major and delicate operation – an operation that had to succeed.'[1126] It is not clear why this vindicated following the suspects from the border and into

[1122] Outlined in *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [15].
[1123] Ibid., [32].
[1124] Ibid., [34].
[1125] Ibid., [61]-[63] and [79].
[1126] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) quoted at [35].

the area where it was thought they would try to plant and detonate a bomb. The IRA did not engage in suicide bombing, meaning the bomb would not be primed when they were with it. However, there were concerns that there would not be sufficient time to identify the suspects to enable an arrest at the border[1127] and the plan was to arrest all three suspects together once they had been identified and had left a parked car.[1128] Although the soldiers were under the impression that they would probably have to kill them.

Savage was spotted and identified between 12:30 and 14:50. He was described as having 'fiddled with something between the seats' of the white Renault car he had parked,[1129] which was later relayed to the House of Commons by then Secretary of State Sir Geoffrey Howe as 'making adjustments to the vehicle,'[1130] arguably demonstrating the amplification of certain facts in the aftermath of a State killing revealed not to have been necessary.[1131]

At 14:50, all three suspects were observed in the assembly area looking at a white Renault car [1132] and identification of all three confirmed at 15:25.[1133] Once they moved away, a cursory inspection of the vehicle was conducted, taking less than two minutes, [1134] by the soldier described as 'a rapid technical examination' to the House of Commons by Howe.[1135] In reality,

[1127] Ibid., [36].
[1128] Ibid., [37].
[1129] Ibid., [38].
[1130] Secretary of State of Foreign and Commonwealth Affairs (Sir Geoffrey Howe) to the House of Commons HC Deb 7 March 1988, vol 129, col 21.
[1131] A similar process occurred after the killing of Jean Charles de Menezes and was the subject of an IPCC investigation, see IPCC, 'Stockwell Two: An Investigation into Complaints about the Metropolitan Police Service's Handling of Public Statements Following the Shooting of Jean Charles de Menezes on 22 July 2005' (July 2007) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-two.pdf> accessed 21 April 2021.
[1132] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [45].
[1133] Ibid., [47].
[1134] Ibid., [48].
[1135] Secretary of State of Foreign and Commonwealth Affairs (Sir Geoffrey Howe) to the House of Commons HC Deb 7 March 1988, vol 129, col 21.

Soldier G was not an explosives or radio-communications expert.[1136] Expert evidence at the inquest stated the car aerial was not sufficient for receiving a detonation transmission and removing it would have neutralised any bomb without destabilising the explosives,[1137] demonstrating the lack of relevant expertise in the operation. Nevertheless, the vehicle was described as a 'suspect car bomb', meaning it was parked in suspicious circumstances, there was 'every reason' to consider it a bomb, and it could not be definitively said that it was not a car bomb.[1138]

This approach, where the mere suspecting of a vehicle is sufficient to render it a potential bomb, demonstrates a central issue in counterterrorism. Suspicion is not the same as certainty, yet the operation proceeded on that basis. The information regarding the vehicle was disseminated and the soldiers believed the examination of the vehicle had confirmed the presence of a bomb and that the suspects were in possession of remote-control devices.[1139] The possibility the suspects may not have a remote-control device or that there may not be a bomb was not mentioned,[1140] demonstrating a lack of temperance in the briefing and operational information sharing and validating the classification of the suspects as threats.

The Commissioner then made the decision to have them arrested and requested the military intercept and apprehend the three.[1141] It is not clear why it was considered necessary at this point to use military personnel to effect an arrest, particularly as soldiers' general training leads them to shoot-

[1136] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [53].
[1137] Ibid., [114].
[1138] Ibid., [48].
[1139] Ibid., [49]-[51].
[1140] Ibid., [52].
[1141] Ibid., [54].

to-kill once the use of firearms is considered necessary. However, it is likely that the belief in the presence of a bomb prompted this decision. Consequently, just as the presence of suspicion rendered the car a danger, the suspicion of the three of planting a bomb fundamentally altered their status as they were not viewed as people with human rights but were threats to be neutralised. Their securitisation meant that the criminal law rules and HRL did not apply.

6.8. The Killings

Soldiers A and B followed McCann and Farrell. According to his inquest testimony, Soldier A was approximately 10 metres behind McCann when he glanced over his shoulder and seemed to identify Soldier A and acknowledge him as a threat. At this point, Soldier A drew his firearm and saw McCann's hand move suddenly and aggressively across his body. He was not certain if he gave any warning or instruction to stop, although four witnesses (three police officers) recalled hearing words to the effect of 'Police, stop'.[1142] However, there was no opportunity for McCann to stop as, thinking he was about to detonate the bomb, Soldier A almost immediately opened fire and shot McCann in the back from approximately 3 metres. In his peripheral vision, he saw Farrell turn towards McCann and grab her handbag. Thinking she was also attempting to detonate the bomb Soldier A shot her in the back. He then returned to McCann and shot him once in the body and twice in the head, totalling a release of five shots.[1143]

From this account, there was no arrest attempt or instructions given that McCann and Farrell could realistically obey to avoid being shot. It appears Soldier A interpreted what were likely to have been completely innocent

[1142] Ibid., [75].
[1143] Ibid., [61].

movements in a negative and hostile way. Other witnesses believed both suspects had turned at the sound of a police siren[1144] and not the presence of the soldiers behind them. There was no reason for McCann to recognise the soldier and, given that neither he nor Farrell were armed and there was no bomb, their movements were not in fact hostile or threatening – they were merely perceived to be by a soldier who had been told inaccurate information and briefed that he would probably have to shoot terrorists. As with the killing of Menezes, the construction of the individual as a threat became the lens through which all action was viewed. Neither suspect knew of their identification as an imminent threat and, even if they had, there was no opportunity for them to disprove the presence of danger.

Soldier B was behind Farrell and saw McCann turn his head over his shoulder. He heard a shout and the almost instantaneous sound of firing. Three police officers stated they saw Farrell make a move towards her handbag and one stated to have also seen McCann move as though reaching for a gun.[1145] For Soldier B, the inability to see Farrell's hands or bag presented a threat and he opened fire to prevent her activating any button. He then perceived McCann as a threat and fired on him, before returning to Farrell and firing until she was no longer considered a threat, discharging a total of seven bullets.[1146] At the inquest, Soldier B admitted the shouted warning was ineffectual.[1147] Although the rules of engagement allowed for 'fire without warning if delay in firing could lead to death or serious injury,'[1148] the accounts demonstrate the lack of clear instructions, an inadequate opportunity for the suspects to obey any commands they may have heard,

[1144] Ibid., [64].
[1145] Ibid., [76].
[1146] Ibid., [62].
[1147] H. Kitchin, *The Gibraltar Report: an independent observer's report of the inquest into the deaths of Mairead Farrell, Daniel McCann and Sean Savage, Gibraltar September 1988* (Liberty (National Council for Civil Liberties) 1989) 22[11.2].
[1148] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [136].

and an absence of consideration that they may not have even understood the situation.

As the soldiers were behind both suspects, the victims would arguably have needed time to comprehend and then decide to comply with clear instructions to surrender and lay down any weapons. Additionally, there was no apparent consideration given to the normal and involuntary reaction a person may have in that moment. Soldier A stated at the inquest that he had intended to kill McCann 'to stop him becoming a threat and detonating that bomb.'[1149] This amounts to an admission that McCann was intentionally and pre-emptively deprived of his life when he objectively and subjectively presented no threat. Pre-emptive action is acceptable when the threat is imminent, but deliberately lethal force should not be the first response. If McCann was not an actual threat at the time of the shooting in the mind of Soldier A, then alternative measures, such as forceful arrest, should have been taken. Although the root cause of the killings lies in the planning failures, including using soldiers and inadequate briefings, each soldier is responsible for their own use of force and should have tempered the level of force to the circumstances.

Three witnesses gave evidence suggesting the victims were shot when lying on the ground[1150] and there were differing accounts regarding the suspects having their hands up.[1151] A member of the surveillance team stated the two were shot when close to, but not on, the ground.[1152] What is clear from all the accounts is that the soldiers made no attempt to arrest either suspect at any point in the operation, despite that being the stated aim, thereby

[1149] Ibid., [63].
[1150] Ibid., [70].
[1151] Ibid., [71]-[73].
[1152] Ibid., [74].

demonstrating substantial 'margins of operational discretion' on the ground are sizeable and a significant variance between policy and practice.[1153] Additionally, as the suspects did not return fire the continued shooting whilst they fell and were at near to, if not on, the ground, was arguably excessive. The aim of preventing the detonation through the push of a button could have been effected through measures such as searching each suspect at gunpoint.

Savage was walking separately along a different road, followed by Soldiers D and C. Soldier D stated he intended to attempt an arrest but felt he needed to get closer before shouting the command to stop. However, gunfire was heard to the rear (which was the shooting of Farrell and McCann) and at the same time Soldier C shouted 'Stop.' Savage spun round and his arm went to his right hip area. Believing he was reaching for a detonator, Soldier D fired nine rounds at rapid rate with the last two aimed at his head. He fired until Savage was motionless on the ground and hands away from his body. He accepted Savage's head may have been inches from the ground when he ceased.[1154] A member of the surveillance team saw Savage being shot whilst on the ground.[1155]

Given that Soldier D had not shouted any instruction, yet stated himself about to attempt an arrest, it is perhaps surprising that no opportunity for compliance was given to Savage before D started shooting. There is also no apparent appreciation or understanding of human behaviour, with no allowances being made for Savage to turn to see what was happening in a busy street with the noise of gunfire behind him and shouting. A member of

[1153] P. Squires and P. Kennison, *Shooting to Kill? Policing, firearms and armed response* (Wiley-Blackwell 2010) 84.
[1154] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [78].
[1155] Ibid., [84].

the surveillance team stated they saw Savage spin round quickly at the sound of gunfire looking shocked.[1156] The soldiers did not make sure Savage had heard the command and knew that he was being spoken to before resorting to the use of lethal force.

Soldier C recalled Savage spinning round at the sound of gunfire coming from the rear, at which point the soldier shouted 'Stop.' Savage moved his right arm to the area of his jacket pocket and 'adopted a threatening and aggressive stance.' Seeing something in his pocket and fearing he was about to detonate the bomb, Soldier C opened fire and continued firing until Savage was down and he was sure no longer presented a threat.[1157] This seems to be confirmation bias as it is difficult to imagine any movement that Savage could have made in the moment that would not have been viewed as threatening to the Soldiers and, as he had been given no further instructions other than to stop (which he did either just before or after the command was shouted), there was nothing for Savage to decide to comply with. Further, there was no indication from the shout that it was an arrest situation or that it was Savage who was being commanded.[1158]

The soldiers claimed they were required to shoot until there was no movement in case the dying terrorists remotely detonated the bomb.[1159] Through their evidence, it was clear that the soldiers intended to kill once they had opened fire.[1160] Thus, the moment the trigger was pulled, there was no intention from either solider to attempt to effect an arrest as Savage was viewed as a threat and the intentional application of lethal force was

[1156] Ibid., [85].
[1157] Ibid., [79].
[1158] Ibid., [81].
[1159] H. Kitchin, *The Gibraltar Report: an independent observer's report of the inquest into the deaths of Mairead Farrell, Daniel McCann and Sean Savage, Gibraltar September 1988* (1989, Liberty (National Council for Civil Liberties)).
[1160] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [80].

considered the only appropriate response. Importantly, the ECtHR found that 'their reflex action in this vital respect lack[ed] the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects.'[1161] Presumably, a law enforcement officer would be expected to show restraint and consider other options, such as wounding the suspects, before employing deliberately lethal force. However, the intent to cause death, as opposed to the loss of life being an unintended consequence from the application of lethal force, was not interrogated by the ECtHR.

6.9. The aftermath

In the aftermath of the killings, media reports inaccurately stated that there had been a gun battle, that a 500lb bomb had been discovered and diffused, and that the victims had been armed.[1162] The BBC reported that the three had been ordered to surrender and were shot as they tried to run away. Also, that they had planted a car bomb in the centre of the town, which required a 'special robot' to make the car safe.[1163] The MoD initially released partially inaccurate and arguably misleading statements stating there was a 'suspect bomb' and that the three individuals had been shot by the police, which were later altered to state security forces were involved in the shooting and military personnel 'dealt with' the bomb.[1164]

The terminology employed by the MoD would seem to indicate to a layperson that there was a bomb. However, as was made clear in the ECtHR judgment, the phrase means there was a vehicle 'parked in suspicious circumstances'

[1161] Ibid., [212].
[1162] D. Miller, 'The Media on the Rock: the media and the Gibraltar killings' in B. Rolston (ed) *The Media and Northern Ireland: covering the Troubles* (Palgrave 1991) 69.
[1163] 'IRA members shot in Gibraltar' *BBC Breakfast Time* (8 March 2013) <https://www.bbc.co.uk/programmes/p0162mb6> accessed 20 June 2023.
[1164] D. Miller, 'The Media on the Rock: the media and the Gibraltar killings' in B. Rolston (ed) *The Media and Northern Ireland: covering the Troubles* (Palgrave 1991) 70.

that was thought could contain a bomb and it was not possible to say that it did not contain a bomb.[1165] The act of being under suspicion rendered the car 'suspect'. Consequently, although arguably misleading, the phrasing is accurate as a 'suspect bomb' is created by having a person be suspicious of a vehicle and the 'dealing with it' is simply confirming whether it is a bomb or just a car. However, this creates confusion and muddies the waters as the three victims were still viewed as persons who were about to explode a (non-existent) bomb in a crowded public space.

On the evening of 6 March, the MoD confirmed that no weapons had been found at the scene after military personnel opened fire on the three suspects.[1166] Speaking in Parliament, Howe stated that the three were not armed and that there were no explosives in the parked car,[1167] which had been confirmed by the bomb-disposal team by 20:00 on 6 March.[1168] However, the next day, the Governor of Gibraltar continued to state that a bomb had been defused.[1169] Howe stated that had a bomb been present and successfully detonated, it was estimated that the resulting casualties would have reached three figures.[1170] He went on to say that,

> There is no doubt whatever that… a dreadful terrorist act has been prevented. The three people killed were actively involved in the planning and attempted execution of that act. I am sure that the whole House will share with me the sense of relief and satisfaction that it has been averted.[1171]

[1165] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [48].
[1166] BBC News, '1988: IRA gang shot dead in Gibraltar' *BBC News* (7 March 1988) <http://news.bbc.co.uk/onthisday/hi/dates/stories/march/7/newsid_2516000/2516155.stm> accessed 25 June 2023.
[1167] Secretary of State of Foreign and Commonwealth Affairs (Sir Geoffrey Howe) to the House of Commons HC Deb 7 March 1988, vol 129, col 21.
[1168] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [96].
[1169] D. Miller, 'The Media on the Rock: the media and the Gibraltar killings' in B. Rolston (ed) *The Media and Northern Ireland: covering the Troubles* (Palgrave 1991) 70.
[1170] Secretary of State of Foreign and Commonwealth Affairs (Sir Geoffrey Howe) to the House of Commons HC Deb 7 March 1988, vol 129, col 22.
[1171] Ibid., 21-22.

Here, Howe is engaging in hypothetical speculation presented as fact – the act was not imminent and the three did not have the capability in the near future to detonate any type of bomb as there were no explosives connected to the IRA found in Gibraltar. This could be regarded as an approval of pre-crime execution as, based on the fact an explosive device was found on 8 March in Marbella in a car connected to Farrell,[1172] the three had the potential to develop the ability to detonate a device in Gibraltar.

Apparently missing the fact that there was no disaster averted, Members in the House congratulated the relevant authorities for the success of 'what appears to have been a well-planned operation.'[1173] The suspects were described as 'evil' who 'kill and maim and give no heed to the innocents who get in their way,'[1174] 'evil gunmen,'[1175] and 'extremely dangerous people.'[1176]

The Secretary of State was challenged as to the legitimacy of the killings and asked to 'explain why those three people who, although accepted as members of… the IRA, were shot and killed when it was admitted that they were not carrying guns and had not planted any bombs in Gibraltar?'[1177] Howe replied that after describing the circumstances giving rise to the suspicion and shootings, along with them being IRA members on active service, 'It is difficult to see how I could possibly conclude that the security services could have acted other than they did when faced with the events of

[1172] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [98]-[99].
[1173] Member of Parliament for Hamilton South Mr George Robertson to the House of Commons HC Deb 7 March 1988, vol 129, col 22.
[1174] Ibid.
[1175] Member of Parliament for Colchester, North Sir Antony Buck to the House of Commons HC Deb 7 March 1988, vol 129, col 24.
[1176] Member of Parliament for Upper Bann Mr Harold McCusker to the House of Commons HC Deb 7 March 1988, vol 129, col 24.
[1177] Member of Parliament for Liverpool, Walton Mr Eric S. Heffer to the House of Commons HC Deb 7 March 1988, vol 129, col 25.

that day.'[1178] Thus confirming that their identity was one of the factors justifying the shooting.

The ECtHR found a breach under Article 2(1) based on the decisions taken ahead of the operation, including using military personnel and failing to stop the three at the border, making a fatal shooting 'a foreseeable possibility if not a likelihood.'[1179] The Court highlighted the lack of consideration of other possibilities and the communication of assumptions to the soldiers as certainties that made 'the use of lethal force almost unavoidable.'[1180] In the context of not apprehending the suspects before they entered Gibraltar, not allowing for inaccuracies in their intelligence assessment, and the soldier's automatic recourse to lethal force once they opened fire, the Court was not persuaded that the deaths resulted from a use of force no more than necessary in the circumstances.[1181] Unfortunately, the ECtHR did not make it clear that intentionally killing a suspect,[1182] in distinction from using a measure of force that is likely to result in death, would also be a prima facie breach of Article 2.

6.10. Conclusion

The UK was able to escape a judgment that the substantive provision of Article 2 was breached by the actual killings of the three IRA members in Gibraltar by the SAS soldiers as the ECtHR focused on the aspects of necessity and proportionality when using lethal force, rather than on the legitimacy of a State agent employing lethal force with the intent to kill. The Court found instead that there had been a breach of the right to life in terms

[1178] Secretary of State of Foreign and Commonwealth Affairs (Sir Geoffrey Howe) to the House of Commons HC Deb 7 March 1988, vol 129, col 25.
[1179] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [204].
[1180] Ibid., [208]-[210].
[1181] Ibid., [213].
[1182] Meaning the deliberate use of lethal force with the intent to kill.

of the planning and execution of the operation.[1183] In declining to find a breach for the killing itself, the Court did not challenge the State's use of lethal force in a situation based on the subjective perceptions of the officers at the time, which had been framed by the briefings they had received and the overall context of the ongoing issues in NI and with the IRA.

Given that the State was responsible for what the soldiers believed at the time, finding a procedural breach is welcome. However, there was a lack of consideration of the resort to lethal force and the admission by the soldiers that they were shooting with the *intent to kill* civilians in a non-armed conflict situation. Similarly, subsequent killings by British agents of the State in NI were dealt with on procedural grounds and breaches were found in relation to the lack of a proper investigation and procedure post-incident rather than for the deaths themselves. The Court also ignored the substantial number of civilian deaths arising in similar circumstances.

The absence of challenge to the State for deliberately and intentionally killing unarmed civilians arguably undermines the provisions of the Convention, leading to the conclusion that provided the State agent is able to point to a reasonable apprehension of danger to themselves or others at the given moment, regardless of the facts, the State can intentionally kill a person – even when the alleged criminal activity is either non-existent or at an indeterminate point in the future. This is further exemplified in the killing of Menezes and the Court's lack of condemnation of the apparent existence of a police shoot-to-kill policy.

[1183] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [214].

Chapter 7: Jean Charles de Menezes

7.1. Introduction

At 10:06 on 22 July 2005, armed officers from the London Metropolitan Police Service (Met) shot and killed Jean Charles de Menezes, a Brazilian national, at Stockwell London Underground station.[1184] He had been mistakenly identified as Hussain Osman, one of the four would-be suicide-bombers from an alleged bombing attempt the day before.[1185] Despite claims to the contrary made in the immediate aftermath of the event,[1186] Menezes had not failed to comply with any police orders, was not involved in terrorism, or associated with any of the failed bombers. He was on his way to work, was unarmed, and was not carrying any explosive devices.[1187]

This killing provides another example of the deliberate use of lethal force, with the intention to kill, by State agents. The ECtHR was not asked to decide on the substantive issue of the killing itself and the Met had been found guilty of breaking the 1974 Health and Safety at Work Act for the death of Menezes.[1188] The applicant in *Armani* instead asserted a breach of the procedural aspect of Article 2 on the basis that no individual prosecutions of officers resulted from the killing.[1189]

[1184] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [1.1].

[1185] Ibid., [1.2]; BBC, 'Four guilty over 21/7 bomb plot '(*BBC News,* 10 July 2007) <http://news.bbc.co.uk/1/hi/uk/6284350.stm> accessed 1 September 2022.

[1186] NBC News, 'U.K. police defend shoot-to-kill after mistake' (*NBC News,* 21 July 2005) <https://www.nbcnews.com/id/wbna8655541> accessed 1 September 2022; IPCC, 'Stockwell Two: An Investigation into Complaints about the Metropolitan Police Service's Handling of Public Statements Following the Shooting of Jean Charles de Menezes on 22 July 2005' (July 2007) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-two.pdf> accessed 21 April 2021 Introduction.

[1187] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [1.2].

[1188] J. Sturcke, 'Met Police Guilty over de Menezes Shooting' *The Guardian* (1 November 2007) <https://www.theguardian.com/uk/2007/nov/01/menezes.jamessturcke2#:~:text=The%20force%20was%20fined%20%C2%A3,London%2C%20on%20July%2022%202005> accessed 1 September 2022.

[1189] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [190].

This Chapter assesses the justifications for the killing as an exercise of self-defence considering the human rights principles outlined above.[1190] In accordance with the above approach,[1191] the Chapter begins by providing contextual background to the killing. Section 7.3 considers events prior to the shooting and associated discourse, connecting to the previous discussion on 'othering'.[1192] The importance of the securitisation and 'othering' discourse is relevant throughout the Chapter. Continuing to Section 7.4, the police Operation Theseus 2 is examined together with the English defence of self-defence and purported shoot-to-kill policy of Kratos, as an example of the effect of the general securitisation of terrorism. Sections 7.5 and 7.6 consider pre-killing events and the killing itself. Finally, Section 7.9 details the aftermath and prosecution decisions.

The Chapter demonstrates that suspicion alone is sufficient for the State to kill an individual, despite the absence of threat. HRL, alongside domestic criminal law provisions, were inadequate to protect Menezes from being killed by the State once he was (mis)identified as a terrorist suspect. As in *McCann*, the use of individual self-defence operates to excuse the State in circumstances where the use of deliberately lethal force was not necessary, provided officers can point to an 'honest belief.' Additionally, the security context and language of fear further excuses the actions of State agents, despite this securitisation emanating from the State itself.

7.2. Background to the Shooting

In the IPCC report, inquest, and subsequent domestic and ECtHR cases, the London bombings that occurred two weeks prior to the killing are emphasised.

[1190] See Chapter 6, 6.3.
[1191] Chapter 6, 6.1.
[1192] Chapter 4, 4.3.1.2.

However, the 2005 London bombings are relevant to the killing of Menezes only insofar as they provide a context for the breach of his right to life, in violation of his human dignity. It is argued that this context does not provide an excuse for his killing or make it understandable in the sense that it was a proportionate and necessary State response to the dangers faced by Londoners at that time generally or presented by Menezes in particular. Allowing the context to influence the appraisal of the killing accepts the false 'human rights v security' dichotomy[1193] and reduces human rights protection at times of perceived threat and extremis – which is exactly when human rights need to be at their strongest.[1194] Allowing States to judge the measure of threat they face and giving a wide margin of appreciation, arguably undermines the protections of the human rights instruments.[1195]

On 7 July 2005, in London, UK, four homemade bombs exploded on the London Transport System killing 56 people (52 civilians[1196] and 4 bombers) and injuring over 700.[1197] This was the first suicide bombing to take place in the UK,[1198] resulting in the worst single terrorist incident on UK soil.[1199] The

[1193] H. Duffy, *The "War on Terror" and the Framework of International Law* (2nd edn, CUP 2015) 457.
[1194] L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP 2011) 128.
[1195] See Chapter 3: 3.5.
[1196] Interestingly, and connecting to the 'othering' of terrorists, the adjective 'innocent' is often used to refer to the civilian victims of the incident, e.g., IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [4.1]. This terminology furthers the idea that there is a distinction to be made between the human lives lost. Many newspaper reports ignore the deaths of the bombers entirely, e.g., A. Travis, 'Jean Charles de Menezes ruling due in European court of human rights' *The Guardian* (30 March 2016) <https://www.theguardian.com/uk-news/2016/mar/30/jean-charles-de-menezes-ruling-due-in-european-court-of-human-rights> accessed 27 April 2021.
[1197] BBC, '7/7 attacks: London bombing victims remembered 17 years on' (*BBC News*, 7 July 2022) <https://www.bbc.co.uk/news/uk-england-london-62078637> accessed 1 September 2022; M. Ray, 'London bombings of 2005' (*Britannica*, 17 August 2018) <https://www.britannica.com/event/London-bombings-of-2005> accessed 1 September 2022.
[1198] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [4.6].
[1199] BBC, '7 July London bombings: What happened that day?' (*BBC News*, 7 February 2022) <https://www.bbc.co.uk/news/uk-33253598> accessed 1 September 2022.

bombings were committed by three British citizens and another who had spent most of his life in the UK.

Consequently, the UK threat level was raised to Level 1 (Critical) for the first time, meaning that an attack was expected 'imminently.'[1200] The number of police officers on duty in the capital nearly doubled in the week following the incident[1201] and 4750 people were stopped under s.44 of the Terrorism Act 2000 in the month of July – nearly nine times the number from the previous month.[1202] The identities of the bombers arguably confirmed negative stereotypes around terrorists[1203] and Muslims generally[1204] in the minds of police, politicians and the public, resulting in a more emotive response by those wielding the coercive power of the State. Consequently, every person sharing the same characteristics as the perpetrators becomes a potential terrorist, evidenced by the increase in the numbers of stop and search incidents without a correlating increase in convictions of terrorism related offences.

Two weeks after the 7 July bombs, on 21 July 2005, four homemade explosive devices were detonated on three tubes and one bus but failed to explode.[1205] The next day, Menezes was killed. The IPCC conducted two

[1200] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [4.7].
[1201] Ibid., [4.8].
[1202] Ibid., [4.9].
[1203] C.M. Corbin, 'Terrorists are always Muslim but never White: at the intersection of critical race theory and propaganda' (2017) 86(2) Fordham Law Review 455.
[1204] K. Moore, P. Mason and J. Lewis, 'Images of Islam in the UK: the representation of British Muslims in the national print news media' (2008 Report published by Cardiff School of Journalism, Media and Cultural Studies, commissioned by Channel 4) <https://orca.cardiff.ac.uk/id/eprint/53005/1/08channel4-dispatches.pdf> accessed 1 September 2022.
[1205] Press Association, 'Man jailed over failed 2005 London bombings loses attempt to appeal' *The Guardian* (30 April 2015) <https://www.theguardian.com/uk-news/2015/apr/30/manfo-asiedu-21-july-2005-failed-bombings-loses-appeal-conviction> accessed 21 September 2021; BBC, 'Failed 21/7 London bombers lose court claim' (*BBC News*, 13 September 2016) <https://www.bbc.co.uk/news/uk-37353533> accessed 21 September 2021.

investigations, one into the shooting of Menezes[1206] and the second into complaints regarding the Met's handling of public statements in the aftermath of the shooting.[1207]

7.3. Before the killing

Commander McDowall, the officer in charge of the investigation into the failed attacks,[1208] compared evidence from 7/7 and the failed bombing of 21 July to determine any link between the events.[1209] McDowall was told in a briefing that the explosive devices were viable, peroxide-based, and bearing significant similarities to each other in terms of both nature and construction.[1210] As the bombs used in the 7/7 attack were also peroxide based, law enforcement officers were concerned about a connection between the two events. Other than the nature of the bombs and the assumption that the motive was Islamic terrorism, there were no other discernible links between 7/7 and the apparent failed bombing attempt. It was in fact an independent and unconnected attempt that had been planned for at least several months.[1211]

[1205] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022.
[1206] Ibid.
[1207] IPCC, 'Stockwell Two: An Investigation into Complaints about the Metropolitan Police Service's Handling of Public Statements Following the Shooting of Jean Charles de Menezes on 22 July 2005' (July 2007) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-two.pdf> accessed 21 April 2021.
[1208] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [4.13].
[1209] Ibid., [4.14].
[1210] Ibid., [4.16].
[1211] Press Association, 'The July 21 failed bombings' *The Guardian* (4 February 2008) <https://www.theguardian.com/uk/2008/feb/04/terrorism.world1> accessed 1 September 2022.

7.3.1. The Discourse

In the Met command meeting held in the evening of 21 July 2005, the suspects were described as 'very dangerous individuals who had attempted to commit mass murder.' The fear was expressed 'that the individuals would re-gather the next morning and attempt to cause explosions and achieve their objectives'.[1212] This fear appears to be exactly that, a fear.[1213] The only verifiable facts at that time were that bombs had been found in London but had failed to detonate and had been abandoned.

At 04:20 on 22 July 2005, Hussain Osman was identified as being a potential suspect by the discovery of his gym membership card in the bag containing the explosive device found at Shepherd's Bush.[1214] Along with the similarities in the bombs, connections were made in the minds of the police that this was a potential repeat of 7 July 2005.[1215] The possibility the would-be terrorists may not have intended to detonate the bombs, as the finding of the devices itself created fear,[1216] was seemingly not considered. A suicide-bomber is, by definition, a person who intends to be (and is) killed by their bomb as part of their desire to kill others[1217] and these bombs were not attached to any person but were bags left on public transport. Thus, the suicide-bomber discourse became situated within the meta-securitisation discourse of terrorism, particularly Islamic terrorism, and was emotive and

[1212] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [4.17].
[1213] Fear is defined as an emotional response to stimuli, 'Fear' (*Cambridge Dictionary*, 2022) <https://dictionary.cambridge.org/dictionary/english/fear> accessed 1 September 2022. As such, it is not a rational response to confirmed information. See Chapter 4, 4.3.1.1 and 4.3.1.2.
[1214] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [4.19].
[1215] Ibid., [4.20].
[1216] BBC, 'The 48 Hours that Unnerved a City' (*BBC News*, 22 July 2015) <https://www.bbc.co.uk/news/magazine-33611580> accessed 1 September 2022.
[1217] 'Suicide Bomber' (*Cambridge Dictionary*, 2022) <https://dictionary.cambridge.org/dictionary/english/suicide-bomber> accessed 1 September 2022.

inflammatory. It also lacked logic as it is highly unlikely that persons intending to die via suicide-bomb would nevertheless retained the capacity to make a second attempt the next day

The police briefings 'stoked' the firearms officers' fears they would encounter suicide-bombers and be required to shoot them [1218] and presented an 'unbalanced' view as the fact that not everyone at the premises would be a terrorist was not highlight, which amplified the perceived threat. [1219] Consequently, Menezes was understood by the officers as an existential threat, although he knew himself to be a Brazilian electrician with no links to terrorism, which directed the use of force against him and seemed to override the ability of the officers to make an appropriate threat assessment when on the ground. He was being held by officers when he was shot several times in the head[1220] and so presented no (real or imagined) threat at that moment. The HRL framework, in particular the State's failure to decrease the risk of unnecessary harm and ensure effective safeguards against arbitrariness and abuse of force,[1221] was inadequate to prevent the shooting – the right to life does not form part of the meta-discourse presenting terrorists as 'other'.

The IPCC' report found Menezes' death could and should have been avoided but places significant emphasis on the 'atmosphere of fear' in London

[1218] CPS Review note (9 March 2006), *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [85].
[1219] Ibid., [27].
[1220] Menezes was 'grabbed in a bear hug'. Coroner's Inquest into the Death of Jean Charles de Menezes, 'Jury Questions and Direction and Verdict' (12 December 2008) 10[24], 11[3] <https://webarchive.nationalarchives.gov.uk/ukgwa/20090317235613/http://www.stockwellinquest.org.uk/hearing_transcripts/index.htm> accessed 21 April 2022.
[1221] *Giuliani and Gaggio v Italy* App no 23458/02 (ECHR, 24 March 2011) [209]; *Makaratzis v Greece* App no 50385/99 (ECHR, 20 December 2004) [58]; *Tagayeva and Others v Russia* App no 26562/07 (13 April 2007) [595].

following the 7/7 bombings.[1222] This is echoed in the majority judgment by the ECtHR, which borrows significantly from that report.[1223] An alternative perspective is that the UK sought to preserve itself post-7/7 through attacking human rights[1224] in an 'autoimmunity process' of self-harm.[1225] Suspicion transformed Menzes from a person with dignity to 'bare life', excluded from conventional law and 'subject to exceptional practices.'[1226] His killing is one of many in the WoT and not an isolated incident and had the consequence of increasing fear amongst the British public, particularly Muslims.[1227]

7.4. Operation Theseus 2

Operation Theseus 2 was established with the objective of arresting those suspected of involvement in the 21 July 2005 failed bombing attempts.[1228] The strategy set by Commander McDowall was:

> To control the premises… through covert surveillance, follow any person leaving the premises until it was felt safe to challenge them *and then stop them*…(emphasis added)[1229]

With the aims and objectives as being:

[1222] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [4.6].
[1223] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [13]-[15].
[1224] D. Bulley, 'Foreign Terror? Resisting/responding to the London bombings' in A. Closs, Stephens and N. Vaughn-Williams (eds), *Terrorism and the Politics of Response* (Routledge 2009) 90.
[1225] J. Derrida, 'Autoimmunity: real and symbolic suicides: a dialogue with Jacques Derrida' in G. Borradori, *Philosophy in a Time of Terror: dialogues with Jürgen Habermas and Jacques Derrida* (trans. P-A. Brault and M. Naas, University of Chicago Press 2003) 107.
[1226] Echoed in Chapter 8. C. Vaughn-Williams, 'The shooting of Jean Charles de Menezes: new border politics?' in A. Closs, Stephens and N. Vaughn-Williams (eds), *Terrorism and the Politics of Response* (Routledge 2009) 105.
[1227] Ibid., 100.
[1228] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 23[6].
[1229] Ibid., 24[6].

> [T]o establish whether the two suspects were present in the flat and if they came out to arrest them safely… to detain one or all of the suspects and to establish the whereabouts of any others who posed a threat to the public… to increase 'police control' of the premises and enhance the safety of all concerned in the operation.[1230]

However, similar to McCann, operational decisions meant the objectives were not achievable as police personnel deployed at the scene were not trained to arrest armed suspects, which was the role of CO19, who were not deployed until after Menezes had left his home.[1231] Had the firearms officers been present to support the surveillance team, there would have been a different outcome[1232] as Menezes would have been stopped before reaching any public transport and dismissed as a person of interest. In parallels with using military on Bloody Sunday and in Gibraltar,[1233] the firearms officers were operating outside their usual parameters of deployment,[1234] suggesting a lack of suitability for the role and in breach of the positive obligations of the State in terms of a lack of preparation.[1235]

7.4.1. The Positive Obligations of the State

The ECtHR has held there exists, under Articles 1 and 2, a concomitant procedural obligation on States to conduct 'some form of official investigation' following the killing of an individual resulting from a use of force by a State agent[1236] to ensure the protections of the Convention are 'practical and effective'. [1237] The investigation must be impartial,

[1230] Ibid.
[1231] Ibid., 6.
[1232] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [18].
[1233] See Chapter 6, 6.5.4. and 6.6.1.
[1234] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [17].
[1235] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [150], [213].
[1236] Ibid., [161].
[1237] *İlhan v Turkey* App no 22277/93 Grand Chamber (ECHR, 27 June 2000) [91].

independent, [1238] able to determine whether the force employed was justified, and allow for the identification and punishment, if appropriate, of those responsible. [1239] This procedural obligation is considered to be a 'distinct obligation', which can result in findings of a breach.[1240] Alongside this duty, the State is required, in controversial cases, to provide sufficiently detailed reasons as to why it decided not to prosecute those responsible for the death. [1241]

The operational failings were recognised in the Met's Health and Safety at Work Act 1974 prosecution[1242] and civil compensation was also paid to the family.[1243] The Judge sought to isolate the incident stating it was 'an isolated breach brought about by extraordinary circumstances.'[1244] During the trial, counsel for the defence claimed Menezes had acted in an 'aggressive and threatening manner'[1245] and suggested his lack of compliance was due to having drugs on his person or a forged stamp in his passport.[1246] Despite being wholly innocent, the State sought to blame Menezes for his own death at the hands of its authorities.

[1238] *Jordan v United Kingdom* App no 24746/94 (4 May 2001) [106].
[1239] Ibid., [107]; *McKerr v United Kingdom* App no 28883/95 (ECHR, 4 May 2001) [111]-[115]; *Finucane v United Kingdom* App no 29178/95 (ECHR, 1 July 2003) [67]-[71]; *Nachova and Others v Bulgaria* (Judgment) App no 43577/98 43579/98 (ECHR, 6 July 2005) [116]-[119]; *Isayeva, Yusupova and Bazayeva v Russia* App nos 57947/00, 57948/00 and 57949/00 (ECHR, 24 February 2005) [209]-[214].
[1240] Šilih v Slovenia App no 71463/01 (ECHR, 9 April 2009) [154].
[1241] *Finucane v United Kingdom* App no 29178/95 (ECHR, 1 July 2003) [82].
[1242] E. Henry, 'De Menezes: Met guilty over health and safety' *The Telegraph* (1 November 2007) <https://www.telegraph.co.uk/news/uknews/1568016/De-Menezes-Met-guilty-over-health-and-safety.html> accessed 1 September 2022.
[1243] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [142], [186]. J. Stucke, 'Met police guilty over De Menezes shooting' *The Guardian* (1 November 2007) <https://www.theguardian.com/uk/2007/nov/01/menezes.jamessturcke2> accessed 1 September 2022.
[1244] 'Met Guilty of de Menezes Health & Safety Breaches' (*Mayor Watch*, 1 November 2011) <https://www.mayorwatch.co.uk/met-guilty-of-de-menezes-health-safety-breaches/> accessed 1 September 2022.
[1245] J. Stucke, 'Met police guilty over De Menezes shooting' *The Guardian* (1 November 2007) <https://www.theguardian.com/uk/2007/nov/01/menezes.jamessturcke2> accessed 1 September 2022.
[1246] 'Met Guilty of de Menezes Health & Safety Breaches' (*Mayor Watch*, 1 November 2011) <https://www.mayorwatch.co.uk/met-guilty-of-de-menezes-health-safety-breaches/> accessed 2022.

A conviction under Health and Safety legislation for the avoidable killing of an innocent person appears inadequate. The Met questioned the appropriateness of the prosecution and subsequent conviction and the (minimal) holding to account led to calls for the police to be exempted from the same Health and Safety legislation as other businesses and organisations.[1247] The Prosecution highlighted the catalogue of errors and disarray of the operation, with one officer allegedly having a gun pointed at his chest whilst he was dragged onto the platform and another officer chased the train driver down the tunnel,[1248] but did not address the underlying attitudes of the State in relation to terrorist suspects or the prioritisation of security over human rights.

In *Armani*, the applicant did not allege a breach of the substantive element of Article 2, but that the lack of criminal prosecutions breached the procedural obligation.[1249] The overarching objective of the procedural element of Article 2 is to ensure domestic legislation protecting the right to life is properly implemented and, where the killing involves agents of the State, 'to ensure their accountability for deaths occurring under their responsibility.'[1250] The ECtHR found that the lack of criminal prosecution did not amount to a breach of the procedural aspect of Article 2.[1251] Dissenting, Judge López Guerra felt the lack of adversarial and public proceedings 'effectively granted immunity' to those whose decisions and actions had led to Menezes' death.[1252]

[1249] Ibid.
[1248] BBC, 'Police 'failure' in Menezes death' (*BBC News*, 1 October 2007) <http://news.bbc.co.uk/1/hi/uk/7021401.stm> accessed 1 September 2022. Interestingly, the IPCC Report does not record or address these incidents or confront the very real possibility that the firearms officers were, at this point, out of control and two more deaths, one of a fellow officer, could have occurred. Similarly, this is not considered in the ECtHR judgment.
[1249] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [190].
[1250] *Jordan v United Kingdom* App no. 24746/94 (4 May 2001) [105]; *Anguelova v Bulgaria* App no 38361/97 (ECHR, 13 June 2002) [137]; *Nachova and Others v Bulgaria* (Judgment) App no 43577/98 43579/98 (ECHR, 6 July 2005) [110].
[1251] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [288].
[1252] Ibid., (Dissenting Opinion of Judge López Guerra) [11].

Armani centred on the law of self-defence and the decision-making process of the CPS. The applicant argued that the law on self-defence in England and Wales is not compatible with Article 2 as it prevents an assessment of 'whether the use of force was justified' due to being 'precluded from considering whether the apparently honest belief of Charlie 2 and Charlie 12 that the use of force was necessary was also a reasonable one'.[1253] The majority found the definition of self-defence in English law was not significantly different to the Court's.[1254]

7.4.1.1. Public and Private Self-Defence

In England and Wales, public and private defence is available as a general defence to crimes involving the actual or alleged use of force.[1255] Once the defence is raised, the burden is on the prosecution to disprove the claim beyond reasonable doubt and the jury must be clearly directed by the judge on the matter.[1256] Although the ECtHR describes the relevant law in simple, straightforward terms, it is a difficult area of law involving considerations of the defendant's perception of the threat and what constitutes reasonable force in the circumstances.[1257]

The oft-cited quote from Lord Morris in *Palmer* that 'It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary'[1258] sets out the basic principles of the defence. Under the common law, a person can use reasonable force[1259] to defend themselves

[1253] Ibid., [243].
[1254] Ibid., [252].
[1255] D. Ormerod and K. Laird, *Smith and Hogan's Criminal Law* (16th edn, OUP 2021) 400.
[1256] *O'Brien* [2004] EWCA Crim 2900.
[1257] *Hayes* [2011] EWCA Crim 2680, per Moore-Blick LJ [16].
[1258] *Palmer v The Queen* [1971] AC 814, 831.
[1259] There must be a use of force for the defence to be relevant, *Blake v DPP* [1993] Crim LR 586.

from an attack,[1260] prevent an attack on another person,[1261] or defend their property.[1262] S.3(1) of the Criminal Law Act 1967 provides that a person can use reasonable force to prevent the commission of a crime or to effect or assist in the lawful arrest of a person. The officers on the train used force to prevent the (theoretical) murder of civilians and, had they followed the original strategy, to arrest a terrorist suspect. S.76 of the Criminal Justice and Immigration Act 2008 restates the common law defence regarding the use of force in defence of the person, whether that is the defendant's own person or another's. The use of pre-emptive force is acceptable when seeking to prevent an imminent attack,[1263] meaning the officers were entitled to strike first had Menezes been a suicide-bomber.

Raising the defence involves a consideration of two elements: whether the use of force was subjectively necessary and whether the degree of force used was objectively reasonable in those subjective circumstances.[1264] According to s.76(3), the reasonableness question 'is to be decided by reference to the circumstances as [that defendant] believed them to be' at the time of the event.[1265] The defendant must believe the use of force is necessary,[1266] which holds even if the belief held by the defendant is unreasonable[1267] or founded on unreasonable grounds.[1268] Arguably, this presents an issue in the context of a counterterrorism operation where a firearms officer has incorrect information and does not take proper account of the circumstances, such as Menezes being restrained when he was shot. It also allows the State to escape liability for a death caused by the uncompromising, inflammatory,

[1260] *R v McInnes* [1971] 3 All ER 295.
[1261] *R v Rose* (1884) 15 Cox 540.
[1262] *R v Hussey* (1924) 18 Cr App R 160.
[1263] *Devlin v Armstrong* [1971] NI 13; *Beckford v R* [1987] 3 All ER 425.
[1264] *Mula* [2013] EWCA Crim 1293.
[1265] *R v Gladstone Williams* (1984) 78 Cr App R 276; *Jackson* [1985] Crim LR 674; *Asbury* [1986] Crim LR 258 *R v Oatbridge* (1991) 94 Cr App R 367.
[1266] *R v Yaman* [2012] EWCA Crim 1075.
[1267] S.76(4)(b) CJIA 2008.
[1268] *R v Morris* [2013] EWCA Crim 436.

and dehumanising discourse around terrorism and suicide-bombers and for actions committed by a police force that has been found to be institutionally racist.[1269]

In English law, the force used must be objectively reasonable in the circumstances. There is no test for reasonableness per se. S.76(6) CJIA 2008 provides that the level of force employed 'is not to be regarded as having been reasonable in the circumstances as [the defendant] believed them to be if it was disproportionate in those circumstances.' S.76(7) provides additional considerations to be included when assessing the reasonableness of the degree of force,

> (a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and
>
> (b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

The police are not expected to wait for a situation to unfold before applying a precise matrix of measurement as to the exact amount of force required to neutralise a situation. However, the rush to use lethal force and the amount of force used (Menezes was hit seven times, but the officers

[1269] Post Baroness Casey's report into the MPS, following the kidnapping and killing of Sarah Everard by a police officer, it is now known, and widely accepted, that the MPS is institutionally racist. Baroness Casey of Blackstock DBE CB, 'Baroness Casey Review, An independent review into the standards of behaviour and internal culture of the Metropolitan Police Service' (*Met Police*, March 2023) <https://www.met.police.uk/SysSiteAssets/media/downloads/met/about-us/baroness-casey-review/update-march-2023/baroness-casey-review-march-2023a.pdf>; V. Dodd, 'Met police found to be institutionally racist, misogynistic and homophobic' *The Guardian* (21 March 2023) <https://www.theguardian.com/uk-news/2023/mar/21/metropolitan-police-institutionally-racist-misogynistic-homophobic-louise-casey-report>; V. Dodd, 'Police Federation chair accepts Met is institutionally racist, sexist and homophobic' *The Guardian* (19 April 2023) <https://www.theguardian.com/uk-news/2023/apr/19/police-federation-chair-accepts-met-is-institutionally-racist-sexist-and-homophobic>; It is unfortunate that this is still the case, 24 years after a similar finding was made in 1999 following the police handling of the murder of Stephen Lawrence in 1993. Sir William MacPherson, 'The Stephen Lawrence Inquiry' (Cm 4262-I, 1999) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf>.

discharged nine bullets[1270]) indicates an excess of force that is not controlled or considering the right to life of the person being shot.

The reasonableness requirement was challenged in *Bennett v United Kingdom*[1271] as being incompatible with Article 2, which requires that the use of force must be 'absolutely necessary.' In material given to the jury, the Coroner explained that the killing of Mr Bennett would be lawful if 'reasonable force' was used 'in self-defence or defence of another, or to prevent a crime or to assist in the lawful arrest, even if that force was by its nature or the manner of its application likely to be fatal.'[1272] On judicial review, the High Court held that, 'if any officer reasonably decides that he must use lethal force, it will inevitably be because it is absolutely necessary to do so. To kill when it is not absolutely necessary to do so is surely to act unreasonably.'[1273]

This test bases the reasonableness of the force on the reasonableness of the decision to use it. It is submitted that 'reasonableness' and 'absolute necessity' are not synonymous. An act may be reasonable in the circumstances, meaning that it can be objectively understood, but not absolutely necessary. Instead, the reasonableness of the decision to use lethal force must be contingent on it being absolutely necessary to do so. The killing of Menezes was not, in fact, absolutely necessary as he was not a suicide-bomber. In a joint dissenting opinion, Judges Karakaş, Wojtyczek, and Dedov applied the international standards on the use of force by police, which provide for strict necessity and unavoidability, not honest belief.[1274]

[1270] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [16.11].
[1271] App no 5527/08 (ECHR, 7 December 2010).
[1272] Ibid., [18].
[1273] Ibid., [29].
[1274] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) (Dissenting Opinion of Judges Karakaş, Wojtyczek, and Dedov) [3].

They further held that 'force used in putative self-defence is never absolutely necessary' and expressed the opinion that Article 2 'requires the State to criminalise putative self-defence in so far as the factual error was not justified in the circumstances and the perpetrator may therefore legitimately be reproached for it.'[1275]

In *Bubbins*, the Court stated that 'the force used must be strictly proportionate to the achievement of the permitted aims' under Article 2(2).[1276] However, the officers were shooting Menezes with the intent to kill him. This is de facto a breach of Article 2(1) as it was an intentional deprivation of life that was not a result of a penalty prescribed by law following criminal conviction.[1277] As well as imposing a general obligation to protect those within its jurisdiction from any unjust deprivation of life,[1278] Article 2(2) does not permit a State to *intentionally* take life in the three circumstances outlined. Prima facie, to be Article 2 compliant, the intent behind the use of force in self-defence must be to repel or prevent the imminent attack, it cannot be to kill.[1279] The exceptions provided in Article 2(2) are not a list of situations where States are permitted to kill with intent,[1280] but are rather circumstances where a use of force is permitted that may result in the unintentional deprivation of life.[1281]

[1275] Ibid., [5].
[1276] *Bubbins v United Kingdom* App no 50196/99 (ECHR, 17 March 2005) [135].
[1277] See Chapter 6, 6.3.
[1278] *LCB v United Kingdom* App no 23413/94 (ECHR, 9 June 1998) [36]; *Osman v United Kingdom* App no 23452/94 (28 October 1998) [115]; *Kiliç v Turkey* App no 29601/05 (ECHR, 5 March 2019) [62]; *Makaratzis v Greece* App no 50385/99 (ECHR, 20 December 2004) [57].
[1279] This would include indirect intent. *Woollin* [1998] 4 All ER 103.
[1280] As asserted by some commentators. See, e.g., J.A. Hessbruegge, *Human Rights and Personal Self-Defense in International Law* (OUP 2017) 91 'self-defense… allows police to shoot with intent to kill.' However, this assertion is then seemingly contradicted, 92(fn3) 'even in self-defense situations, killing must never be the purposive intent of law enforcement action, but always the incidental, if unavoidable consequence' of action.' And then reinstated, 93 HRL permits law enforcement agents to 'intentionally kill for defensive purposes.' This confusion demonstrates the lack of clarity and coherence in HRL regarding intentional killing by the State.
[1281] *Stewart v United Kingdom* App no 10044/82 (Commission, 10 July 1984) [15].

To allow a State to act with the intent to kill, outside of a death penalty situation, is to permit the breach of Article 2 and undermine its provisions. The ECtHR rejected the applicant's argument that agents of the State should be held to a higher standard than ordinary citizens. However, it is suggested that this approach undermines the protection of Article 2. As expressed by Judges Karakaş, Wojtyczek, and Dedov, 'If acts of killing in putative self-defence based on an unjustified error are not properly criminalised and punished under domestic law, there is a serious danger that the police may use excessive force with lethal effect.' The police are organs of the State that wield its coercive power and, in the UK context, are the only persons permitted to carry firearms. Thus, the State should be held to the standard of the Convention.

The dissenting judges considered that the majority had erred 'by putting the emphasis on the subjective element and by diminishing the importance of the objective element.'[1282] This approach was considered 'unacceptable' and 'puts citizens' lives at risk' as 'acts committed by the police in putative self-defence as a result of gross negligence may become immune from criminal liability.' Similarly, Judge López Guerra's dissenting opinion began at the fact that despite the entire operation going wrong and acknowledgement from the UK that there existed 'serious deficiencies in all aspects', there was no individual accountability.[1283] Further, the finding of institutional criminal liability but lack of individual responsibility was 'difficult to understand.'[1284] It is indeed concerning that an institution can be found to have committed criminal negligence, but no persons were responsible. The effect of the investigations was to create an exemption from criminal prosecution.[1285]

[1282] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) (Dissenting Opinion of Judges Karakaş, Wojtyczek, and Dedov) [5].
[1283] Ibid., (Dissenting Opinion of Judge López Guerra) [1]-[2].
[1284] Ibid., [6].
[1285] Ibid., [5].

Consequently, as the ECtHR focused more on process than outcome,[1286] the danger is that States will simply pay lip-service to the procedural obligation and killings will go unscrutinised and unpunished as independence in an investigation is not sufficient to guarantee effectiveness.[1287]

In the immediate aftermath of the shooting, then Met Commissioner Sir Ian Blair resisted attempts to follow standard procedure[1288] for fatal shootings by police and allow the IPCC to investigate. In a letter to Home Office Secretary Sir John Gieve, Blair expressed concern regarding the legal protection for officers killing suspected, asserting the need for an officer to 'shoot-to-kill in order to prevent the detonation of a device' and taking the opportunity to advocate for 'a document similar to the military rules of engagement.'[1289] Thus, seeking to blur the boundaries between military and police action by allowing intentional killing of *suspects* to be permitted in a non-armed conflict situation. He sought to avoid usual processes by stating the Directorate of Professional Standards would conduct an investigation into the shooting, which would be 'rigorous but subordinate to the needs of the counter-terrorism operation.' [1290] The IPCC report indicates crucial information regarding the identity and suspect status of Menezes was withheld from the press, senior MET officers, and Home Office

[1286] Ibid., [286].
[1287] Ibid., (Dissenting Opinion of Judge López Guerra) [8].
[1288] S.17(1) Police Reform Act 2002 provides that 'It shall be the duty of (a) every police authority, and (b) every chief officer… to provide the Commission with all such information and documents as may be specified or described in regulations so made.' S.17(2) continues that 'It shall also be the duty of every police authority and of every chief officer (a) to provide the Commission with all such other information and documents specified or described in a notification given by the Commission to that authority or chief officer, and (b) to produce or deliver up to the Commission all such evidence and other things so specified or described, as appear to the Commission to be required by it for the purposes of the carrying out of any of its functions.'
[1289] Letter from Metropolitan Commissioner Sir Ian Blair to Home Office Permanent Secretary Sir John Gieve on 22nd July 2005, archived <https://web.archive.org/web/20090510125404/http://cms.met.police.uk/news/policy_organisational_news_and_general_information/commissioner/commissioner_s_letter_to_the_home_office> 21 April 2021.
[1290] Ibid.

representatives,[1291] demonstrating the unwillingness of the Met to face public scrutiny and mirroring the actions of State agents in NI.

Even though Menezes was never identified as a suspect and initial inspection of his body revealed an absence of any explosives or weapons, Blair's letter frames the IPCC investigation as one that potentially undermines State security through the release of information to Menezes' family members, paying no regard to the role of public scrutiny in a liberal State or to Menezes' human rights and Article 2 procedural obligations.

7.4.1.2. Operation Kratos

The armed police officers were also operating in the context of Operation Kratos,[1292] a policy permitting police officers to shoot suspected terrorists in the head.[1293] As an example of Derrida's 'autoimmunity',[1294] the antithetical purpose of Kratos was to protect life through destroying it.[1295] Although the situation involving Menezes was described by Sir Ian Blair in his letter as a 'choice' by an officer to 'shoot-to-kill'[1296] it was denied that Kratos was essentially a 'shoot-to-kill' policy, the distinction being made on the basis

[1291] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022.
[1292] MPA Memo dated 8 August 2005, archived <http://policeauthority.org/metropolitan/downloads/foi/log/kratos-attach.pdf> accessed 21 May 2021.
[1293] D. Casciani, 'Shoot-to-kill policy under debate' (*BBC News*, 08 November 07) <http://news.bbc.co.uk/nol/ukfs_news/mobile/newsid_7080000/newsid_7085200/7085244.stm> accessed 21 May 2021.
[1294] 'The quasi-suicidal process in a living being where it "works to destroy its own protection."' In the counterterrorism context, this is protecting the liberal State through destroy human rights. J. Derrida, 'Autoimmunity: real and symbolic suicides: a dialogue with Jacques Derrida' in G. Borradori, *Philosophy in a Time of Terror: dialogues with Jürgen Habermas and Jacques Derrida* (trans. P-A. Brault and M. Naas, University of Chicago Press 2003) 94.
[1295] C. Vaughn-Williams, 'The shooting of Jean Charles de Menezes: new border politics?' in A. Closs, Stephens and N. Vaughn-Williams (eds), *Terrorism and the Politics of Response* (Routledge 2009) 103.
[1296] Letter from Metropolitan Commissioner Sir Ian Blair to Home Office Permanent Secretary Sir John Gieve on 22nd July 2005, archived <https://web.archive.org/web/20090510125404/http://cms.met.police.uk/news/policy_organisational_news_and_general_information/commissioner/commissioner_s_letter_to_the_home_office> 21 April 2021.

that the objective is not to kill but to protect the public from the threat posed by criminal activity.[1297] As this was to be achieved by killing, this is merely a semantic argument. Moreover, 'shoot-to-kill' rhetoric 'poses a deep and enduring threat to human rights-based law enforcement approaches' and 'serves only to displace clear legal standards with a vaguely defined licence to kill, risking confusion among law enforcement officers, endangering innocent persons, and rationalizing mistakes.' [1298]

Shooting in order to kill is a clear intention to kill the person being shot. There may be an overarching motivation of protecting the public, but the intent towards the individual affected is unequivocal. However, if human dignity is inherent in all persons, the ends do not justify the means as each individual is an end in themselves. A utilitarian approach to HRL, namely the willingness to sacrifice one life for the perceived benefit of a greater number of lives, inevitably leads to the denial of dignity, which is a threat to international peace and security.[1299] HRL operates at the individual level to protect individual persons from the coercive power of the State. A policy that begins at the point of using overwhelming force to incapacitate a terror suspect by shooting them in the head is not one that envisages the suspect walking away and being subjected to the processes of the CJS.

Following 9/11, Met personnel were sent to Israel, Sri Lanka, and Russia to discover potential tactics for use in responding to a suicide-bomber.[1300] It

[1297] Charles Clarke before the Home Affairs Committee, 'Counter-Terrorism and Community Relations in the Aftermath of the London Bombings', Home Affairs Committee, *Oral Evidence* (13 October 2005) Q25 <https://publications.parliament.uk/pa/cm200506/cmselect/cmhaff/462/5091301.htm> accessed 31 July 2023.
[1298] ESC, 'Extrajudicial, Summary or Arbitrary Executions Report of the Special Rapporteur, Philip Alston' (8 March 2006) UN Doc E/CN.4/2006/53 [45].
[1299] See Chapter 3, 3.4.1.1 and 3.4.1.2.
[1300] MPA Committee Report, 'MPS Response to the Threat of Suicide Terrorism' (27 October 2005) <http://policeauthority.org/metropolitan/committees/mpa/2005/051027/13/index.html> 18 November 2021.

was recognised that the three countries used tactics operating outside the HRL framework and were 'wholly unsuitable for adoption by the UK' and inconsistent with policing policy.[1301] However, it was also noted that in all three countries, suicide-bombers would trigger their device upon realising they had been discovered by law enforcement. Consequently, tactics needed to enable covert officers to 'retain the element of surprise' and also 'ensure immediate incapacitation to eradicate any opportunity' for spontaneous detonation by the bomber.[1302] They did not need to respect the human rights of the suspect.

Consequently, Operation Kratos was developed.[1303] The MPA Committee report states that 'This is not a "shoot-to-kill" policy' and the 'tactics are wholly consistent with S.3 Criminal Law Act.'[1304] However, that statutory provision is focused on the legal detainment of persons suspected of an offence (either that they have already committed an arrestable offence or are about to). It provides for the use of 'such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders.'

The Act accepts a level of reasonable force to prevent crime or effect an arrest, it does not provide for the application of intentionally lethal force. Whilst killing a suspect will prevent them from being able to commit any criminal offence, this cannot be the starting point as it undermines the purpose of the force (to effect arrest) and will not satisfy the test of being reasonable in every circumstance.

[1301] Ibid., [4].
[1302] Ibid., [6].
[1303] Ibid., [7]-[9].
[1304] Ibid, [10].

A policy that begins at the use of lethal force is arguably in breach of Article 2(1) of the European Convention on Human Rights, which arguably excludes the *intentional* taking of life.[1305] Additionally, it is also in breach of 2(2) as there is no scale to enable the officer to determine what is 'no more than absolutely necessary' in the circumstances.[1306] To deliver the guarantees provided by Article 2, States are required to enact appropriate legislative and administrative frameworks that delineate 'the limited circumstances in which law enforcement officials may use force and firearms, in the light of the relevant international standards.'[1307] Officers must only be permitted to use firearms after careful consideration of the situation, in accordance with the principle of strict proportionality,[1308] and taking into account the potential nature of the threat.[1309]

From the jurisprudence of the ECtHR, it is clear that Article 2 also requires the domestic legislation to ensure a regulatory framework that protects against 'arbitrariness and abuse of force and even against avoidable accident.'[1310] As part of this, the training of relevant State agents must equip them with the ability to calculate whether the use of a firearm is 'an absolute necessity' in the circumstances, taking into account the relevant regulations and 'with due regard to the pre-eminence of respect for human life as a fundamental value.'[1311] In this situation, the existence of Operation Kratos arguably undermined the respect for Menezes' right to life. Although the ECtHR has previously criticised the UK's use of 'shoot-to-kill' instructions in

[1305] Chapter 6: 6.3.1.
[1306] Chapter 6: 6.3.2.
[1307] *Makaratzis v Greece* App no 50385/99 (ECHR, 20 December 2004) [59]; *Giuliani and Gaggio v Italy* App no 23458/02 (ECHR, 24 March 2011) [209].
[1308] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [149]; *Giuliani and Gaggio v Italy* App no 23458/02 (ECHR, 24 March 2011) [209].
[1309] *Nachova and Others v Bulgaria* (Judgment) App no 43577/98 43579/98 (ECHR, 6 July 2005) [96].
[1310] *Makaratzis v Greece* App no 50385/99 (ECHR, 20 December 2004) [58]; *Nachova and Others v Bulgaria* (Judgment) App no 43577/98 43579/98 (ECHR, 6 July 2005) [97]; *Giuliani and Gaggio v Italy* App no 23458/02 (ECHR, 24 March 2011) [209].
[1311] *Nachova and Others v Bulgaria* (Judgment) App no 43577/98 43579/98 (ECHR, 6 July 2005) [97].

a peacetime context,[1312] in *Armani* it did not examine the legality of the Kratos policy.

The College of Policing's Guidance on armed policing states that 'respect for an individual's human rights should be the central focus throughout the entire policing process.'[1313] It further asserts that 'Every effort should be made to resolve the situation without resorting to the use of force or firearms, however, the overriding consideration should be a human rights-based approach to public and officer safety.'[1314] The phraseology employed here is interesting. The first phrase suggests that the suspect's human rights should also be at the centre of any decisions being made at the operative time. However, the second phrase places the human rights of the suspect in opposition to the safety of the public and police officers. This accords with the overarching State narrative that State security and the human rights of terrorist suspects are not compatible,[1315] which arguably leads to the violation of a suspect's human rights and without subjecting them to CJS processes.

Although the stated aim of Operation Theseus 2 was to detain and arrest the persons suspected of the bomb attempt, police firearms officers were issued with 9mm 124 hollow point bullets.[1316] In IHL, the prohibition on the 'use of bullets which expand or flatten easily in the human body' is a

[1312] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [211].
[1313] College of Policing, 'Authorised Professional Practice Legal Guidance' (25 March 2021) <https://www.college.police.uk/app/armed-policing/legal-framework> accessed 1 June 2022.
[1314] Ibid.
[1315] As illustrated by Sir Ian Blair's letter. Letter from Metropolitan Commissioner Sir Ian Blair to Home Office Permanent Secretary Sir John Gieve on 22nd July 2005, archived <https://web.archive.org/web/20090510125404/http://cms.met.police.uk/news/policy_organisational_news_and_general_information/commissioner/commissioner_s_letter_to_the_home_office> 21 April 2021.
[1316] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [16.1]

norm of customary international law.[1317] Yet, their use is permitted in a domestic law enforcement context and were used in Kratos operations.[1318] This choice of ammunition arguably undermines the stated aim of the operation and demonstrates a disregard for the right to life of any suspected terrorist.

Combined with the hyperbolic briefing, the situation echoed that of *McCann* as it did not allow for a margin of error[1319] and led to the SFOs acting, akin to soldiers, without 'the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects.'[1320] In the *Armani* judgment, the ECtHR did not consider the Article 2 compatibility of the Kratos policy or repeat the criticisms of the use of a shoot-to-kill instruction in a non-armed conflict situation, indicating a concession to the State on matters of security in the context of counterterrorism. This demonstrates the ineffectiveness of HRL to protect the right to life of terrorist suspects when State security is asserted.

Whilst there needs to be a focus on preventing crime and protecting the public, this does not automatically necessitate the killing of a suspect. Operation Kratos demonstrates a State willing to use deadly force as a first step when confronting a suspected suicide-bomber, regardless of the reality of the threat or the rights of the individual.

[1317] International Humanitarian Law Databases, 'Rule 77. Expanding Bullets' (Volume II, Chapter 25) (*ICRC*, 2023) <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule77> accessed 14 September 2022.
[1318] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [16.7].
[1319] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [211].
[1320] Ibid., [212].

7.5. The Lead up to the Killing

At 06:50 on 22nd July 2005, Commander McDowall held a briefing laying out the firearms strategy[1321] and where 'it was envisaged that an Operation Kratos scenario could well develop.'[1322] Thus, although the Operation Theseus 2 did not comply with Kratos,[1323] it was clearly put in the mind of officers that shoot-to-kill was likely and acceptable. The killing was not formally conducted under Kratos,[1324] demonstrating the danger of the policy's existence in reducing safeguards. The discourse of the day, within the context of the meta-discourse of securitisation and the threat of terrorism, was that the police were going to shoot a suspect.[1325]

The SFOs were briefed that they 'may be required to use unusual tactics' due to the circumstances and that they 'should think about this.'[1326] They were told the instruction relating to the critical shot would come from the Designated Senior Officer. However, if they were engaged to intercept a suspect, who was then challenged and was non-compliant, they were permitted to take that critical shot (meaning kill shot), enhancing fears they would meet and be required to kill suicide-bombers.[1327]

[1321] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [25].
[1322] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 24[6].
[1323] Ibid., [9.9].
[1324] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [9.14].
[1325] It is worth noting that the suspects were later apprehended, without the use of lethal force. M. Oliver, 'July 21 Suspects Arrested' *The Guardian* (29 July 2005) <https://www.theguardian.com/uk/2005/jul/29/july7.uksecurity3> accessed 1 July 2022. They were convicted of conspiracy to murder under s.1 Criminal Law Act 1977, demonstrating that a criminal law enforcement approach is both possible and appropriate in a counterterrorism context. BBC, 'Four Guilty over 21/7 Bomb Plot' (*BBC News*, 10 July 2007) <http://news.bbc.co.uk/1/hi/uk/6284350.stm> accessed 1 July 2022. Notwithstanding the ECtHR's finding that trial of Hussain Osman was unfair. *Ibrahim and Others v United Kingdom* App nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECHR, 13 September 2016) [319].
[1326] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [26].
[1327] Ibid., [26]

The element of the briefing around interception, challenge, and non-compliance was not absorbed by the officers as, in the event, Menezes was *not* non-compliant but was still shot. According to the findings of the inquest jury, there was no challenge by the firearms officers,[1328] and, although he did stand up,[1329] he did not move towards the SFO before being grabbed and held in a 'bear hug' by another officer.[1330] However, the IPCC Report and ECtHR case (which appears to unquestioningly accept the Report) suggest Menezes approached the officers with his hand going towards his waistband and ignores the fact that accounts of the officers at the scene were given after they had had time to confer and knew Menezes was not a terrorist.[1331] This again demonstrates the ECtHR's apparent willingness to accept State established 'facts'[1332] and disinclination to scrutinise the effectiveness of an investigation beyond the procedural aspects.

The SFOs were briefed by DCI C,[1333] who declared the suspects were 'prepared deadly and determined suicide-bombers' who were 'up for it'[1334] and their devices were capable of being worn by the bomber and easily triggered. This echoes the briefings given to soldiers in *McCann* regarding the definitive reporting of a remote detonator and absence of allowance for

[1328] Coroner's Inquest into the Death of Jean Charles de Menezes, 'Jury Questions and Direction and Verdict' (12 December 2008) <https://webarchive.nationalarchives.gov.uk/ukgwa/20090317235613/http://www.stockwellinquest.org.uk/hearing_transcripts/index.htm> accessed 21 April 2022 10[12].
[1329] Ibid., 10[25].
[1330] Ibid., 11[4].
[1331] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [166]; *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [31]. The practice of allowing officers involved in a fatal shooting to confer and write up their notes together was criticised by the Coroner and a change recommended. Coroner's Inquest into the Death of Jean Charles de Menezes, 'Jury Questions and Direction and Verdict' (12 December 2008) <https://webarchive.nationalarchives.gov.uk/ukgwa/20090317235613/http://www.stockwellinquest.org.uk/hearing_transcripts/index.htm> accessed 21 April 2022.
[1332] Demonstrated in the Northern Ireland cases. Chapter 6: 6.5.
[1333] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [27].
[1334] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [11.11], [18.20] and [18.30].

alternative possibilities,[1335] demonstrating that lessons had not been learnt from that case regarding the State's duty to plan and execute an operation centring HRL. It was also erroneously stated that there were links between the bombers from the day before and those that had caused the mass casualty event on 7/7.[1336] The briefings were criticised by the CPS as being unbalanced and did not caution against an overreaction.[1337] This is crucial as it strongly suggests that officers who are aware of a doubt about the identity and intentions of a person will not automatically employ lethal force.

Despite a lack of information on the 21 July 2005 suspects, their motivations, and intentions (other than the reasonable assumption that they had desired to detonate several explosive devices on public transport), the official language used framed them as an imminent threat. In describing the planters of the bombs as 'suicide-bombers'[1338] the police officers in charge of the briefing arguably reinforced the idea that these persons were not people who could be reasoned with – they were 'deadly and determined' killers.[1339] As such, the suspects were delegitimised as individuals with a right to life who should be counted by law enforcement officers when considering their response. Consequently, it is unsurprising that the individual officers involved, as in a classic utilitarian thought experiment scenario, felt their only option was to kill the guilty individual in order to save the innocent many.[1340]

[1335] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [209]-[10].
[1336] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [11.11].
[1337] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [27].
[1338] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [11.2], [11.5] and [11.9].
[1339] Ibid., [11.13].
[1340] Ibid., [13.7] and [13.12].

At 09:33, Menezes exited his flat and was observed by a surveillance officer, who was unable to positively discount him as a suspect.[1341] A second officer was also unable to distinguish Menezes, a light skinned Brazilian, from Osman, a black Ethiopian, and described him as being 'possibly identical' to the target.[1342] A third officer believed Menezes 'appeared nervous' but did not identify him as Osman.[1343] As the SFOs were not present, it was not possible to implement the strategy outlined by Commander McDowall,[1344] demonstrating the complete failure of the operation from the outset.

7.6. The Killing

Whilst the surveillance team scrambled to get an image of his face, Menezes was seen boarding a bus.[1345] He was described as not being identical to Osman but was still followed.[1346] There was significant confusion regarding his identity, with those in the Control Room believing he had been positively identified as the suspect.[1347] Additionally, the SFOs and Control Room thought they were informed Menezes was 'acting nervously or "twitchy"'.[1348] The operation log records it was communicated that 'it is him… they think it is him and he is very, very jumpy.'[1349] It was heard over the surveillance radio that a positive identification of Osman had been made.[1350] This

[1341] Ibid., [12.9].
[1342] Ibid., [12.10].
[1343] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [12.11].
[1344] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [29].
[1345] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [12.13].
[1346] Ibid., [12.14].
[1347] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [32].
[1348] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [12.17].
[1349] Ibid., [12.19].
[1350] Ibid., [12.20].

accorded with the prevailing discourse of the day that the officers were going to encounter a terrorist.

In what seems to be a situation of confirmation bias,[1351] Menezes' actions, mannerisms, and appearance were perceived negatively due to the identity imposed upon him as a terrorist suspect. As in *McCann*, the lens of 'terrorist suspect' rendered ordinary human behaviour suspicious, confirming the suspicion. In a situation where the suspicion alone allows for the deliberate use of lethal force, the individual is powerless to protect themselves from State violence.[1352] Interpretations of HRL permitting extrajudicial killing undermines the dignity of persons put outside the normal sphere through the arbitrary allocation of the 'suspect' moniker as it is impossible to prove innocence. The onus is on the agents of the State to not jump to conclusions and to centre the human rights of the suspect.

The decision was made to arrest Menezes before he entered the underground transport system by CO19.[1353] No order was given that the suspect was to 'receive a critical headshot without challenge.'[1354] The SFO unit heard, via the radio, that 'it was definitely our man' and 'he was nervous and twitchy.'[1355] This misinformation connected with the prevailing threat discourse of the day and wider context,[1356] confirming the briefing information that deadly force was required.

[1351] B.J. Casad, 'Confirmation Bias' (*Britannica*, 18 August 2023) <https://www.britannica.com/science/confirmation-bias> accessed 20 August 2023.
[1352] Chapter 6: 6.8.
[1353] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [12.29].
[1354] Ibid., [12.37].
[1355] Ibid., [12.27].
[1356] M. Foucault, *The Archaeology of Knowledge and the Discourse on Language* (trans. A.M. Sheridan-Smith, Pantheon Books 1972) 21-24.

At 10:03, Menezes calmly entered the station, passed through the ticket barriers, and boarded a train waiting at the platform.[1357] He was followed approximately two minutes later by officers.[1358] The SFOs were informed they were on State Red, meaning an armed interception with the suspect was imminent and that they had control of the situation.[1359] Although there were other armed officers in the vicinity with the capability to stop Menezes before he entered the station,[1360] this option was not taken and the SFOs, operating under the mistaken belief that would-be-suicide-bomber Osman had entered the underground and boarded a train,[1361] acted to prevent a terrorist event from occurring. As in *McCann*, a non-violent intervention was possible at several stages before the lethal shooting. Due to the context of Kratos and the failure to stop and question Menezes as per the stated strategy, his death was inevitable.

Surveillance officers followed Menezes onto the train and sat near him,[1362] apparently unaware he had been identified as Osman and was about to receive lethal force.[1363] No attention was paid to Menezes' lack of negative reaction. The 7/7 bombers had detonated their devices at stations.[1364] Had Menezes been Osman about to attempt a suicide-bomb, it is likely that the bomb could have been detonated at this point. Nonetheless, the actual behaviour and character of Menezes was not considered.

[1357] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [36].
[1358] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [12.31].
[1359] Ibid., [12.32]; *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [35].
[1360] Ibid., [12.30-31].
[1361] Ibid., [12.33].
[1362] Ibid., [12.40-41].
[1363] Ibid., [12.42].
[1364] M. Ray, 'London Bombings of 2005' (*Britannica*, 17 August 2018) <https://www.britannica.com/event/London-bombings-of-2005> accessed 21 April 2022.

According to the IPCC, 'There is no doubt that officers shouted, "armed police" as they ran down the escalators and onto the platform to clear the area of passengers.'[1365] The surveillance officers shouted that 'he's here' and indicated Menezes.[1366] This seems inconsistent with the fear he was a suicide-bomber and impression he was nervous. Had he been Osman planning to detonate a bomb, he would be hyper-aware of his surroundings, fearing discovery after the failure of his first attempt, and so likely to detonate at the first signs of police presence. The uncritical acceptance of police assertions undermines the effectiveness of the IPCC report and highlights issues around the State investigating itself for rights violations.

According to the IPCC report, there was no attempt to negotiate with or disarm Menezes. He stood up, presumably in response to the commotion and being indicated, but this was interpreted negatively by the officers.[1367] Accounts of events varied and the inquest jury rejected the SFOs' version, issuing an open verdict.[1368] However, there is agreement that Menezes was grabbed and pinned down in his seat by officers.[1369] At this point, had the officers not been operating under the assumption that they were compelled to use lethal force, he could have been arrested and his person checked for an explosive device. Given that the devices found the day before were in bags and not carried on the person, it is unclear why there was the belief that Menezes would be wearing a device easily concealable under a light denim jacket. No consideration was given to the possibility that it could be detonated by the manhandling of his body or through the operation of a

[1365] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [13.2].
[1366] Ibid., [13.4].
[1367] Ibid., [13.11].
[1368] R. Edwards, 'Jean Charles de Menezes Shooting: No Officers Face Charges' *The Telegraph* (13 February 2009) <www.telegraph.co.uk/news/uknews/law-and-order/4611838/Jean-Charles-de-Menezes-shooting-no-officers-face-charges.html> accessed 1 September 2022.
[1369] *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) [37].

dead-man switch. Despite his being incapacitated and restrained, police officers fired nine shots at Menezes. Seven entered his head,[1370] one misfired and one missed his body.[1371]

Menezes was arguably a victim of three stages of 'othering' utilising existing discourses within the securitised context. Firstly, he was perceived as non-white, meaning he was considered potentially criminal.[1372] Secondly, he was suspected of criminal activity, confirming the prejudices informing the first stage.[1373] Thirdly, he was suspected of terrorist activity, reinforcing the previous prejudices, and placing him within the exceptional sphere.[1374] The securitisation of Islamic terrorism suggests that, in the counterterrorism law enforcement context, suspicion is sufficient to justify lethal action, which arguably results from the fear and threat discourse that articulates Muslims as the 'suspect community.'

7.7. The Aftermath

In contrast to the 'innocent' victims of the 7 July 2005 bombings, Menezes is not described as such. Despite the acknowledgement that he was not involved in or connected to terrorism, there is a sense that he is still somewhat culpable for his own killing as he had chosen to be in that place, at that time, and of (apparently) indeterminate ethnicity. He is still considered 'other.'

[1370] BBC, 'Police 'thought Menezes had a bomb'' (*BBC News*, 22 September 2008) <http://news.bbc.co.uk/1/hi/uk/7629961.stm> accessed 1 September 2022.
[1371] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [16.11].
[1372] W. McMahon and R. Roberts, 'Truth and Lies About "Race" and "Crime"' (2011) 83 Criminal Justice Matters 20; K.K. Russell, *The Color of Crime: racial hoaxes, white fear, black protectionism, police harassment, and other macroaggresions* (NYUP 1998).
[1373] A. Goodman and V. Ruggiero, 'Crime, Punishment, and Ethnic Minorities in England and Wales' (2008) 2(1) Race/Ethnicity 53, 65.
[1374] J. Githens-Mazer and R. Lambert, 'Islamophobia and Anti-Muslim Hate Crime: a London case study' (*EMRC*, January 2010) 18 <https://www.hatecrimescotland.org/wp/wp-content/uploads/2014/08/Islamaphobia-Anti-Muslim-Hate-Crime-a-London-Case-Study-EMRC-2010.pdf> accessed 27 April 2022.

Met Commissioner Sir Ian Blair made a number of claims in the press, including that Menezes 'was challenged and refused to obey police instructions.'[1375] Newspaper reports describe his as 'fleeing from armed police'.[1376] Press releases given throughout 22 July 2005 linked Menezes to the bombs found the previous day and stated that his 'clothing and behaviour at the station' had contributed to the suspicions of the surveillance officers.[1377] In the aftermath of the event, several stories circulated about Menezes, including claims he was in the UK illegally, had cocaine in his system, and was being investigated for rape.[1378] The allocating of Menezes to the 'guilty' sphere is essential for the justification of his rights violation. Innocent people do not get shot by the State as their dignity counts. It is only those with something to hide that are at risk,[1379] putting the onus on individuals to protect themselves from State force.

The following day, the police issued statements acknowledging Menezes was not connected to the bombs found on 21 July 2005, but continued to state 'his clothing and behaviour added to [officers'] suspicions'.[1380] It later

[1375] BBC, 'Man Shot Dead by Police on Tube' *BBC News* (22 July 2005) <http://news.bbc.co.uk/1/hi/uk/4706787.stm> accessed 27 February 2021.
[1376] T. Thompson, G. Hinsliff and A. Xavier, 'Man shot in terror hunt was innocent young Brazilian' *The Guardian* (24 July 2005) <https://www.theguardian.com/uk/2005/jul/24/july7.uksecurity3> accessed 27 February 2021.
[1377] IPCC, 'Stockwell Two: An Investigation into Complaints about the Metropolitan Police Service's Handling of Public Statements Following the Shooting of Jean Charles de Menezes on 22 July 2005' (July 2007) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-two.pdf> accessed 21 April 2021 7–9.
[1378] R. Edwards, 'De Menezes family: Met claims were 'sickening'' *The Telegraph* (1 November 2007) <https://www.telegraph.co.uk/news/uknews/1568022/De-Menezes-family-Met-claims-were-sickening.html> accessed 21 July 2022.
[1379] This is an extension of the 'nothing to hide, nothing to fear' argument asserted by States to justify increased surveillance for national security reasons that plays on fears introduced by the terrorism discourse. See, e.g., D.J. Solove, '"I've Got Nothing to Hide" and Other Misunderstandings of Privacy' (2007) 44 San Diego Law Review 745; J. Kopf, 'Nothing to Hide, Everyone to Suspect' (*Media@LSE*, 2023) <https://www.lse.ac.uk/media-and-communications/assets/documents/research/msc-dissertations/2022/Kopf.pdf> accessed 21 July 2023.
[1380] Dennis, J., 'Shot man was not bomber – police' *The Guardian* (23 July 2005) <https://www.theguardian.com/uk/2005/jul/23/july7.uksecurity11> accessed 21 February 2021; IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at

emerged from CCTV footage that Menezes had in fact walked 'calmly' into the station, pausing to pick up a newspaper, before using his travel card to pass through the barriers[1381] and that his clothing was appropriate for the weather.[1382] It became clear that Menezes 'had nothing to do with terrorism' and had actually been travelling to work.[1383] Although Menezes was not connected to terrorism, the IPCC does not describe him as innocent[1384] and alludes to potential immigration issues[1385] and cocaine use.[1386] This unnecessary information arguably reinforces notions that those who are truly innocent have nothing to fear from the activities of the security forces and that the infringement of human rights only impacts the guilty.[1387]

7.7.1. Prosecution Decisions

On 17 July 2006, the CPS announced it was not pursuing prosecutions against any individuals involved in the killing of Menezes due to 'insufficient evidence' and the lack of a 'realistic prospect of conviction.'[1388] It was asserted the officers fired under the impression Menezes was identified as a suicide-bomber and about to explode a bomb. Further, the Prosecution would

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Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [9–10].

[1381] Ibid., [8.16].

[1382] Ibid., [8.16] and [20.62].

[1383] Ibid., [1.2].

[1384] Ibid., [4.1] describes the 52 persons who died in the London bombings on 7 July 2005 as 'innocent'; The IPCC summary chronology of the events also describes the 52 as 'innocent', in direct contrast to the 22 July entry of 'Jean Charles de Menezes shot and killed by officers from the Metropolitan Police Service' (*IPCC*, Archived Webpage) <webarchive.nationalarchives.gov.uk/20100908152737/http://www.ipcc.gov.uk/index/resources/evidence_reports/investigation_reports/the_stockwell_investigation/summary_chronology.htm> accessed 1 September 2022.

[1385] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [5.5] states that the Home Office Immigration files have no record of him after 20 June 2003, although a footnote does acknowledge that the Health and Safety trial revealed that he was lawfully in the country on the date of his death.

[1386] Ibid., [14.22] states that there was cocaine in de Menezes' blood and that he may have been under the influence of the drug at the time of the incident.

[1387] See, e.g., British Foreign Secretary William Hague asserting that those who are 'law-abiding' have nothing to fear from the security services, R. Watts and R. Winnett, 'William Hague: British Public have 'Nothing to Fear' from US Spies' *The Telegraph* (9 June 2013) <www.telegraph.co.uk/news/politics/10108564/William-Hague-British-public-have-nothing-to-fear-from-US-spies.html> accessed 26 June 2021.http://news.bbc.co.uk/1/hi/uk/5187484.

[1388] BBC, 'CPS statement on Menezes report' (*BBC News*, 17 July 2006) <http://news.bbc.co.uk/1/hi/uk/5187484.stm> accessed 3 July 2021.

have to show the officers 'did not honestly and genuinely hold those beliefs' where evidence supported their claim.[1389] However, the decision was made to prosecute the Met under ss.3 and 33 of the 1974 Health and Safety at Work Act for 'failing to provide for the health, safety and welfare' of Menezes on the day he was killed by police officers.[1390]

The Met responded to the prosecution decision stating 'we are pleased for the officers and their families' and 'are concerned and clearly disappointed' that the CPS saw fit to bring charges under Health and Safety legislation.[1391] The statement reflected the concerns raised in an MPS letter sent to the Attorney General Lord Goldsmith, expressing concern that the prosecution would inhibit the ability of the police to 'respond to unforeseen or hazardous situations' appropriately.[1392] Thereby asserting that the usual rules should not apply in a counterterrorism context. Additionally, the MPS used the statement as an opportunity to reaffirm its commitment to the Kratos policy and willingness to use it when considered necessary.[1393] There was no engagement with the problematic elements of having a policy that aims to kill persons identified, but not confirmed, as a potential threat and the undermining of human rights guarantees.

[1389] Ibid.
[1390] Press Association 'Menezes officers escape charges' *The Independent* (17 July 2006) <https://www.independent.co.uk/news/uk/crime/menezes-officers-escape-charges-408312.html> accessed 3 July 2021.
[1391] 'De Menezes statements from the CPS and the Met' *The Guardian* (17 July 2006) <https://www.theguardian.com/uk/2006/jul/17/terrorism.menezes1> accessed 3 July 2021.
[1392] Letter from MPA to Attorney General about health and safety prosecution of MPS (4 August 2006) <http://policeauthority.org/metropolitan/publications/letters/060804/index.html> accessed 3 July 2021.
[1393] 'De Menezes statements from the CPS and the Met' *The Guardian* (17 July 2006) <https://www.theguardian.com/uk/2006/jul/17/terrorism.menezes1> accessed 3 July 2021.

7.8. Conclusion

Menezes' killing can be explained as 'a tragic mistake'[1394] and the understandable consequence of an appropriately zealous police unit determined to protect the public from 'very dangerous individuals' who had attempted a suicide-bombing the previous day.[1395] However, it is asserted that dismissing the event as a mistake, which could be repeated as the security forces struggle to keep the country safe,[1396] ignores the wider context of the securitisation of terrorism and the destruction of the individual as a unit that counts. The events took place in a climate of fear created by the political rhetoric surrounding terrorism that has been shaping reality since 9/11, with politicians reinforcing the threat through the 'other' narrative post-7/7.[1397] Thus, far from being a 'freak'[1398] or even 'terrible'[1399] mistake, the shooting of Menezes was a result of a policing approach that fails to recognise the human dignity of terrorist suspects.

The operational failures leading to Menezes' death were acknowledged, although isolated to the incident. However, the UK's apparent refusal to recognise the human rights implications of a policy allowing the deployment of intentionally lethal force and the ECtHR's lack of engagement with that issue, raises substantial HRL issues. Further, the willingness of the majority in *Armani* to accept the securitisation narrative and reduce the international

[1394] 'Open Verdict at Menezes Inquest' *BBC News* (12 December 2008) <news.bbc.co.uk/1/hi/uk/7764882.stm> accessed 3 July 2021.
[1395] IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (January 2006) <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-one.pdf> accessed 1 September 2022 [4.17].
[1396] M. Hughes, 'Seven Mistakes that Cost De Menezes his Life' *The Independent* (13 December 2008) <www.independent.co.uk/news/uk/crime/seven-mistakes-that-cost-de-menezes-his-life-1064466.html> accessed 3 July 2021.
[1397] See, e.g., Tony Blair stating that 'We will not allow violence to change our societies or our values.' 'Full Text G8 Leaders' Statement' *The Guardian* (7 July 2005) <www.theguardian.com/world/2005/jul/07/g8.july7> accessed 5 July 2021.
[1398] J. Appleton, 'Memorial to Paranoia' (*Spiked*, 24 August 2005) <https://www.spiked-online.com/2005/08/24/memorial-to-paranoia/> accessed 5 July 2021.
[1399] G. Rayner, 'De Menezes: acting Met Chief Sir Paul Stephenson admits 'most terrible mistake'' *The Telegraph* (12 December 2008) <https://www.telegraph.co.uk/news/uknews/law-and-order/3724533/De-Menezes-Acting-Met-Chief-Sir-Paul-Stephenson-admits-most-terrible-mistake.html> accessed 22 April 2022.

standards on the use of force by police officers to the low bar of subjective 'honest belief' places significant barriers to holding States accountable.

Affording civilians less protection in the normal sphere than under IHL[1400] by permitting the intentional killing of a civilian in circumstances where there was no actual threat, and where the authorities had the opportunity to make an arrest, seriously undermines HRL in terms of content and purpose. Furthermore, the acceptance of current English law on self-defence, which allows for the exercise of prejudice to inform the 'honest belief', permits both the State and its agents to escape accountability, providing no impetus for practice to change.

[1400] Geneva Convention Relative to the Protection of Civilian Persona in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 74 UNTS 287.

Chapter 8: Reyaad Khan

8.1. Introduction

Reyaad Khan, a 21-year-old British citizen believed to be an ISIL recruiter, was killed by UK drone strike on 21 August 2015 in Syria[1401] after he reportedly travelled to join ISIL in Syria in 2013.[1402] Alert to the difficulties for ethnic minorities caused by stereotyping,[1403] he felt public money should be spent on youth programmes instead of on 'illegal wars.'[1404] After he appeared in a 2014 ISIL propaganda video encouraging viewers to join ISIL,[1405] friends urged him to return home.[1406]

Although the police had developed Operation Kratos for domestic use in defence situations,[1407] prior to the killing of Khan, the UK did not have an explicit policy on the use of extra-territorial lethal force outside an armed conflict. Although it asserted there was no targeted killing policy, the JCHR enquiry established that 'it is the Government's policy to use lethal force abroad, even outside of armed conflict, against individuals suspected of planning an imminent terrorist attack against the UK, when there is no other way of preventing the attack.'[1408]

[1401] P. Wintour and N. Watt, 'UK Forces Kill British ISIL Fighters in Targeted Drone Strike on Syrian City' (*The Guardian*, 7 September 2015) <https://www.theguardian.com/uk-news/2015/sep/07/uk-forces-airstrike-killed- ISIL-briton-reyaad-khan-syria> accessed 14 January 2020.
[1402] BBC, 'Cardiff Jihadist Reyaad Khan Dies in Syria' *BBC News* (2 September 2015) <https://www.bbc.co.uk/news/uk-wales-34125743> accessed 14 July 2023.
[1403] Demonstrating an awareness of the 'othering' experienced by minorities in Britain, see e.g., S. Khan, 'Social Exclusion of Muslims in India and Britain' (2020) 6(1) Journal of Social Inclusion Studies 56. Chapter 4: 4.3.1.2.
[1404] B. Quinn, 'Briton Reyaad Khan Believed Killed in Air Strike on Islamic State in Syria' *The Guardian* (21 July 2015) <https://www.theguardian.com/uk-news/2015/jul/21/briton-reyaad-khan-believed-killed-air-strike-islamic-state-syria> accessed 14 July 2023.
[1405] BBC News, 'Cardiff Jihadist Reyaad Khan, 21, Killed by RAF Drone' *BBC News* (7 September 2015) <https://www.bbc.co.uk/news/uk-wales-34176790> accessed 14 July 2023.
[1406] BBC News, 'Friend Urges Jihadist Reyaad Khan to Return to Cardiff' *BBC News* (2 July 2014) <https://www.bbc.co.uk/news/av/uk-wales-28120838> accessed 14 July 2023.
[1407] Chapter 7: 7.4.1.2.
[1408] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing* (2015-16, HL 141, HC 574) 29[2.2].

Continuing the UK's approach to terrorist suspects discussed in the previous two Chapters, Prime Minister David Cameron justified Khan's killing based on self-defence against alleged attacks plotted by Khan.[1409] In this situation, however, the claim was not of individual State agents fearing the imminent detonation of a bomb, but a State against an individual outside its territory and with no capability to remotely launch a strike. The Government also asserted that the applicable legal regime for a targeted killing outside an armed conflict was IHL. Thus, this case demonstrates the expansion of the exceptional sphere through the securitisation of terrorism to exclude the operation of HRL from any counterterrorism action taken in the name of security.

Following the methodological approach outlined in Chapter 6: 6.1, this Chapter utilises primary legal sources of caselaw and statute, alongside secondary materials from Parliamentary debates and Committees. Additionally, the extra-disciplinary materials relating to securitisation and discourse theories are employed in the analysis. The Chapter begins with a consideration of the application of HRL to the taking of life, drawing on the discussions above, and considering issues of due diligence and jurisdiction. Section 8.3 outlines the report to Parliament of Khan's killing and the contextual securitisation of Islamic extremism to assist in the analysis of the UK's actions and justifications. The discussion continues in Section 8.4 with an examination of the self-defence argument and application of the legal framework provided in Chapter 4, 4.4. Finally, the Chapter assesses the assertion that Khan's killing occurred within an armed conflict situation, precluding any liability for the violation of Khan's right to life and demonstrating the weakness of existing scrutiny mechanisms.

[1409] Prime Minister David Cameron, HC Deb 7 September 2015, vol 599, col 25.

The Chapter demonstrates that existing legal frameworks are insufficient to temper a State's actions in the counterterrorism context. The macrosecuritisation of terrorism provides the basis for future securitisations of NSAs and individuals, resulting in a violation of the right to life and revealing the limitations of public scrutiny processes. Although the Governments confused legal argument was challenged and the application of HRL outside armed conflict asserted, the JCHR accepted the strike occurred within an IHL context. Additionally, the Committee expanded the UK's position that States can intentionally kill terrorist suspects based on an 'honest belief' of an imminent threat[1410] to read an *obligation* to intentionally kill into the ECHR provision.[1411] Furthermore, the JCHR also appeared to accept that a terrorist can constitute a threat 'by their very nature.'[1412] Consequently, the right to life of terrorist suspects does not exist in situations where they can be constructed as presenting a future threat, which amounts to a denial of their human dignity and so itself presents a threat to international peace and security.

8.2. Application of Human Rights

Actions taken outside an armed conflict do not fall under the IHL framework, even when undertaken by the military, and are arguably governed by HRL.[1413] Using drones for targeting purposes either extends the parameters of armed conflict or represents an extreme form of law enforcement that

[1410] As demonstrated in *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) and *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016) and not challenged by the ECtHR.
[1411] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 8.
[1412] JCHR, *Oral Evidence* (2015-16, HC 574) 10.
[1413] H. Duffy, *The "War on Terror" and the Framework of International Law* (2nd edn, CUP 2015) 502. A significant issue is whether the extraterritorial use of force by a State amounts to an assertation of jurisdiction under Article 1 ECHR. See 8.2.2 below.

utilises summary execution instead of capture, arrest, and trial,[1414] both of which are problematic.

The securitisation of the public sphere post 9/11 has elevated security to a primary position through which all other rights are interpreted, rather than it being part of the human rights framework provided by international law.[1415] The legal uncertainty surrounding the understanding and application of fundamental international legal principles regulating the use of lethal force in counterterrorism contexts 'leaves dangerous latitude for differences of practice by States' and not only fails to adequately protect the right to life, but also threatens international peace and security.[1416] The HRC expressed concern over the US' use of drones for targeted killings, especially regarding the lack of transparency, legal accountability for the resulting deaths, clarity as to the legal justification for specific attacks, and opaque definition of 'imminent threat.'[1417]

The right to life is non-derogable and extra-judicial executions are not only prohibited in CIL, the prohibition is considered a jus cogens norm.[1418] According to Alston, 'outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal.'[1419] As an application of lethal force outside an armed conflict, the relevant applicable legal framework in determining whether taking Khan's life was legally acceptable

[1414] N.D. White and A. Davies-Bright, 'Drone Strikes: a remote form of self-defence?' in J.D. Ohlin (ed), *Research Handbook on Remote Warfare* (Edward Elgar 2017) 221.
[1415] L. Lazarus, 'The Right to Security – Securing Rights or Securitising Rights?' in R. Dickinson, E. Katselli, C. Murray, and O.W. Pederson (eds), *Examining Critical Perspectives on Human Rights* (CUP 2012) 87.
[1416] UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (28 February 2014) A/HRC/25/59 [70].
[1417] HRC, 'Concluding Observations on the Fourth Periodic Report of the United States of America' (23 April 2014) UN Doc CCPR/C/USA/CO/4.
[1418] H. Duffy, *The "War on Terror" and the Framework of International Law* (2nd edn, CUP 2015) 500.
[1419] UNGA, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' (28 May 2010) UN Doc A/HRC/14/24/Add.6 [85].

is HRL.[1420] Under the ECHR, a State is not considered to have violated the right to life of an individual through the application of lethal force if one of the exceptions in Article 2 apply.[1421] However, the self-defence provision under Article 2(1)(a) does not provide a State right to self-defence against a person, it is the right of the State agent faced with a perceived threat posed by an individual.

In a self-defence situation, the State agent is not held liable for killing resulting from reasonable force deemed necessary by their perception of a real/imaginary threat to their life or the lives of others. In the case of Khan, the self-defence being asserted is different as there was no threat to the drone or its operator[1422] sitting in the ground control station[1423] in RAF Waddington, Lincolnshire.[1424] Similarly, there was no immediate threat to the life of another person.

The justifications where the taking of life is considered acceptable have been integrated into the norm as a negative element, meaning there is no rule violation when a defender kills to save themselves.[1425] Consequently, an aggressor's rights are denied as their legal interests are not considered to have been violated through using lethal force in legitimate and justified self-defence. As Fletcher and Ohlin argue, this is conceptually unsound as it means aggression effects a complete forfeiture of the right to life.[1426] Thus, the standard interpretation of the legal provision to permit a State to take

[1420] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 54[3.68].
[1421] Chapter 6: 6.3.
[1422] N.D. White and A. Davies-Bright, 'Drone Strikes: a remote form of self-defence?' in J.D. Ohlin (ed), *Research Handbook on Remote Warfare* (Edward Elgar 2017) 221.
[1423] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 13[1.1].
[1424] E. MacAskill and R. Norton-Taylor, 'How UK Government Decided to Kill Reyaad Khan' *The Guardian* (8 September 2015) <https://www.theguardian.com/world/2015/sep/08/how-did-britain-decide-to-assassinate-uk- ISIL-fighter-reyaad-khan-drone-strike> accessed 14 July 2023.
[1425] G.P. Fletcher and J.D. Ohlin, *Defending Humanity* (OUP 2008) 35.
[1426] Ibid., 36.

life undermines its protection where the victim is considered an aggressor. This has been extended further to include situations where the defender kills pre-emptively in the mistaken belief the victim was about to visit unlawful violence upon their person, or against others.[1427]

8.2.1. Due Diligence

Due diligence obligations under HRL are ones of conduct, rather than result.[1428] States must take reasonable measures to protect any persons within their jurisdiction subject to a known threat to their life.[1429] Terrorist attacks create a level of uncertainty due to the random selection of victims, meaning they cannot always be identified beforehand.[1430] However, logically the State would discharge its duty if it knew of a risk to a class of victims and took measures to prevent it, even if it was ultimately unsuccessful. The JCHR appears to have extended this obligation by repeatedly asserting that 'human rights law may even impose a duty to use… lethal force in order to protect life.'[1431] In other words, a State *must* kill an individual or group to save the lives of others in certain circumstances.

Although there is an obligation on States to take such measures as is reasonable to prevent a threat to life manifesting where it knew or ought to have known of the risk,[1432] there is no requirement to violate the right to life of the perpetrator. To assert otherwise is to suggest that the offender has forfeited their right to life simply by being a suspect. HRL does not permit

[1427] See, e.g., *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) and *Armani da Silva v United Kingdom* App no 5878/08 (ECHR, 30 March 2016).
[1428] S. Marks and F. Azizi, 'Responsibility for Violations of Human Rights Obligations: international mechanism' in J. Crawford, A. Pellet, and S. Olleson (eds), *The Law of State Responsibility* (OUP 2010) 729.
[1429] *Delgado Paez v Columbia* (12 July 1990) HRC Communication No 195/1985, [5.5]; *Osman v United Kingdom* App no 23452/94 (28 October 1998).
[1430] E.S. Bates, *Terrorism and International Law: accountability, remedies, and reform* (OUP 2011) 83-4.
[1431] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 37[2.40] and 55[3.72].
[1432] *Osman v United Kingdom* App no 23452/94 (28 October 1998).

intentional killing based on a cost/benefit analysis. The application of a utilitarian matrix to a deontological concept is illogical and demonstrates the fundamental issue – States do not respect the human dignity of all persons and will avoid the constraints of HRL to achieve their objectives in the context of counterterrorism.

Articulating killing in self-defence as a *right* to kill exaggerates the right a defender has in responding to an aggressor as the objective of the response must only be to repel the attack – it is not an intent to kill.[1433] The general legal prohibition on killing provides a rationale against conduct resulting in death. The justification of self-defence counteracts these reasons but does not provide a stronger argument as otherwise there *would* exist an obligation to kill in self-defence. The defender is *permitted* to act, but not *obligated*. If the prohibited act (killing) is the same as the permitted act (killing), then legal permissibility becomes a fallacy.[1434]

Articulating killing in self-defence as a *duty* to kill goes even further outside the realms of acceptable, human rights compliant action. It is an unwarranted extension of the approach criticised above, which already denies the rights of the aggressor, to include remote threats and further undermines the foundational principle of HRL – that each person possesses human dignity by virtue of their humanity. Such an assertion essentially amounts to a licence to kill in situations where a State can articulate a person as a threat and is contrary to HRL, under which 'an intentional, premeditated, and deliberate killing by law enforcement officials cannot be legal because,

[1433] G.P. Fletcher and J.D. Ohlin, *Defending Humanity* (OUP 2008) 46.
[1434] J. Gardner, 'Fletcher on Offenses and Defenses' (2004) 39 Tulsa Law Review 817.

unlike in armed conflict, it is never permissible for killing to be the *sole objective* of an operation.'[1435]

8.2.2. Jurisdiction

A significant issue in determining the application of HRL to an incident is the question of jurisdiction. In public international law, 'the jurisdictional competence of a State is primarily territorial.'[1436] The use of force against individuals outside of an armed conflict is governed by HRL, which generally applies territorially and there is debate as to its extra-territorial application.[1437] However, jurisdiction cannot operate to allow States to act within a legal vacuum where the rights of individuals are not protected as this would present a significant loophole for States, seriously undermining human rights protections and ignoring the historical impetus for the creation of the legal framework.

The ICJ observed that the ICCPR did not intend to allow States to escape their Convention obligations when exercising jurisdiction outside its territory.[1438] Additionally, the HRC found jurisdiction under the ICCPR means 'all persons over whose enjoyment of the right to life [the State] exercises power or effective control,' which includes those 'whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner.'[1439] This echoes previous Comments holding that a State has a duty 'to respect and ensure' the rights of 'anyone within

[1435] UNHRC 'Philip Alston: study on targeted killings, report to the Huma Rights Council' UN Doc A/HRC/14/24/Add.6 [33]
[1436] *Banković and Others v Belgium et al* Admissibility Decision App no 52207/99 (12 December 2001) [59].
[1437] E.g., M. Milanović, 'Human Rights Treaties and Foreign Surveillance: privacy in the digital age' (2015) 56 Harvard International Law Journal 81, 111ff.
[1438] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [109].
[1439] HRC, 'General Comment No.36' CCPR/C/GC/36 (3 September 2019) [63].

the power or effective control of that State Party.'[1440] It is posited that this would include the use of a drone to target and kill an individual.

The Inter-American Commission on Human Rights has adopted an expansive view of jurisdiction, focusing on the level of control the State had over the person at the time. Basing its reasoning on rights being founded in a person's humanity, the Commission in *Coard* found that, 'each American State is obliged to uphold the protected rights of any person subject to its jurisdiction, 'which can include extraterritorial situations where 'the person concerned is present in the territory of one State, but subject to the control of another.' The question is then whether 'the State observed the rights of a person subject to its authority and control.'[1441]

The Commission repeated this approach in another judgment delivered on the same day that involved the shooting down of a civilian aeroplane.[1442] As the victims were in international airspace, the basis for jurisdiction appears to be the level of control the State agents had over the victims in determining whether they lived or died. It is submitted that this approach is to be preferred as it provides maximum protection to individuals subject to the use of force by a State and recognises their human dignity.

Under Article 1 ECHR, States Parties are obliged to 'secure to everyone within their jurisdiction' the Convention protections. The ECtHR has held extraterritorial jurisdiction, meaning responsibility arising outside the territory of the State, to be 'exceptional' and case specific.[1443] Further, the

[1440] HRC, 'General Comment No.31' CCPR/C/21/Rev.1/Add.13 (26 May 2004) [10].
[1441] *Coard et al v United States* Inter-American Commission on Human Rights Case 10.951 Report No. 109/99 (29 September 1999) [37].
[1442] *Armando Alejandre Jr et al v Cuba* Case 11.589 Report no 86/99 (29 September 1999) [23].
[1443] *Banković and Others v Belgium et al* Admissibility Decision App no 52207/99 (12 December 2001) [52]-[3], [61].

Convention does not operate to include any person negatively impacted by an act imputable to a member State within that State's jurisdiction.[1444] Emphasising the regional nature and application of the ECHR, the ECtHR in *Banković* held that it 'was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.'[1445] Although this may be an understandable position from a political perspective, the effect is that States are not considered responsible for their interference with the rights of those humans who happen to be outside their territory, creating a de facto two-tier human rights system where those without the ECHR's espace juridique have fewer rights than those within despite being similarly negatively impacted by Member State action.

The applicants in *Banković* argued that NATO's control over Serbian airspace at the time was akin to Turkey's control over Cyprus and, as it was limited to airspace, the positive obligation of Article 1 would be equally limited.[1446] However, the Court held that Convention rights cannot be 'divided and tailored in accordance with the particular circumstances of the extra-territorial act in question' and so the obligations either apply in full or not at all.[1447]

However, the Court has held that a State can acquire extraterritorial jurisdiction where it exercises 'effective overall control'[1448] over 'an area outside its national territory,'[1449] denoting the exercise of public powers.[1450] This includes where a State has temporary effective overall control over a

[1444] *Banković and Others v Belgium et al* Admissibility Decision App no 52207/99 (12 December 2001) [75].
[1445] Ibid., [80].
[1446] Ibid., [52].
[1447] Ibid., [75].
[1448] *Cyprus v Turkey* (Judgment) App no 25781/94 (10 May 2001) [77].
[1449] *Loizidou v Turkey* (Judgment) App. No 15318/89 (18 December 1996) [52].
[1450] *Banković and Others v Belgium et al* Admissibility Decision App no 52207/99 (12 December 2001) [71].

portion of territory – individuals within that area would fall within the State's espace juridique for that period.[1451] In *Al-Saadoon*, the Court held that the applicants had been brought within the UK's jurisdiction through their arrest and detention and remained within its judicial space for the purposes of the ECHR until they were transferred to Iraqi control.[1452]

Importantly, in *Al-Skeini* the Court held that jurisdiction may be found outside the physical territory of the Council of Europe Member States[1453] and a 'use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction.'[1454] The Court provided examples and stated 'What is decisive in such cases is the exercise of physical power and control over the person in question.'[1455] Further, the Court seemed to backtrack from *Banković* and held that 'whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms… of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored".'[1456] The Court has subsequently acknowledged extraterritorial jurisdiction in State uses of force 'going beyond physical power and control exercised in the context of arrest or detention' that were 'isolated and sporadic' and involved 'an element of proximity.'[1457]

The UK Government declined to provide details of its understanding of the applicable law regarding drone strikes outside an armed conflict to the JCHR

[1451] *Issa and Others v Turkey* [74].
[1452] *Al-Saadoon and Mufdhi v United Kingdom* App. no. 61498/08 (ECHR, 2 March 2010).
[1453] *Al-Skeini and Others v United Kingdom* App. no. 55721/07 (ECHR, 7 July 2011) [142].
[1454] Ibid., [136].
[1455] Ibid., [136].
[1456] Ibid., [137].
[1457] *Georgia v Russia (II)* App no 38263/08 (21 January 2021) [131]-[132].

enquiry.[1458] In a letter, Michael Fallon stated that the Court of Appeal's decision in *Al-Saadoon*[1459] confirmed that the use of force by a State against an individual does not bring them within the jurisdiction of that State and so HRL does not apply, regardless of the existence of an armed conflict.[1460] Lord Justice Lloyd Jones disagreed with the proposition that the concept of jurisdiction articulated in *Al-Skeini* results in a requirement for Contracting States to refrain from using physical force in a non-complaint manner. He argued that *Al-Skeini* requires 'a greater degree of power and control' than 'the use of lethal or potentially lethal force alone.' He contended that the ECtHR required 'that there be an element of control of the individual prior to the use of lethal force.'[1461] He further stated that if *Al-Skeini* means 'any use of extra-territorial violence is within the acting State's jurisdiction' then this needs to be made clear by the Court itself.[1462] It is suggested that this was clarified in *Carter v Russia*.[1463]

In *Carter*, the Court held that the persons who administered poison to Mr Litvinenko had him under their 'physical control' as he could not 'escape the situation' and they 'wielded power over his life.'[1464] Consequently, 'the administration of poison to Mr Litvinenko… amounted to the exercise of physical power and control over his life in a situation of proximate targeting.' Consequently, if attributable to the State, 'it was capable of falling within the jurisdiction of that State.'[1465] Here the Court appears to be applying a

[1458] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing: Government response to the Committee's second report of session 2015-16* (2016-17, HL 49, HC 747) 4[8]-[9], 6.
[1459] *Al-Saadoon and Others v Secretary of State for Defence* [2017] 2 WLR 219.
[1460] Appendix: Letter from Rt Hon Michael Fallon MP, Secretary of State for Defence. JCHR, *The Government's Policy on the Use of Drones for Targeted Killing: Government response to the Committee's second report of session 2015-16* (2016-17, HL 49, HC 747) 24.
[1461] *Al-Saadoon and Others v Secretary of State for Defence* [2017] 2 WLR 219 per Lloyd Jones LJ [69].
[1462] Ibid., [70].
[1463] *Carter v Russia* App no 20914/07 (21 September 2021).
[1464] Ibid., [160].
[1465] *Carter v Russia* App no 20914/07 (21 September 2021) [161].

functional form of jurisdiction, finding its presence on the basis of the ability of the State to impact the right to life.[1466]

Accordingly, it is argued that Khan was within the UK's jurisdiction at the time of his death. Analogous to *Carter*, the drone operator was acting under the directions of the State[1467] and had Khan under their physical control as they watched him from above choosing the moment to strike. He was unable to escape, and they wielded the power of life and death over him. The fact that it was a missile rather than poison does not prevent it from being an 'exercise of physical power and control over his life in a situation of proximate targeting.'[1468] Khan was identified, followed, and then killed. The drone was above him and of sufficient proximity that it was able to deliver the fatal strike.

The situation can be distinguished from *Banković*, which involved the killing of civilians in an indiscriminate use of force, as the calculated nature of the act, choosing the moment when to end an identified person's life, is, arguably, the ultimate form of control. Similarly, the killing of Khan can be distinguished from *Georgia* where the ECtHR declined to find jurisdiction for a substantive breach of Article 2 during the active phase of the armed confrontation, in the 'context of chaos', on the basis that the purpose of the conflict was to establish control.[1469] The UK was not participating in an armed conflict in Syria at the time and was not engaged in artillery shelling or other military operations.

[1466] M. Milanović, 'European Court finds Russia Assassinated Alexander Litvinenko' (*EJIL: Talk!*, 23 September 2021) <https://www.ejiltalk.org/european-court-finds-russia-assassinated-alexander-litvinenko/#:~:text=On%20Tuesday%20a%20Chamber%20of,07%2C%2021%20September%202021).> accessed 12 April 2023.
[1467] Prime Minister David Cameron, HC Deb 7 September 2015, vol 599, col 25.
[1468] *Carter v Russia* App no 20914/07 (21 September 2021) [161].
[1469] *Georgia v Russia (II)* App. no. 38263/08 (ECHR, 21 January 2021) [126].

The situation does not fit neatly into an existing legal paradigm and there is no ECtHR jurisprudence directly on the matter of targeted killings outside of an armed conflict. However, although it can be argued, following *Banković*, that Khan was outside the UK's jurisdiction as he was in Syria and the UK did not have any on the ground control, more recent caselaw demonstrates an expansion of the understanding of jurisdiction that more appropriately reflects the impact of State action and use of force on individuals and better upholds the fundamental principles of HRL.

Drones bridge the gap between opposing forces, bringing the enemy and their context closer, enabling them to be watched and assessed.[1470] Consequently, they should not be viewed as a remote use of force simply on the basis that the operator is in a different country and bears no risk to themselves. Rosén suggests that the length of time a person is surveyed is pivotal to the question as to whether the State exercised effective control.[1471] However, although this may be a relevant factor, the ultimate control being exercised is the taking of life and this is the element that arguably generates jurisdiction and so responsibility. Additionally, if States are seeking to stretch the application of concepts such as self-defence to include individuals, it is logical to also expand the scope of HRL as it cannot be acceptable to allow States to escape their human rights obligations because the person they have chosen to summarily execute is outside their territorial jurisdiction.

As the UDHR has arguably attained customary status[1472] and, although human rights treaties may be limited in their application, this does not apply

[1470] F. Rosén, 'Extremely Stealthy and Incredibly Close: drones, control, and legal responsibility' (2014) 19(1) Journal of Conflict and Security Law 113, 117.
[1471] Ibid., 121.
[1472] E.g., H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25(1) Georgia Journal of International and Comparative Law 287.

to customary HRL.[1473] Human rights always apply, and a State should not be permitted to choose the most convenient legal framework to justify its actions. The human rights of Khan and his companions were not considered in the decision to kill him extrajudicially and the situation is not analogous to the shooting of a person suspected of being about to detonate a device in a civilian location.

8.3. Report to Parliament of the killing

On 7 September 2015 in the House of Commons, Prime Minister David Cameron delivered a statement informing the House of an extrajudicial killing conducted by UK armed forces. The strike against Khan was the first time the UK executed a lethal drone strike against a terrorist target outside participation in a military campaign,[1474] meaning outside an armed conflict situation. Cameron asserted the killing was an act of self-defence 'to protect our country from a terrorist attack'[1475] and contextualised the event by referencing 15 ISIL attacks in 2014 and 150 in 2015, including in Tunisia,[1476] which was the largest loss of British life to terrorism since 7/7.[1477] To emphasise the proximity of the threat, Cameron added that security services had prevented 'at least six different attempts to attack the UK in the past 12 months alone.'[1478] This discourse frames the event in fear and threat, evoking the securitisation of terrorism and consequent necessity to take extraordinary measures to protect the State.

[1473] N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 232-5.
[1474] Intelligence and Security Committee, *UK Lethal Drone Strikes in Syria* (2017, HC 1152) [3].
[1475] Prime Minister David Cameron, HC Deb 7 September 2015, vol 599, col 25.
[1476] Ibid.
[1477] Grierson, J., 'Sousse Terror Attack: the 30 British victims' (*The Guardian*, 28 February 2017) <https://www.theguardian.com/world/2017/feb/28/sousse-terror-attack-the-30-british-victims> 17 July 2021.
[1478] Prime Minister David Cameron, HC Deb 7 September 2015, vol 599, col 25.

Cameron continued, declaring himself prepared to take action to prevent a 'direct threat to the British people.'[1479] Referring to media reports of the killing circulating prior to his Parliamentary statement Cameron continued stating the British persons killed had been 'plotting attacks against the UK' and were 'actively recruiting ISIL sympathisers and seeking to orchestrate specific and barbaric attacks against the west' including Britain.[1480] Although referencing 'specific and barbaric' attacks, no details were given of the alleged plots. Downing Street later indicated two plots on VE Day in May and Armed Forces Day in June.[1481] It was not explained why the airstrike was still considered necessary in self-defence after the alleged identified attacks had failed to materialise.

Nonetheless, the Prime Minister made it clear that there were two threats presented by Khan against the UK: the recruitment of people to the ISIL cause and the orchestration of attacks in Britain. This has the effect of making the danger at once external and internal. External due to Khan's locus in Syria, and internal due to his ability to effect an attack in Britain. Such an all-encompassing threat, which touches on both the interior and exterior life of the State, is obviously extremely dangerous and requires a response.

[1479] Ibid.
[1480] Ibid.
[1481] E. MacAskill and R. Norton-Taylor, 'How UK Government Decided to Kill Reyaad Khan' *The Guardian* (8 September 2015) <https://www.theguardian.com/world/2015/sep/08/how-did-britain-decide-to-assassinate-uk- ISIL-fighter-reyaad-khan-drone-strike> accessed 14 July 2023; N. Watt, P. Wintour, and V. Dodd, 'David Cameron Faces Scrutiny Over Drone Strikes Against Britons in Syria' *The Guardian* (8 September 2015) <https://www.theguardian.com/world/2015/sep/07/david-cameron-justifies-drone-strikes-in-syria-against-britons-fighting-for- ISIL> accessed 14 July 2023.

8.3.1. Securitisation of Islamic Extremism

It is a choice to phrase an issue in terms of security.[1482] In his speech, Cameron claimed the UK faces an 'acute' threat from Islamic extremism. Here, Cameron takes the role of a 'securitising actor' and constructs Islamic extremism, which is synonymous with terrorism, as a security issue that requires an immediate response,[1483] connecting to the pre-existing securitisation of terrorism.[1484] Designating Islamic extremism a 'security issue' means it becomes one. The UK (the referential object) is existentially threatened by this ideology, meaning that unless something is done, the UK will be fundamentally altered.[1485]

Cameron outlined legislative and strategic measures taken to confront the threat, the cause of which being 'the poisonous ideology of Islamist extremism,' by confronting all extremism, not just the violent kind.[1486] The language here reflects that of Bush's 2002 security strategy[1487] and indicates that perceived threats will be eradicated at even the most nascent stage, such as the exchange of ideas. It also serves to demonstrate to gainsayers that the normal sphere has been appropriately utilised and reinforce the assertion that extraordinary measures are necessary to secure the State's survival.

The UK Counter-Extremism Strategy defines extremism as 'the vocal or active opposition to our fundamental values, including democracy, the rule

[1482] B. Buzan, O. Wæver, and J. de Wilde, *Security: a new framework of analysis* (Lynne Reinner 1998) 211.
[1483] Ibid., 26.
[1484] Chapter 4: 4.3.1.
[1485] B. Buzan, O. Wæver, and J. de Wilde, *Security: a new framework of analysis* (Lynne Reinner 1998) 24.
[1486] Prime Minister David Cameron, HC Deb 7 September 2015, vol 599, col 25.
[1487] Stating, 'as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed.' White House, *The National Security Strategy of the United States of America* (September 2002) <https://2009-2017.state.gov/documents/organization/63562.pdf> accessed 14 July 2023.

of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs.'[1488] This categorises any person who does not ascribe to democracy, such as a Socialist or Anarchist, as an extremist.[1489] Combined with the broad definition of terrorism,[1490] criticised by the HRC as being overly restrictive of political expression,[1491] any level of opposition to the status quo could be defined as extremist, contributing to the 'othering' of minorities. As a 'relational concept',[1492] extremism requires a counterpoint, which the Government asserts is 'our fundamental values.'[1493] Consequently, the willingness of the government to forcefully eliminate any level of perceived threats (here meaning any expressed views classified as contrary to mainstream thought) presents an actual threat to the Article 2 rights of any person with different opinions that can be brought under the securitising banner.[1494] This laid the foundation for the explanation of the drone strike against Khan. From his words, Islamic extremism is to be viewed as an existential threat, requiring a robust response.

Cameron employed the securitising tactic again in the December 2015 Commons debate on military action in Syria arguing that 'we face a fundamental threat to our security' from ISIL who 'attack us because of who we are, and not because of what we do.'[1495] This presents the unreasonable nature of the threat, utilising similar rhetoric to Obama and Hollande

[1488] Home Office, *Counter-Extremism Strategy* (Cm 9148, Counter-Extremism Directorate: UK Home Office 2015) 9.
[1489] It is also contradictory as one of the fundamental values is respect and tolerance for different beliefs.
[1490] S.1 Terrorism Act 2000.
[1491] HRC, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland CCPR/C/GBR/CO/7 (17 August 2015) [14].
[1492] M. Malik, 'Engaging with Extremists' (2008) 22 International Relations 85, 88.
[1493] Home Office, *Counter-Extremism Strategy* (Cm 9148, Counter-Extremism Directorate: UK Home Office 2015) 9.
[1494] Other human rights, such as the right to freedom of expression (Art 10 ECHR), are also engaged but fall outside this thesis.
[1495] HC Deb 2 December 2015, vol 603, col 329.

asserting that it is 'our' very nature that ISIL objects to.[1496] Thus, criticisms followers of ISIL or persons sympathetic to their ideology may have towards the UK, such as Khan's view that public money would be better spent in local communities than in war, are delegitimised.

The urgency of the situation was emphasised as 'we should not wait any longer' to confront the threat,[1497] implicitly suggesting that delay would seriously harm the State. To emphasise his point, Cameron asserted that 'ISIL has brutally murdered British hostages' and 'inspired the worst terrorist attack against British people since 7/7 on the beaches of Tunisia, and it has plotted atrocities on the streets here at home.'[1498] He further added that in just over a year, 'security services have foiled no fewer than seven different plots against our people, so this threat is very real.'[1499]

As though to avoid any further consideration of the point, because if security services were successfully thwarting ISIL attempts to attack Britain it would seem military action was unnecessary, and emphasise the urgency, Cameron presented the House with a binary choice. Either the UK worked with its allies to destroy the threat, or it waits for the threat to arrive.[1500] Combined with the reported urging of Conservative MPs that they, '…should not be walking through the lobbies with Jeremy Corbyn and a bunch of terrorist

[1496] E.g., President Barack Obama, referring to the Paris attacks, stating, 'This was an attack on our free and open societies,' and President Hollande declaring that, 'France came under attack for what it represents, for what it stands for, for its culture, our way of living, as well as our values, our principles.' Office of the Press Secretary, 'Remarks by President Obama and President Holland of France in Joint Press Conference' *The White House* (24 November 2015) <https://obamawhitehouse.archives.gov/the-press-office/2015/11/24/remarks-president-obama-and-president-hollande-france-joint-press> accessed 13 July 2023.
[1497] HC Deb 2 December 2015, vol 603, col 325.
[1498] HC Deb 2 December 2015, vol 603, col 324.
[1499] Ibid.
[1500] Ibid.

sympathisers,'[1501] the use of security speech around ISIL made opposition to airstrikes and other uses of force difficult to coherently articulate.

Additionally, the use of force against terrorists is viewed as an assertion of sovereignty and the manifestation of the social contract – the State is fulfilling its duty to protect its citizenry in return for its monopoly on the use of force.[1502] The subsequent approval of the motion demonstrates that the securitisation was successful.[1503]

8.4. Self-defence Against NSAs

From a State perspective, the assertion of self-defence falls under the jus ad bellum and justifies what would otherwise be unlawful aggression against another State's sovereignty.[1504] The concept is traditionally connected to a use of force from another State.[1505] The attack compromises the State's freedom, and they are permitted to act to defend it.[1506] Consequently, the action taken in response is limited to the repulsion of the armed attack.[1507] NSAs have previously been considered only in the context of acting on behalf of a State[1508] and their acts must reach the scale and effects of an armed attack.[1509] Prior to 9/11, State use of force against terrorist NSAs was limited to Israel and the US and not generally supported as self-defence.[1510]

[1501] N. Watt, 'David Cameron Accuses Jeremy Corbyn of being 'Terrorist Sympathiser'' (*The Guardian*, 2 December 2015) <https://www.theguardian.com/politics/2015/dec/01/cameron-accuses-corbyn-of-being-terrorist-sympathiser> accessed 27 March 2021.
[1502] N.D. White and A. Davies-Bright, 'Drone Strikes: a remote form of self-defence?' in J.D. Ohlin (ed), *Research Handbook on Remote Warfare* (Edward Elgar 2017) 215.
[1503] P. Wintour, 'Britain Carries Out First Syria Airstrikes After MPS Approve Action Against ISIL' *The Guardian* (3 December 2015) <https://www.theguardian.com/world/2015/dec/02/syria-airstrikes-mps-approve-uk-action-against- ISIL-after-marathon-debate> accessed 13 July 2023.
[1504] See Chapter 4, 4.4.
[1505] I. Brownlie, *International Law and the Use of Force by States* (OUP 1963) 255.
[1506] G.P. Fletcher and J.D. Ohlin, *Defending Humanity* (OUP 2008) 48, 51.
[1507] A. Cassese, *International Law* (2nd edn, OUP 2005) 355.
[1508] UNGA Resolution 3314 (14 December 1974) Annex, Article 3(g).
[1509] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, [191].
[1510] C. Gray, 'The Use of Force and the International Legal Order' in M. Shaw (ed), *International Law* (5th edn, OUP 2018) 615.

The US' post-9/11 invasion of Afghanistan was widely accepted as an act of self-defence.[1511] UNSC resolutions 1368 and 1373, passed in response to the incident, recognised the right to self-defence in the context of terrorism. Consequently, large scale attacks by NSAs may amount to an 'armed attack' within the meaning of Article 51 without requiring a corollary attribution to a State.[1512] There is significant consensus that 9/11 was an armed attack, justifying a military response[1513] over a criminal law approach, undermining the US' previous position that domestic courts are sufficient to deal with international terrorism. [1514] The attack, followed by attacks elsewhere, exemplified the need to pursue a preventative strategy, as opposed to the traditional post-facto pursuit of criminal justice.[1515]

Nonetheless, the action against al-Qaeda in Afghanistan was still framed as being connected to the State due to the Taliban regime's alleged support of al-Qaeda,[1516] meaning it fell within the established legal rules. Since then, the US has significantly expanded self-defence, asserting the right 'is not restricted to threats posed by States,' relying on the *Caroline* incident and asserting wide acceptance.[1517] The doctrine has expanded beyond a literal

[1511] E.P.J. Myjer & N.D. White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?' (2002) 7 *Journal of Conflict and Security Law* 5, 7.
[1512] *Congo* (n) (Separate Opinion of Judge Kooijmans) 314[28]-[9] and (Separate Opinion of Judge Simma) 337[11].
[1513] SD Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter' (2002) 43 *Harvard International Law* Journal 41, 49
[1514] A. Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 EJIL 993, 994.
[1515] D Moeckli, 'The Selective 'War on Terror': Executive Detention of Foreign Nationals and the Principle of Non-Discrimination' (2006) 31 *Brooklyn Journal of International Law* 495, 504.
[1516] UNSC, 'Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council' (7 October 2001) UN Doc S/2001/946; UNSC, Letter dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council' (7 October 2001) UN Doc S/2001/947.
[1517] See, e.g., NSC, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (*White House*, December 2016) 9[2] <https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf> accessed 26 June 2023.

reading of Article 51 UNC to include defence of *all* aspects of a State[1518] and any contemplation of an attack, irrespective of the NSAs ability.[1519]

For example, Politicians now assert the right of self-defence against threats to nebulous concepts such as 'values.' Thus, States have moved beyond conceptualising self-defence as being limited to defence against a physical act of aggression. In 2020, French President Emmanuel Macron announced new laws to 'defend the republic and its values' from religious 'separatism' that promotes 'other values.'[1520] Speaking at the tribute to Samuel Paty, the schoolteacher beheaded in Paris by a terrorist,[1521] Macron stated that, 'Islamists want our future.'[1522] Also speaking after the terrorist attacks in Paris, David Cameron stated that ISIL 'want to destroy everything our countries stand for – peace, tolerance, liberty – but we will not let them.'[1523]

The acceptance of a broad, all-encompassing right to self-defence and assertion of an 'unable or unwilling' doctrine, has not been widespread, with other States justifying military action, for example in Syria, on an alternative or exceptional legal basis.[1524] However, acknowledging that self-defence has expanded to include NSAs acting apart from a State, there is no evidence it

[1518] N.D. White and A. Davies-Bright, 'Drone Strikes: a remote form of self-defence?' in J.D. Ohlin (ed), *Research Handbook on Remote Warfare* (Edward Elgar 2017) 216.
[1519] J. McCulloch and S. Pickering, 'Pre-Crime and Counterterrorism: Imagining Future Crime in the 'War on Terror'' (2009) 49 *British Journal of Criminology* 628, 636.
[1520] K. Willsher, 'Macron Outlines New Law to Prevent "Islamic Separatism" in France' *The Guardian* (2 October 2020) <https://www.theguardian.com/world/2020/oct/02/emmanuel-macron-outlines-law-islamic-separatism-france> accessed 8 July 2023.
[1521] K. Willsher, 'Teacher Decapitated in Paris Named as Samuel Paty, 47' *The Guardian* (17 October 2020) <https://www.theguardian.com/world/2020/oct/17/teacher-decapitated-in-paris-named-as-samuel-paty-47> accessed 8 July 2023.
[1522] E. Macron, 'National tribute to the memory of Samuel Paty – Speech by Emmanuel Macron, President of the Republic, at the Sorbonne' (*France Diplomacy*, 21 October 2020) <https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/freedom-of-religion-or-belief/article/national-tribute-to-the-memory-of-samuel-paty-speech-by-emmanuel-macron> accessed 8 July 2023.
[1523] L. Dearden and S. Osborne, 'Paris attack live: Attackers wore 'identical' explosive devices and worked in three teams, French prosecutor says' *The Independent* (14 October 2015) <https://www.independent.co.uk/news/world/europe/paris-attacks-latest- ISIL-claims-responsibility-for-suicide-bombings-shootings-after-france-declares-state-of-emergency-live-updates-a6734381.html> accessed 8 July 2023.
[1524] Gray (2018) 616.

has widened to support an assertion of self-defence against an *individual person*.

8.4.1. Self-defence Against an Individual

In killing Khan, the UK asserted that it was necessary to kill him as an *individual* due to *his* aggression and the direct threat he posed to the UK at that time. The action was not taken in the context of a broader claim of self-defence against ISIL in Syria and the government did not target him as an ISIL member but as a threat in himself. The assertion was that self-defence was necessary against *Khan*. Through this contention, the Government sought to shine 'a light of rectitude on the harm done, thus casting the conduct in relief as lawful and free from stigma, even as the shadow' of the harm remains.'[1525] Killing is a prohibited act, preventing an attack is a justified act, meaning the attack can be stopped despite the indirect consequence being fatal for the aggressor.[1526] Cameron sought to justify what would otherwise be a prohibited (and criminal) extrajudicial killing by the State.

In the case of killing another person, the crime would be murder, defined in English law as the unlawful killing of a person outside armed conflict with the intent to cause death or grievous bodily harm.[1527] Establishing the necessary and sufficient conditions for liability are the basic norms of criminal law.[1528] A killing perpetrated by a British citizen outside the UK may still be tried in England,[1529] meaning a murder committed by a person within the UK would be prosecutable even though the victim was elsewhere. Thus, the drone

[1525] G.P. Fletcher and J.D. Ohlin, *Defending Humanity* (OUP 2008) 34.
[1526] Ibid., 34.
[1527] Coke 3 Inst 47 cited in D. Ormerod and K. Laird, *Smith, Hogan, and Ormerod's Criminal Law* (16th edn, 2021 OUP) 523.
[1528] H.L.A. Hart, 'The Ascription of Responsibilities and Rights' (1949) 49 Proceedings of the Aristotelian Society 171, 180, 188-90.
[1529] S.9 Offences Against the Person Act 1861.

operator and person who gave the order are potentially criminally liable for murder.[1530] They could raise private and public self-defence as a justification but would encounter significant difficulty, not least because of a lack of proximity, imminence,[1531] and the operator's genuine belief that, in the circumstances, force was necessary.[1532] Additionally, the use of a missile would need to be reasonable in the circumstances.[1533] This consideration may have contributed to the JCHR erroneously accepting the government's later assertion that the strike took place within an armed conflict against ISIL in Syria.[1534]

Should the operator be able to raise a claim of self-defence against a charge of murder, this would be at the individual and not State level. In the instances outlined above of State agents applying lethal force in purported self-defence, the UK did not claim this was an act of *State* self-defence. The State was responsible for its agent acting under its authorities and their actions were attributable to the UK. However, the act of self-defence was based on the officers/soldiers being in the situation and responding to the circumstances as they claimed to believe them to be.[1535] Thus, the UK's claim to have a right of self-defence against an individual person does not find support in either international or domestic law.

[1530] As acknowledged by the JCHR. JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 15[1.9].
[1531] *Devlin v Armstrong* [1971] NI 13.
[1532] *Keane* [2010] EWCA Crim 2514; *Noye* [2011] EWCA Crim 650.
[1533] *Harvey* [2009] EWCA Crim 469.
[1534] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 35[2.29].
[1535] Chapter 6, 6.5, 6.8; Chapter 7, 7.6.

8.4.2. Applying Self-defence[1536]

8.4.2.1. Armed Attack

Putting aside the legitimacy of the UK asserting self-defence against an individual, for the act to be legitimate, there would need to be an armed attack. Khan was accused of planning attacks in the UK, but not to the level of an armed attack. Contemporaneous events in Europe attributed to ISIL, such as the killing of 38 tourists by a gunman in Tunisia,[1537] were arguably not of sufficient gravity as to amount to an armed attack. Nevertheless, Defence Secretary Michael Fallon used the Tunisian example to justify using lethal force to avoid such an event.[1538] This contradicts the Government's later statement that, in relation to NSAs, the threshold is 'where terrorist violence reaches a level of gravity such that were it to be perpetrated by a State it would amount to an armed attack,'[1539] which appears to accord with the ICJ's judgments.[1540]

However, in the Memorandum to the JCHR, the Government stated that 'individual terrorist attacks, or an ongoing series of terrorist attacks, may rise to the level of an "armed attack" for these purposes if they are of sufficient gravity,'[1541] conflicting with the ICJ position that each incident is to be viewed separately.[1542] The Government additionally asserted that 'the

[1536] This section follows the broad self-defence criteria outlined in Chapter 4, 4.4.
[1537] The 2015 attack in Tunisia (approximately two months prior to the killing of Khan), was a mass killing event and not an armed attack. BBC News, 'Tunisia attack: what happened' *BBC News* (1 February 2017) available: <https://www.bbc.co.uk/news/world-africa-33304897> accessed 27 February 2022.
[1538] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 36[2.36].
[1539] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing: Government response to the Committee's second report of session 2015-16* (2016-17, HL 49, HC 747) 5[11].
[1540] See Chapter 4: 4.4.2.1.2.
[1541] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 41[3.14].
[1542] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14; *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 161; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168.

scale and effects of ISIL's campaign are judged to reach the level of an armed attack against the UK,'[1543] although failed to provide the basis for this conclusion. Similarly, the JCHR asserted, without reference to an applicable document, that the UNSC had accepted that attacks by ISIL on the UK amounted to an armed attack.[1544]

Whether ISIL's activities reach the level of armed attack is a separate issue as the UK asserted the right to self-defence against Khan *as an individual*. Thus, *Khan's* activities needed to meet the scale and effects of an armed attack. The references to attacks orchestrated by or connected to Khan were either future, had already been foiled, or had simply not occurred.[1545] A failed attempt cannot be an armed attack – there is an important legal distinction between an attempted and a completed crime.[1546] Consequently, the threat posed by Khan in directing persons within the UK to effect terrorist incidents did not meet the required level to trigger the right of self-defence.

8.4.2.2. Unlawful

Further, for self-defence to be activated, the alleged threat must emanate from an unlawful use of force. As a citizen, Khan could not commit the crime of aggression [1547] and the State does not employ self-defence when addressing criminal behaviour, even where the offences involve an extra-territorial aspect.

[1543] JCHR, *Government Memorandum to the JCHR* (2015-16, HL 141, HC 574).
[1544] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 44[3.29].
[1545] Ibid., [3.27].
[1546] See, e.g., D. Ormerod and K. Laird, *Smith and Hogan's Criminal Law* (16th edn, OUP 2021) 412ff.
[1547] Article 5(d), Article 8bis Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

8.4.2.3. Imminent

Any armed attack would need to be imminent. The UK's position is that anticipatory self-defence is legitimate.[1548] However, it seems to have gone beyond the traditional position, in line with *Caroline*, that imminence in a pre-emptive situation means action can only be taken in 'the most compelling emergency.'[1549] When asked whether imminence means 'so proximate that it leaves no time for deliberation,'[1550] Fallon indicated the use of a more exceptionalist 'case-by-case' definition.[1551]

In its Memorandum, the Government stated in relation to Khan that there was evidence of: 'Khan's involvement in planning and directing a series of attacks;' his 'intent and capability of delivering the attacks;' the current status of the threat; and that 'an attack could have become a reality at any moment and without warning.'[1552] However, Khan was not going to deliver the attacks himself and an intent cannot amount to imminence as it is potential, not actual, action. Further, the Government's use of a hypothetical shows the attacks were not actual.

Furthermore, the authorisation of the use of force against Khan was provided approximately three months ahead of his killing,[1553] raising further doubts as to imminence. The time delay would suggest a lack of imminence. Thus, the UK appears to have reinterpreted 'imminence' in this context to merely mean 'existing.'

[1548] JCHR, *Oral Evidence* (2015-16, HC 574) 7.
[1549] E. Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-defence' (2006) 55(4) ICLQ 963 971; Leiden Policy [47].
[1550] JCHR, *Oral Evidence* (2015-16, HC 574) 9.
[1551] Ibid., 10.
[1552] JCHR, *Government Memorandum to the JCHR* (2015-16, HL 141, HC 574) 3.
[1553] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 47[3.39].

This proposition is supported by Fallon's apparent acceptance of MP Harriet Harman's summary of his definition of imminence as meaning it can be ongoing, 'somebody by their very nature, by their ongoing commitment to a particular course of action, can be an ongoing imminent threat by virtue of what they have done in the past and their general way of going about things.'[1554] Thus, the UK has defined an imminent threat as existing by virtue of the *nature* of a person. This is a serious affront to the concept of all persons being endowed with human dignity by their nature[1555] and is the ultimate 'othering' of terrorist suspects. It is their *nature* that identifies them as an imminent threat, not solely their actions. Consequently, as their nature endows them with 'imminent threat' status, they can no longer be endowed with human dignity and so fall outside the category of human protected by HRL.

8.4.2.4. Necessary

Cameron argued there was 'no alternative' to the strike on Khan due to the situation in Syria and Khan's persisting 'desire to murder us at home.' Consequently, 'the airstrike was the only feasible means of effectively disrupting the attacks that had been planned and directed.' [1556] The Government's Memorandum stated that lethal force will be used when there are no alternatives for self-defence and 'no other means to detain, disrupt or otherwise prevent those plotting acts of terror.'[1557] This would appear to diminish the imminence of an attack as plotting is not the same as executing an attack and so does not create imminence.

[1554] JCHR, *Oral Evidence* (2015-16, HC 574) 10.
[1555] Chapter 3, 3.2.
[1556] Prime Minister David Cameron HC Deb 7 September 2015 Vol 599 Col 25-6.
[1557] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 35[2.32].

Similarly, Cameron's claim that 'their intention was the murder of British citizens, so on this occasion we ourselves took action'[1558] further shows a lack of imminence and is more a tacit recognition that the UK had inflicted a form of capital punishment upon Khan.[1559] Additionally, although the ECtHR has afforded States a degree of latitude in interpreting the necessity requirement, acknowledging challenges of terrorist violence, [1560] this situation had no 'heat of the moment' as the operation had been 'meticulously planned' over a period of months.[1561] Khan was subjected to a pre-meditated, intentional use of lethal force by the UK, in violation of HRL.[1562]

Moreover, the Cameron also stated that 'the primary objective' of the wider ongoing intelligence operation, which included the Khan strike, 'remains to identify and disrupt external attack planning… against the UK.'[1563] Thus contextualising the killing of Khan as one facet of an intelligence operation as opposed to a necessary act to thwart an imminent attack. Additionally, the plots Khan was allegedly connected to had been thwarted,[1564] indicating that this was more an extrajudicial punishment for criminal attempts.

8.4.2.5. Proportionate

The proportionality of the strike is difficult to measure as the materials relating to the strike were kept secret. The ISCP was not confident it had received the full facts[1565] but recognised 'that the Government had to tackle

[1558] HC Deb col 25.
[1559] N.D. White and A. Davies-Bright, 'Drone Strikes: a remote form of self-defence?' in J.D. Ohlin (ed), *Research Handbook on Remote Warfare* (Edward Elgar 2017) 229.
[1560] *Finogenov and Others v Russia* App nos 18299/03 and 27311/03 (Judgment) (20 December 2011) [211]-212.
[1561] David Cameron HC Deb
[1562] UNGA, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' (28 May 2010) UN Doc A/HRC/14/24/Add.6 [9].
[1563] HC 1152 UK Lethal Drone Strikes in Syria [6]
[1564] Intelligence and Security Committee of Parliament (ISCP), *UK Lethal Drone Strikes in Syria* (HC 2013 1152) [21].
[1565] ISC Report 24[72].

the threat at source and seek to disrupt Khan himself.'[1566] This is not a declaration that a remote missile strike was proportionate.

Given that States have eschewed the death penalty, even for the worst offenders, death is a de facto disproportionate response to a person's criminal behaviour. The defence against suspected terrorism does not automatically justify a use of lethal force against the would-be aggressor.[1567] Further, as there was no armed attack and a lack of imminence, the use of intentionally lethal force cannot be supported.

Consequently, although a State cannot invoke self-defence against a person, the criteria are not satisfied. However, as the UK constructed Khan as a threat by his nature, presumably any action is acceptable. Thereby demonstrating not only the ineffectiveness of HRL to protect terrorist suspects in a counterterrorism context, but also its inability to prevent the denial of a person's dignity.

8.4.3. Constructing Khan as a Threat

By constructing Khan as a threat, Cameron justified the extraordinary response, tacitly acknowledging the absence of a coherent legal basis for the strike. Within the macrosecuritisation of terrorism context, the securitisation of Khan asserts the threat he presents is so severe, the normal rules are inapplicable. Following the practice of 'othering' and dehumanising of the person articulated as 'the enemy,'[1568] the language used around the killing shows a dehumanisation of Khan, which facilitates the threat construction.

[1566] ISC Report 16[41].
[1567] H. Duffy, *The "War on Terror" and the Framework of International Law* (2nd edn, CUP 2015) 502.
[1568] Chapter 4: 4.3.1.2. Also, e.g., Israeli spokesperson, Mr Gillerman, described Sheikh Yassin, in defence of his targeted killing by Israeli security forces, as 'an arch-terrorist with international aims…,' implying that this characteristic deprived him of legitimacy and rights *as a person*. UNSC (23 March 2004) UN Doc S/PV/4929.

Speaking before the JHRC, Michael Fallon declared that 'These were people fighting for ISIL. They were not innocent civilians,'[1569] implying that their guilt made them less deserving of human rights protections. He also made the distinction between Khan and other British nationals stating, 'we are talking about preventing loss of life… among our own people.'[1570] Thus, indicating that, despite his British nationality, Khan was not considered to be part of the British people.

Similarly, MP Liam Fox wrote that the victims 'were part of a barbaric organisation involved in systematic gang rape, torture and beheadings' in support of the killings and against the legal scrutiny of the act, thereby implying that their behaviour denied them human rights.[1571] The ECtHR also arguably demonstrated this thinking when it declined to award damages for the violation of Article 2 ECHR to the family of the three killed in Gibraltar on the basis that they were terrorists.[1572] This line of argument conflates the legitimacy and authority of the act with the result – because Khan was a terrorist with aspirations of co-ordinating an attack in the UK, the act was justified and legitimate.[1573] However, self-defence should be aimed at repelling an act, not inflicting damage 'according to the deserts of the aggressor.'[1574] Consequently, the UK government needed to not only demonstrate that the situation met the criteria outlined above, but that it also specifically applied to Khan *as an individual*.

[1569] JCHR *Oral Evidence* (HC 2015-16, 574) 15.
[1570] JCHR, *Oral Evidence* (2015-16, HC 574) 7 <https://committees.parliament.uk/oralevidence/5260/pdf> accessed 20 July 2021.
[1571] L. Fox, 'Drone Strikes in Syria are not Just Legally Justified' *Independent* (9 September 2015) <https://www.independent.co.uk/voices/comment/drone-strikes-in-syria-are-not-just-legally-but-morally-justified-10493619.html> accessed 29 September 2020.
[1572] *McCann and Others v United Kingdom* App No 18984/91 (27 September 1995) [219].
[1573] US President Barack Obama more overtly utilised the same argument when announcing the killing of Osama bin Laden and asserting 'justice has been done.' See, D. Fraser, 'Evil Law, Evil Lawyers? From the Justice Case to the Torture Memos' (2012) 3(2) Jurisprudence 391.
[1574] G.P. Fletcher and J.D. Ohlin, *Defending Humanity* (OUP 2008) 57.

8.4.4. Exceptionalising the threat

The macrosecuritisation of terrorism allows for the erosion of well-established legal frameworks. The JCHR contextualised the discussion as being within a 'new situation,'[1575] asserting that advances in technology enabling instant communication means terrorist attacks can be remotely launched from anywhere in the globe, without warning, and at any time.[1576] However, this is a hypothetical situation and not a reality. Fears of an unknowable future are not an appropriate basis for the interpretation and application of existing legal frameworks.

The second exceptional situation claimed by the JCHR is the 'changing nature of armed conflict' due to the increase in NSAs, particularly ISIL.[1577] It is argued that much of the exceptionalism comes from States choosing not to utilise criminal law to confront the issue, instead choosing to expand the application of IHL and undermine HRL. The 'blurring of the lines' between IHL and counterterrorism comes from the assertion that transnational terrorism is somehow new and cannot be confronted within existing legal frameworks.[1578] However, NSAs attempting to effect terrorist attacks in other States is not new and was previously confronted through criminal law.[1579] The use of IHL as the default legal framework is inappropriate as it creates a perpetual armed conflict situation and undermines human rights.

[1575] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 18.
[1576] Ibid., 19[1.26].
[1577] Ibid., 19[1.27].
[1578] Ibid., 19[1.28].
[1579] See Terrorist Conventions.

8.4.4.1. Khan's Breach of the Social Contract

The picture of Khan painted by Cameron is of an enemy to the State, meaning he would not fall within Vattel's 'most faithful subjects' whose blood it is not permissible to spill without necessity or extremely strong reasons.[1580] According to Rousseau, an individual cannot be permitted to enjoy the rights of citizenship without satisfying the concurrent duties of a subject as this would 'bring about the ruin of the body politic.'[1581] Although Rousseau states that those persons may be obliged to conform to the general will, this is to enable them to live in the freedom that being part of the State brings.[1582] Under this conception, a person does not have the freedom to choose to fulfil their duties to the collective being, whilst still retaining the benefits of being part of that body. However, using State force against members of the collective would be to commit an act of self-harm.[1583] Individuals that have chosen to remove themselves from the collective, and so not enjoy the benefits of citizenship, do not automatically become threats and legitimate targets for assassination.

8.5. Whether it was an Armed Conflict Situation

The legal justification for the drone strike is muddled, utilising different legal frameworks. The right to self-defence falls under the jus ad bellum. However, Cameron also stated that 'the strike was conducted according to specific military rules of engagement, which always comply with international law and the principles of proportionality and military necessity.'[1584] This suggests an application of the jus ad bello. Yet Cameron reassured the House that 'the strike was not part of coalition military action against ISIL in Syria… The

[1580] E. de Vattel, *The Law of Nations* (J. Chitty (ed), CUP 2011) 301 §24.
[1581] J-J Rousseau, *The Social Contract and the First and Second Discourses* (S. Dunn (ed), YUP 2002) 166.
[1582] Ibid., 167.
[1583] Ibid., 165.
[1584] HC Deb 7 September 2015, vol 599, Col 26.

position with regard to the wider conflict with ISIL in Syria has not changed.'[1585] Thus, making it clear that the action was not part of the UK's armed conflict against ISIL,[1586] which it was then conducting solely in Iraq due to an absence of Parliamentary agreement to airstrikes in Syria.

Additionally, the Attorney General's legal advice was that the strike was in accordance with international law as an exercise of the UK's inherent right to self-defence.[1587] It was also made clear, despite overly broad statements by ministers post-strike, that the UK does not adopt a global armed conflict against ISIL approach.[1588] In describing the decision making process, the Prime Minister referred to the self-defence criteria and not to the IHL standards of distinction, military necessity, proportionality, and precaution.[1589] There is no 'imminence' requirement under IHL.[1590] It would be logical to assume that had the applicable legal framework been IHL, this would have been made clear and the relevant justification given.

Demonstrating that the securitisation of Khan was not completely accepted, the UK Government faced a legal challenge on the apparent existence of a hitherto secret targeted killing policy.[1591] According to the JCHR, the existence of the policy was brought into question by the Government's assertion that the strike had been conducted within an armed conflict situation.[1592] Referencing the letter written to the UNSC by the UK's

[1585] HC Deb 7 September 2015, vol 599, Col 26.
[1586] Questions around the legitimacy of the UK conducting an armed conflict against ISIL, which was not recognised as a State, are outside the scope of this thesis. Iraq had requested the UK's assistance to address the issue of ISIL within its territory.
[1587] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 14[1.3].
[1588] Ibid., 50[3.51]-[3.52].
[1589] S. Sivakumaran, *The Law of Non-International Armed Conflict* (OUP OUP).
[1590] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 53[3.65].
[1591] Ibid., 30[2.8].
[1592] Ibid., 31[2.9].

Permanent Representative to the UN,[1593] the JCHR quotes it as stating 'action against ISIL in Syria is lawful in the collective self-defence of Iraq' and posits that the reference to the right of collective self-defence of Iraq suggests the operation against Khan was conducted as part of the existing armed conflict.[1594]

The letter contains three paragraphs, the first provides the context of the previous notification of action taken in the collective self-defence of Iraq, at the request of the Iraqi government,[1595] to assist in enabling Iraq to regain full control of its territory through the striking of ISIL sites and military strongholds in Syria.[1596] It states that the UK 'has undertaken military action in Syria' against ISIL 'in exercise of the inherent right of individual and collective self-defence.' This clearly states the action was taken in self-defence of the UK and is not an explanation for a use of force within an armed conflict situation.

The reference to collective self-defence is not clear and could refer to Iraq or to the global community, as ISIL had been designated a general threat.[1597] However, it cannot refer to collective self-defence in relation to Khan, as asserted by the JCHR,[1598] as the specific threat to the UK presented by Khan was repeatedly emphasised.[1599] There were no indications that he presented

[1593] 'Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council' (8 September 2015) UN Doc S/2015/688.
[1594] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 31[2.10]
[1595] Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council (22 September 2014) UN Doc S/2014/691.
[1596] 'Identical Letters Dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council' (26 November 2014) UN Doc S/2014/851.
[1597] UNSC Res 2178 (24 September 2014) S/RES/2178; UNSC Res 2253 (17 December 2015) S/RES/2253.
[1598] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 41[3.11].
[1599] E.g., David Cameron, Michael Fallon, Security Committee.

a threat to Iraq. Other States could take action against Khan as an exercise of the collective right of self-defence, but the UK's action against Khan can only be individual self-defence.

Although the JCHR acknowledged the contradiction between Cameron's statement to the Commons and the assertion that the strike was part of the armed conflict in Iraq,[1600] and despite the fact that the Commons had not endorsed UK military action in Syria without a separate vote,[1601] the JCHR accepted that this was a standard use of force within an existing armed conflict.[1602] However, the mere existence of an armed conflict in Syria does not make a UK use of force within that territory fall under the armed conflict. It was not an active party to armed conflict within Syria as its military activity was then confined to Iraq.

Furthermore, it is contended that reference to collective self-defence would not demonstrate the belief that the action was taken under the auspices of IHL and the existing conflict, but the opposite. Had the action been part of the ongoing armed conflict against ISIL in Iraq, references to self-defence and complying with the Article 51 notification requirements would be superfluous. The UK's initial letter in 2014 notified the UNSC that military force was being used in collective self-defence and included reference to 'striking ISIL sites and military strongholds in Syria.'[1603] Consequently, had the UK viewed itself as additionally being party to the armed conflict in Syria, IHL would be the operative legal framework for military action in *both* Iraq and Syria. Assessments of the legitimacy of targets would then be taken under that framework.

[1600] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 31[2.13].
[1601] Ibid.
[1602] Ibid., 5.
[1603] UN Doc S/2014/851.

Assertions of self-defence reference the jus ad bellum, thereby acknowledging that the strike was conducted outside the existing sphere of hostilities. The jus in bello, the law governing the conducting of hostilities that applies equally to both sides, is distinct from the jus ad bellum, the law determining when a State may resort to force.[1604] The JCHR acknowledges the difference between the legal regimes, making the clear distinction between IHL and jus ad bellum, described as the law determining a State's entitlement to use force,[1605] and indicating that self-defence falls under the rules governing whether a State is entitled to use force and not IHL.[1606]

Furthermore, the second paragraph of the 2015 letter provides details of the strike and does not explicitly refer to the 'collective self-defence of Iraq' and instead provides that is was 'a necessary and proportionate exercise of the individual right of self-defence of the United Kingdom.'[1607] The specific reference to only individual self-defence in the context of the *strike* illustrates this was not a military operation taken within an armed conflict situation, but a justification of a use of force in the territory of another State under the jus ad bellum.

The letter further claimed that the airstrike was against a 'target'[1608] who was 'actively engaged in planning and directing imminent armed attacks' against the UK and was 'a necessary and proportionate exercise' of self-defence *of the UK*. Here, the Permanent Representative is using the language

[1604] M.N. Schmitt and E.W. Widmar, '"On Target": precision and balancing in the contemporary law of targeting' (2014) 7 Journal of National Security Lawn and Policy, 327 381.
[1605] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 99 fn 223.
[1606] Ibid., 43[3.21].
[1607] UNSC, 'Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council' (7 September 2015) UN Doc S/2015/688.
[1608] Note the dehumanising language.

of self-defence to assert the legitimacy of the action. Consequently, any legitimate claim of self-defence would need to be based on the threat posed by Khan to the UK. Somewhat confusingly, the letter also asserted that ISIL 'is engaged against an ongoing armed attack against Iraq' and consequently military action against ISIL in Syria is 'lawful act in the collective self-defence of Iraq.'[1609] This would appear to be extraneous information as the strike was against Khan due to the threat he was alleged to pose.

On one view, there appears to be a distinct lack of understanding of the operating legal framework on the part of the UK. The Attorney General's obscuring of the line between the law applicable before and during war appeared to be accepted.[1610] Similarly, the Justice Committee, to which his evidence was presented, did not challenge his assertion that when applying the criteria of self-defence, 'it is necessary to demonstrate that what you do complies with international and humanitarian law.'[1611] As a matter of logic, the law of war will not apply until there is an armed conflict. Up until that point, the applicable legal framework governing any use of force is the jus ad bellum. However, this final paragraph could be viewed as a general assertion that the UK views any future action in Syria to be justified under the same auspices as the ongoing military involvement in Iraq and so further supports the assertion that, at the time of the strike, the UK was not (and did not view itself as being) involved in an armed conflict against ISIL in Syria.

[1609] Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council 8 September 2014 S/2015/688.
[1610] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 41 [3.12].
[1611] JCHR, *Oral Evidence: the work of the Attorney General* (2015-16, HC 409) Attorney General Jeremy Wright 12 <https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-work-of-the-attorney-general/oral/21698.pdf> accessed 31 July 2023.

In its conclusions, the JCHR Report highlights the lack of clarity regarding the applicable framework exhibited by the Secretary of State[1612] and recommends the Government clarify its position on which legal framework applies to the use of force outside armed conflict.[1613] However, despite forwarding recommendations regarding the need to clarify 'armed attack' and 'imminence',[1614] so as to avoid an overbroad policy permitting the killing of any ISIL member, and highlighting the importance of the rule of law for the maintenance of international peace and security,[1615] there is no assertion of the human dignity of *all* individuals and the subsequent obligation for counterterrorism actions to be respectful the suspects' human rights.

Despite explicitly rejecting the US' position that it is engaged in a global war against ISIL and confining the armed conflict zone to Iraq and Syria,[1616] the Secretary of State for Defence asserted that any UK use of force outside an armed conflict zone would comply with IHL.[1617] As noted by the JCHR, 'The effect of that assertion is that the UK Government's policy ends up in the same place as the US policy,'[1618] meaning that by applying IHL to all uses of military force,[1619] the UK is effectively operating within a global armed conflict. In later asserting the killing took place within the theatre of armed conflict, the UK arguably attempted to extend the concept of non-international armed conflict. This approach 'threatens to blur the line

[1612] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 82[9].
[1613] Ibid., 83[15].
[1614] Ibid., 82-3[10]-[12], 84[20].
[1615] Ibid., [1.30].
[1616] JCHR, *Oral Evidence* (2015-16, HC 574) 3.
[1617] Ibid., 4. Although it was clear from his evidence that Michael Fallon was labouring under significant confusion as to the content of IHL and kept using the language of self-defence.
[1618] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 51[3.54].
[1619] It was clear from his evidence that Michael Fallon viewed IHL to govern any use of military force. JCHR, *Oral Evidence* (2015-16, HC 574) 4.

between armed conflict and law enforcement, to the detriment of the protection of human rights.'[1620]

8.6. Conclusion

In confronting terrorists, States are asserting a form of 'absolute' sovereignty[1621] against perceived threats to any aspect of the State. In the macrosecuritisation of terrorism context, discrete legal frameworks have been merged, creating a hybrid self-defence/IHL 'law' that seeks to legitimise what is an extrajudicial killing, a murder, of a British citizen by the British State. Additionally, although the Government received some resistance to the expansion of IHL outside armed conflict and reduction of HRL, the JCHR accepted the unconvincing and post facto legal justification of the strike through the application of IHL. This is a positive assertion of the applicability of HRL to *all* non-armed conflict. However, it is not an assertion of the application of HRL to *all* people.

Further, the lack of co-operation with the oversight mechanisms, including declining to publish the legal advice and evidence of imminence,[1622] with no sanctions for individuals, resulted in an unsatisfactory situation where the UK Government killed UK citizens in an apparent legal vacuum and with no consequences, thereby demonstrating a successful securitisation act.

The JCHR's assertion that Article 2 ECHR *demands* the use of lethal force in situations of terrorism for a State to meet its obligations demonstrates a concerning expansion of the exceptions by a body that aims to oversee HRL

[1620] Parliamentary Assembly, 'Drones and targeted killing: the need to uphold human rights and international law' Resolution 2051 (2015) COE Doc 13731, [6.5].
[1621] N.D. White and A. Davies-Bright, 'Drone Strikes: a remote form of self-defence?' in J.D. Ohlin (ed), *Research Handbook on Remote Warfare* (Edward Elgar 2017) 215.
[1622] JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574) 26[1.55] and 39[3.7].

application. The ECtHR had the opportunity to clarify the position on the legitimacy of the intentional taking of life by State agents in a counterterrorism context in its previous judgments but declined to do so.

Conceptualising killing as a legal duty is problematic as it denies the proposition that deadly force is permissible to avert an act of aggression but is still a violation of the aggressor's right to life.[1623] It instead asserts that the aggressor has forfeited their rights through their actions. Similarly, permitting the characterisation of terrorist suspects as presenting an imminent threat by their nature denies the human dignity of suspects and is the end point of the 'othering' process.

[1623] G.P. Fletcher and J.D. Ohlin, *Defending Humanity* (OUP 2008) 55.

Chapter 9: Conclusion

9.1. Introduction

HRL developed in response to State actions during WWII, where some groups were 'othered' and categorised as 'less than', meaning they could be killed with impunity as they fell outside the protections of the law. Indeed, the law often facilitated the killing. Through setting a 'common standard' for human existence, it was hoped that future atrocities could be avoided, and international peace and security maintained. However, the centralisation of security in the UNC and concessions to security in human rights instruments, through the limitation of rights for national security purposes, encourages the view that security and human rights are in opposition. Thus, leading to a curtailment of rights being justified through assertions of the security imperative.

This thesis evaluated the protection of the right to life provided through HRL to individual terrorist suspects, who are not presenting an immediate threat, from State uses of force in a counterterrorism context. In doing so, the context of legal provisions and court judgments, including the construction and articulation of threats and security, were used to facilitate the analysis. Through exposing the significant limits of HRL in the counterterrorism context that have been permitted to develop, due mainly to the operation and influence of the political sphere in terms of framing HRL as restricting States' ability to protect and uphold national and international security, the issue can be confronted.

The central finding is that the construction of individual terrorists as presenting an existential threat to the State, and of them being 'other', permits the denial of their human dignity and so their human rights. Additionally, the lack of clarity from the ECtHR encourages the widespread

belief and practice that, contrary to the provisions of Article 2 ECHR, a State agent can deliberately apply lethal force to a terrorist suspect with the intent to kill. Further, existing mechanisms of scrutiny and accountability are limited in effectiveness, particularly as the macrosecuritisation of terrorism enables the simple securitisation of individuals, removing that person from the normal sphere and placing them within the exceptional.

The functional articulation of human dignity and HRL in the international instruments assists in this process. Rather than the core contention that all human beings have dignity and so are an end in themselves, meaning that they matter and should be counted, being at the centre of international law and politics, State security is considered the primary value. Consequently, individuals can be dispatched if necessary to satisfy the central objective. However, this approach ignores the role of human dignity and human rights in achieving State security and works to jeopardise the security it aims to achieve. As demonstrated by the ever-escalating responses to terrorism, conceptions of security in militaristic and violence paradigms does not provide safety and instead serves to necessitate more force and manifestations of coercive power.

In Sections 9.2-9.4, the Chapter provides a summary of the key findings in relation to first three subsidiary research questions, before addressing the final subsidiary question and considering the extent to which the case studies demonstrate different aspects of the weaknesses and failures of HRL in the context of counterterrorism in Section 9.5. It then concludes in Section 9.6 with overall observations and recommendations.

9.2. What is the central justification for HRL?

As outlined, HRL manifests an aspect of the international community's response to WWII, in particular Nazi Germany's categorisation of people by race and consequent diminishing of those viewed as racially inferior.[1624] There was a recognition that individuals needed to be protected from State power. The central method for limiting State abuse and preventing the ensuing conflict, was through the recognition of the inherent dignity of each human person, regardless of their characteristics. The proposition was essentially that the lack of recognition of the value of each person resulted in the global conflicts and mass killing. Ergo, by centring that value, articulated as human dignity, States will be able to maintain international peace and security.

The international human rights instruments represent a universal agreement on the existence of human dignity and the crucial role respect of that dignity plays in maintaining international peace and security. HRL was articulated to facilitate the respect of human dignity and so performs a functional role as the conduit by which human dignity is realised. However, the functional role of human dignity was also articulated as a route to attaining peace and security – it is recognised to facilitate the achievement of peace and security.[1625]

The establishment of the UN with the central aim of upholding international peace and security appears to confirm that this is the endpoint and recognition of human dignity is merely a means to an end, rather than an end in itself. Consequently, the only motivation for respecting human dignity

[1624] Chapter 3: 3.3.
[1625] Chapter 3: 3.5.

through the recognition and observance of HRL is to prevent international armed conflict.

Accordingly, HRL provides for the limitation of rights for national security purposes, which presents a fundamental contradiction and inherent weakness in HRL. The law exists to aid the recognition of human dignity, which is required to achieve international peace and security. There is a cooperative relationship between the three elements: human rights law brings recognition of human dignity, which brings peace and security.

However, the State sets the parameters of the limitations as it has the monopoly on the identification and articulation of threat. Thus, an instrument intended to restrict the ability of States to violate the human dignity of individuals through the articulation of rights, allows States to decide the content and limits of those rights. This is despite many of the human rights instruments also referring to human dignity in a translational manner – human dignity assists in understanding the scope of the right. Therefore, States can restrict rights, which are needed for security, in the name of national security.

This apparent subordination of human dignity to security and ability of State to apply restrictions also allows for the conception of human rights as being necessarily limited and limitable. This prevalent view positions individuals against each other and the State. People's rights are seen as being in competition with each other, meaning that an expression of a right by one person necessitates the diminishing of the rights of another. Additionally, rights are not viewed as a means by which State security is achieved but present a threat to that security and so must be monitored and curtailed.

Furthermore, in the drafting process, the authors of the UDHR themselves did not recognise the inherent dignity of all humans, with fascists and criminals being expressly 'othered'. The perceived dangers presented by these groups, particularly to democratic values, assisted in the centralising of security. Thus, from the very beginning, human rights were the preserve of those considered within the legitimate sphere and those without were articulated as a threat.

The resulting utilitarian approach to human rights, the prioritising of the perceived needs of the majority over the actual right to life of the terrorist suspect, undermines the foundational deontological concept that each human being has inherent dignity and so counts as one. Further, the subordination of life to security undermines that security as individuals, particularly from minoritised and otherised communities, feel (and in some situations are) less safe from the State. The approach also establishes perceived guilt and suspect status as the measure of a human life, rather than the inherent dignity, creating a tiered human rights approach where only the 'innocent' have full human rights protection and all other rights are subordinated for their security and well-being.

9.3. What is the State and why does it need to be secure?

States exist as human socio-political constructions and are the external manifestation of the individuals within.[1626] The primary function of the State is to facilitate the lives of its citizens and protect them from external forces, which is articulated as 'State security'. The consideration of the State's need for security highlights several issues.

[1626] Chapter 4: 4.2.

Firstly, 'security' does not have an independent meaning and is a subjective concept.[1627] The perception of security of those using it to justify the ever-reduction of the legitimate public sphere and limitation on human rights is significantly different to those impacted. For the Gibraltar three, Menezes, and Khan, assertions of security did not result in their protection but in their destruction.

Secondly, articulations of self-defence at both the international and national levels allow for the expansion of pre-emptive force to reduce the imminence requirement and include the mere presence of a perceived threat as a justification for the use of force.[1628] Additionally, the macrosecuritisation of terrorism facilitates the suspending of normal rules in the face of the existential threat of Islamic terrorism, legitimising exceptional responses and the consequent human rights violations, supported through the construction of the terrorist 'other'.[1629]

The Lockerbie case stands as an illustrative example of the broadening of the political sphere and diminishing of law in response to a specific incident and articulation of more general threat. Libya was successfully securitised by the UK and US, leading to the imposition of punitive measures operating outside existing legal frameworks. Further, the political sphere prevented the effective operation of judicial arbitration and oversight mechanisms, using the UNSC's Chapter VII powers.[1630] This heralded a general broadening of 'threat' and 'terrorism', which accelerated after 9/11.

[1627] Chapter 4: 4.3.
[1628] Chapter 4: 4.3.1.
[1629] Chapter 4: 4.3.1.2.
[1630] Chapter 5: 5.3.

9.4. How have States responded to terrorism?

The reaction of States to terrorism has generally been to utilise their monopoly on the legitimate use of force by permitting ever-increasing applications of violence on terrorist suspects. This is legitimated through the securitised threat construction and otherisation of marginalised groups.

Post-9/11, the UNSC's adoption of a legislative and quasi-judicial role has resulted in States implementing significant counterterrorism legislation, which has had a negative impact on human rights and reduced the usual protections of a rule of law centred legal system. Additionally, the role of State consent in the international rule-making process has been diminished.

The security concession in human rights instruments has had the effect of reducing oversight and judicial scrutiny, as the assessment of threat is within the political sphere. The UK has expanded the scope of Article 2(2) to include the deliberate application of lethal force with the intent to kill in a purported self-defence situation, where only the 'honest belief' of the State agent is required to excuse the action.[1631] This is despite the State's responsibility for that belief and the presence of other options besides lethal force.

Further, the self-defence rights of the State agent, which operate to provide a defence for the individual against criminal liability for the death, shield the State from a finding of a substantive breach of Article 2. Additionally, in Khan, the UK sought to apply the international right of self-defence to an individual, thereby merging national individual State agent's rights with international State rights.

[1631] Chapter 6: 6.8; Chapter 7: 7.6.

9.5. In what way do security and HRL interact and impact an individual terrorist suspect's right to life within a counterterrorism context?

The three case studies demonstrate an expansion of legal concepts, such as self-defence, to achieve political ends. Consequently, the role of HRL in tempering State action to protect the individual, is diminished. Although it is positive that cases such as those from NI and *Armani* reach the ECtHR rather than remaining unadjudicated, the Court's decisions have allowed States to assert a right for State agents to use deliberate lethal force against a suspect with the intent to kill. This fundamentally undermines the Convention's protections and is incompatible with the prohibition of the death penalty.

A person can be deprived of their life due to the imposition of suspect status, but a convicted criminal cannot be executed as an outcome of the criminal justice process. The wide acceptance that the death penalty is inappropriate in a liberal State is an extremely positive development. However, it further reinforces the observation that terrorist suspects are not viewed as being in the same category of human as most others. This is further emphasised through Michael Fallon's tacit acceptance of Harriet Harman's definition of imminence that included the terrorist being constructed as a threat by their nature.[1632] Additionally, the JCHR chose not to clarify in its report that a person cannot be a threat by their *nature* and that instead, their nature as human means they possess inherent dignity.

Through the macrosecuritiation of terrorism and the individual securitisation of individual suspects, in the context of 'othering' Muslims and other groups, the UK has prioritised an extremely broad concept of security, involving almost any aspect of the State, which enables a significant reduction in

[1632] Chapter 8: 8.4.2.

accountability and an increase in uses of force against individuals. Although the ECtHR found breaches of the procedural aspect of Article 2 in connection to *McCann* and several other NI cases, the State has not brought proceedings against agents shown to have lied and obstructed investigations.[1633] This lack of willingness to engage with oversight measures was again demonstrated by Ian Blair after Menezes' killing,[1634] and the Government after Khan's.[1635] Furthermore, the parallels between *McCann* and Menezes are striking, despite being over a decade apart, demonstrating a lack of willingness to learn lessons and centre human rights in a counterterrorism context.

The case studies illustrate how concepts of the rule of law and due process are viewed more as ideals, indulgences for a more utopian time, rather than concrete principles to govern the behaviour and reach of executive power. The security imperative of the State and those who wield its power subordinates all other principles and values, including the inherent dignity of each human being that each person has simply by virtue of being human. The imagined community of the State has become more powerful than the reality of the individual. This asymmetry is a result of the questionable idea that an individual can pose an existential threat to a State. However, as these extra-judicial killings illustrate, the State poses a far greater existential threat to the individual.

In a counterterrorism context, the perceived security needs of the State (and individual agents) override all other considerations, particularly the rights of the suspect. This is justified through the view of individual human rights as being in conflict and standing in opposition to State needs. Thus, States

[1633] Chapter 6: 6.5.4.
[1634] Chapter 7: 7.7.
[1635] Chapter 8: 8.5.

legitimise complete rights violations. However, in cases of State error, such as Menezes, the suspect is somewhat reinstated as a valid human through the application of procedures, such as through the CPS and Coroner's court, that offer some level of accountability and reassurance than killing persons who cannot be successfully securitised is still considered problematic.

The expansion by States of concepts such as imminence and proportionality, thereby permitting the application of force against a threat in the indeterminate future, can be seen in the case studies. In *McCann*, the suspects were killed two days before the alleged attack was due to take place and when they were not sufficiently proximate to the supposed bomb.[1636] In a further expansion, Khan was killed when he was travelling in a car and was not in the territory of the UK.[1637] This removes significant safeguards against the arbitrary deprivation of force. However, the ECtHR chose to address this issue through criticisms of the planning and running of the operation, those mistakes were made again with Menezes, rather than through addressing the substantive issue of the actual deprivation of life. In Khan, the UK Government asserted the killing took place after meticulous planning, demonstrating that a focus on process over substance permits a sidestepping of the fundamental issue as to when a State can legitimately take life in a non-armed conflict situation.

9.6. Observations and Recommendations

Today, terrorism is seen as constituting a significant threat to international peace and security and aims to destroy human rights, fundamental freedoms, and democracy. However, terrorists actively seek to disrupt the status quo and so can be framed as an existential threat only to a certain

[1636] Chapter 6: 6.8.
[1637] Chapter 8: 8.3.

extent. For example, the IRA in NI sought the reunification of Ireland,[1638] which would necessitate a fundamental change in the character of the UK but without extinguishing the State. Thus, characterisations of terrorism and terrorists as posing an *existential* threat to a State significantly exaggerate their abilities.

The tactic of terrorism utilises 'provocative violence' that provokes States into self-destructive over-reactions.[1639] As demonstrated by the killing of Khan and the confused legal justification that at once merged and undermined established legal frameworks, the real existential threat posed to States through terrorism is through responses that subordinate basic values, such as human rights and the rule of law, to temporary security and political objectives. Similarly, the domestic law on self-defence of England and Wales has been utilised to provide a generous approach to the intentional use of lethal force by State agents as the subjective view of the officer is central to the assessment of the legitimacy of the use of force.[1640] This ignores the context of a group being constructed as a threat and is potentially a recipe for prejudice to determine whether a suspect can retain their life.[1641] Combined with the absence of clear judicial direction that the *intentional* taking of life is never permissible under HRL, rather than increase State security, the current situation portends a dangerous undermining of the legitimacy of the State and challenging its existence. In this way, it could

[1638] K. Cowell-Meyers and P. Arthur, 'Irish Republican Army' (*Britannica*, 29 May 2023) <https://www.britannica.com/topic/Irish-Republican-Army> accessed 27 March 2020.
[1639] M. Innes and D. Thiel, 'Policing Terror' in T. Newburn (ed), *Handbook of Policing* (Willan 2008) 571.
[1640] See Chapter 4: 4.4 for an outline of the law on self-defence.
[1641] E.g., the International Association of Chiefs of Police guidelines utilises profiles of suicide bombers, which is likely to increase suspicion of certain groups and the likelihood of intentionally lethal force being used against them, particularly as the counterterrorism tactics often preclude the use of warnings – as happened in the Jean Charles de Menezes situation. ESC, 'Extrajudicial, Summary or Arbitrary Executions Report of the Special Rapporteur, Philip Alston' (8 March 2006) UN Doc E/CN.4/2006/53 [50].

be said that State action in the counterterrorism context presents an existential threat to the State.

It is too simplistic to suggest that liberal States will suddenly start using counterterrorism measures to arbitrarily oppress their populations. However, the broadening of terrorism to potentially include any form of antagonism towards the status quo, including through speech, artistic expression, political opposition, and political accountability, risks putting anyone on the 'wrong' side. Once placed outside the legitimate sphere through the holding and expressing of unacceptable ideologies, a person can then be conceptualised as a threat to State security. What constitutes a threat has also significantly expanded and a person can constitute a threat by their 'very nature' as well as through their actions, which denies their human dignity. Once articulated as a threat, the person is securitised and the usual rules can be disapplied or exceptionally applied, such as using counterterrorism legislation against *Miranda* [1642] when normal criminal provisions would have been equally effective and avoided the dangerous creep of rights restrictions.

To achieve the aims set out in the UDHR, human rights should not be limited. Rather, the scope and application of the right should be better defined to fully communicate the necessity for each human's dignity to be valued. Further, to give full effect to HRL protections, it needs to be strictly applied in all non-armed conflict situations with the overriding objective being to maintain and secure human life, which could be termed a 'human dignity approach' – it does not permit the diminishing of dignity and conceptualises

[1642] *R (Miranda) v SSHD and MPC* [2014] EWHC 255 (Admin).

security as maximum human rights manifestation, rather than as State security.

Placing human dignity at the centre of the international order would necessitate a radical rethink in how politics and international relations operate and how threat is conceptualised, and risk evaluated. The human dignity concept can reshape all aspects of human life and has the advantage of not prioritising one culture or set of beliefs over another. It is incredibly powerful in its simplicity – every human being possesses equal and inviolable dignity. Nothing can be prioritised over that, and it can never be subordinated to other concerns. This would fundamentally alter the dynamic between individual and State, reconceptualising individuals as not being in opposition to the State or with each other, thereby protecting all humans.

Individuals want to achieve maximum human rights expression, within a society that is mutually beneficial. Issues arise when there is a lack of mutual benefit and consequent disparity in human rights expression. Persons labelled as 'other' do not have the same ability to manifest their rights as those within the 'in' group. Thus, a utilitarian approach has some suitable application within a human rights discussion. Increasing mutual benefit, which would necessitate a reduction in individual benefit for some, maximises overall human rights expression and security. The damage caused by individualising threat and denying dignity reduces the legitimate public sphere and curtails everybody's rights. The deontological approach to human dignity is the route to achieving overall human rights expression and State (meaning the collection of individuals within that territory) security. The current obstacle is that the mechanisms of the State and State interests have come to represent the interests of a minority, who enjoy maximum

freedom and rights protection. Therefore, State power is used to maintain the status quo in its, rather than the collective, interest.

The contribution to knowledge made by this thesis is the recognition that HRL, as articulated and applied, does not adequately safeguard individuals suspected of involvement in terrorism and subsequently constructed as a threat to the State. The law does not restrict State action in this arena, and it is utilised more as a legitimising tool, rather than delimiting action. The centrality of the State in international law and the primacy of State security undermines the HRL protections as wherever there is a perceived 'conflict' between individual rights and State security, the latter will always 'win'.

As it is the State that defines its security concerns and agenda, with considerable latitude from the Courts whose role is to hold States to account and keep them within the limits of the law, HRL is unable to prevent deprivation of life. Provided the State can construct an argument that satisfies the legal requirements, the action is presented as 'justified'. However, this approach does not protect individuals from State violence and so undermines the fundamental purpose of HRL to prevent the dehumanisation of people and demonstrates that the most important 'one' is not the individual human person, but the State.

Bibliography

Treaties

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No.36

Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) reprinted in (2005) 12 International Human Rights Report 893

Common Article III, Geneva Conventions (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135

Conference on Security and Cooperation in Europe, 'Final Act of Helsinki' (1 August 1975) 14 ILM 1292

Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221, and its first Protocol (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 304, and second Protocol (adopted 14 October 2005, 28 July 2010) 3358 UNTS

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 177

Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105, and its Protocol (adopted 10 September 2010, entered into force 1 July 2018) 3302 UNTS

Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969) 704 UNTS 219

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13

Convention on the Marking of Plastic Explosives for the Purposes of Detection (adopted on 1 March 1991, entered into force 21 June 1998) 2122 UNTS 359

Convention on the Physical Protection of Nuclear Material (adopted 26 October 1979, entered into force 8 February 1987) 1456 UNTS 124

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167

Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277

Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19

Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3

Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (adopted 10 September 2010; entered into force 1 July 2018) 3307 UNTS

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 74 UNTS 287

International Convention Against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205

International Convention for the Protection of All Persons from Enforced Disappearance (adopted 23 December 2010, entered into force 23 December 2010) 2716 UNTS 3

International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) 2445 UNTS 89

International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256

International Convention for the Suppression of the Financing Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

Locarno Treaties (adopted 1 December 1925, entered into force 14 September 1926) 54 LNTS 289

Protocol to the Montreal Convention (adopted 24 February 1988, entered into force 6 August 1989) 1589 UNTS 474

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90

Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993

United Nations, 'Charter of the United Nations' (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UNC)

Regional Instruments

African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 363

Charter of Fundamental Rights of the European Union (2010) 53 Official Journal of the European Union C83 380

Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5

ICAS, 'American Declaration on the Rights and Duties of Man' (adopted 2 May 1948) UN Doc E/CN.4/122/Rev.1

Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in all Circumstances (adopted 3 May 2002, entered into force 1 July 2003) ETS 187

Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (adopted 28 April 1983, entered into force 1 March 1985) ETS 114

The ASEAN Human Rights Charter (adopted 19 November 2012)

International Court of Justice Cases

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections) [1996] ICJ Rep 595, 613

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections) [1996] ICJ Reps 595, 613

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment) [2005] ICJ Rep 168

Barcelona Traction, Light and Power Company Ltd. (Belgium v Spain) (Judgment) (1970) ICJ Rep 3

Conditions of Admission of a State to Membership in the United Nations (Advisory Opinion) [1948] ICJ Rep 57

Islamic Republic of Iran v United States of America (Judgment) [2003] ICJ Rep 161

Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14

Oil Platforms Case (Iran v US) [2003] ICJ Rep 161

Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States) (Judgment) [1998] ICJ Rep 746

Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) and *(Libyan Arab Jamahiriya v. United States)* (Provisional Measures) [1992] ICJ Rep 3

United States Diplomatic and Consular Staff in Tehran (Judgment) [1980] ICJ Rep 3

Western Sahara Advisory Opinion (1975) ICJ Rep 12, 39

Human Rights Committee

Burrell v Jamaica Communication 546/1993 (2004) UN Doc CCPR/C/80/D/888/1999

Camargo v Columbia Communication 45/1979 (1982) UN Doc CCPR/C/15/D/45/1979

Chongwe v Zambia Communication 821/1998 (2000) UN Doc CCPR/C/70/D/821/1998

De Morais v. Angola Communication 1128/2002 (2005) UN Doc CCPR/C/83/D/1128/2002

Delgado Páez v Colombia Communication 195/1985 (1990) UN Doc CCPR/C/39/D/195/1985

El Alwani v The Libyan Arab Jamahiriya Communication 1295/2004 (2012) UN Doc CCPR/C/104/D/1782/2008

Dermit v Uruguay Communication 84/1981 (1982) UN Doc CCPR/C/17/D/84/1981

HRC, 'Concluding Observations on the Fourth Periodic Repot of the United States of America' (23 April 2014) UN Doc CCPR/C/USA/CO/4

HRC, 'Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland' (17 August 2015) CCPR/C/GBR/CO/7

HRC, 'General Comment 6: Article 6' (30 April 1982) UN Doc HRI\GEN\1\Rev.9

HRC, 'General Comment No.13' (13 March 1984) HRI/GEN/1/Rev.9

HRC, 'General Comment No.31' (26 May 2004) CCPR/C/21/Rev.1/Add.13

HRC, 'General Comment No.36' (3 September 2019) UN doc CCPR/C/GC/36

International Cases

Badinter Commission, 'Opinion No.1' (1991) 92 ILR 162

International Military Tribunal (Nuremberg) (Judgment) [1946] 22 IMT 203

Island of Palmas Case (United States v Netherlands) (1928) II RIAA 829

European Court of Human Rights

Al Nashiri v Poland App. no. 28761/11 (ECHR, 24 July 2014)

Al-Saadoon and Mufdhi v United Kingdom App. no. 61498/08 (ECHR, 2 March 2010)

Al-Skeini and Others v United Kingdom App. no. 55721/07 (ECHR, 7 July 2011)

Anguelova v Bulgaria App. no. 38361/97 (ECHR, 13 June 2002)

Armani da Silva v United Kingdom App. no. 5878/08 (ECHR, 30 March 2016)

Bączkowski and Others v Poland App. no. 1543/06 (ECHR, 3 May 2007)

Banković and Others v Belgium et al App. No. 52207/99 (ECHR, 12 December 2001)

Bennett v United Kingdom App. no. 5527/08 (ECHR, 7 December 2010)

Brogan and Others v United Kingdom App. nos. 11209/84; 11234/84; 11266/84; 11386/85 (ECHR, 29 November 1988)

Bromiley v United Kingdom App. no. 33747/96 (ECHR, 23 November 1999)

Bubbins v United Kingdom App. no. 50196/99 (ECHR, 17 March 2005)

Câmpeanu v Romania App. no. 47848/08 (ECHR, 17 July 2014)

Carter v Russia App. no. 20914/07 (ECHR, 21 September 2021)

Choreftakis and Choreftaki v Greece App. no. 46846/08 (ECHR, 17 January 2012)

Cyprus v Turkey App. no. 25781/94 (ECHR, 10 May 2001)

Edwards v United Kingdom App. no. 46477/99 (ECHR, 14 March 2002)

Finogenov and Others v Russia App. nos. 18299/03 and 27311/03 (ECHR, 20 December 2011)

Finucane v United Kingdom App. no. 29178/95 (ECHR, 1 July 2003)

Georgia v Russia (II) App. no. 38263/08 (ECHR, 21 January 2021)

Giuliani and Gaggio v Italy App. no. 23458/02 (ECHR, 24 March 2011)

Hirst v United Kingdom (No.2) App. no. 74025/01 (ECHR, 27 April 2005)

Huohvanainen v Finland App. no. 57389/00 (ECHR, 13 March 2007)

Ibrahim and Others v United Kingdom App. nos. 50541/08, 50571/08, 50573/08 and 40351/09 (ECHR, 13 September 2016)

İlhan v Turkey App. no. 22277/93 Grand Chamber (ECHR, 27 June 2000)

Isayeva, Yusupova and Bazayeva v Russia App. nos. 57947/00, 57948/00 and 57949/00 (ECHR, 24 February 2005)

Issa and Others v Turkey App. no. 31821/96 (ECHR, 16 November 2004)

Jordan v United Kingdom App. no. 24746/94 (ECHR, 4 May 2001)

Kavala v Turkey App. no. 28749/18 (ECHR, 11 July 2022)

Kelly v United Kingdom App. no. 30054/96 (ECHR, 4 May 2001)

Kelly v United Kingdom App. no. 17579/90 (ECHR, 13 January 1993)

Kiliç v Turkey App. no. 29601/05 (ECHR, 5 March 2019)

Kurt v Austria App. no. 62903/15 (ECHR, 15 June 2021)

L (XW) v Russia App. no. 44095/14 (ECHR, 29 October 2015)

LCB v United Kingdom App. no. 23413/94 (ECHR, 9 June 1998)

Lawless v Ireland App. no.332/57 (1 July 1961)

Loizidou v Turkey App. no. 15318/89 (ECHR, 18 December 1996)

Makaratzis v Greece App. no. 50385/99 (ECHR, 20 December 2004)

Mammadli v Azerbaijan App. no. 47145/14 (ECHR, 19 April 2018)

Mammadov v Azerbaijan App. no. 15172/13 (ECHR, 29 May 2019)

Mastromatteo v Italy App. no. 37703/97 (ECHR, 24 October 2002)

McCann and Others v United Kingdom App. No. 18984/91 (ECHR, 27 September 1995)

McKerr v United Kingdom App. no. 28883/95 (ECHR, 4 May 2001)

Mendy v France App. no. 71428/12 (ECHR, 4 September 2018)

Merabishvili v Georgia App. no. 72508/13 (ECHR, 28 November 2017)

Murray v United Kingdom App. no. 14310/88 (ECHR, 28 November 1994)

Nachova and Others v Bulgaria (Judgment) App. no. 43577/98 43579/98 (ECHR, 6 July 2005)

Ocalan v Turkey App. no. 46221/99 (ECHR, 12 May 2005)

Osman v United Kingdom App. no. 23452/94 (ECHR, 28 October 1998)

Ramsahai and Others v Netherlands App. no. 52391/99 (ECHR, 15 May 2007)

Šilih v Slovenia App. no. 71463/01 (ECHR, 9 April 2009)

Stewart v United Kingdom App. no. 10044/82 (ECHR, 10 July 1984)

Tagayeva and Others v Russia App. no. 26562/07 (ECHR, 13 April 2007)

Tomašić and Others v Croatia App. no. 46598/06 (ECHR, 15 January 2009)

Yüksel Erdoğan and Others v Turkey App. no. 57049/00 (ECHR, 15 February 2007)

Regional Cases and Materials

Armando Alejandre Jr et al v Cuba (29 September 1999) Case 11.589 Report no.86/99

Coard et al v United States (29 September 1999) Case 10.951 Report no.109/99

Parliamentary Assembly, 'Drones and Targeted Killing: the need to uphold human rights and international law' Resolution 2051 (2015) COE Doc 13731

Villagrán-Morales v Guatemala (Merits) (19 November 1999) IACtHR (ser.C) No.63

UK Statutes

Act of Union (Ireland) Act of 1800

Aviation and Maritime Security Act 1990

Aviation Security Act 1982

British Nationality Act 1981

Children Act 2004

Civil Contingencies Act 2004

Counterterrorism Act 2008

Crime and Disorder Act 1998

Criminal Act 1967

Criminal Damage Act 1971

Criminal Justice Act 2003

Criminal Justice and Immigration Act 2008

Criminal Law Act (Northern Ireland) 1967

Damage Act 1971

Firearms Act 1968

Government of Ireland Act 1920

Human Rights Act 1998

Immigration Act 2014

International Criminal Court Act 2001

Murder (Abolition of Death Penalty) Act 1965 Anti-terrorism, Crime and Security Act 2001

Nuclear Material Offences Act 1983

Offences Against the Person Act 1861

Police Reform Act 2002

Prevention of Terrorism Act 2005

Taking of Hostages Act 1982

Terrorism Act 2000

Terrorism Act 2006

The Terrorism and Preventative Measures Act 2011

Union of Ireland Act of 1800

UK Cases

A v Secretary of State [2004] UKHL 56

AG's Reference (No 1 of 1975) [1976] 2 All ER 937

Al-Saadoon and Others v Secretary of State for Defence [2017] 2 WLR 219

Asbury [1986] Crim LR 258

Attorney General's Reference (No. 1 of 1975) [1975] QB 773

Beckford v R [1987] 1 AC 130

Blake v DPP [1993] Crim LR 586

Collins v Wilcock [1984] 3 All ER 374

Constanza [1997] 2 Cr App R 492

Devlin v Armstrong [1971] NI 13

Dudley and Stephens (1884) 14 QBD 273

Duffy [1967] 1 QB 63

F v West Berkshire Authority [1989] 2 All ER 545

Fagan v Metropolitan Police Commissioner [1969] 1 QB 439

Faulkner v Talbot [1981] 3 All ER 468

Harvey [2009] EWCA Crim 469

Hayes [2011] EWCA Crim 2680

Hyam v DPP [1975] AC 55

Ireland [1998] AC 147

Jackson [1985] Crim LR 674

Jones [2005] Crim LR 122

Jordan, Re Judicial Review [2014] NIQB 11

Jordan, Re Judicial Review [2018] NICA 34

Keane [2010] EWCA Crim 2514

Leigh v Gladstone (1909) 26 TLR 139

Lewis [1970] Crim LR 647

Logdon v DPP [1976] Crim LR 121

Martin [2001] EWCA Crim 2245

Mouse's Case (1608) 12 Co Rep 63

Mula [2013] EWCA Crim 1293

Noye [2011] EWCA Crim 650

O'Brien [2004] EWCA Crim 2900

Owino [1996] 2 Cr App R 128

Palmer [1971] AC 814

Palmer v The Queen [1971] AC 814 at 831

Quayle [2005] EWCA Crim 1415

R (Miranda) v SSHD and MPC [2014] EWHC 255 (Admin)

R (Nicklinson) v Ministry of Justice [2014] UKSC 38

R v Bainbridge [1960] 1 QB 129

R v Giannetto [1997] 1 Cr App R 1

R v Gladstone Williams (1984) 78 Cr App R 276

R v Gul [2013] UKSC 64

R v Hussey (1924) 18 Cr App R 160

R v McInnes [1971] 3 All ER 295

R v Morris [2013] EWCA Crim 436

R v Oatbridge (1991) 94 Cr App R 367

R v Ray [2017] EWCA Crim 1391

R v Rose (1884) 15 Cox 540

R v Secretary of State ex parte Hosenball [1977] 1 WLR 766, 783

R v Venna [1976] QB 421

R v Yaman [2012] EWCA Crim 1075

Re A (Children) [2000] 4 All ER 961

Reed v Wastie [1972] Crim LR 221

Secretary of State v Rehman [2001] UKHL 47

Smith v Chief Superintendent of Woking Police Station (1983) 76 Crim App R 234

Wilcox v Jeffrey [1951] 1 All ER 464

Wood v DPP [2008] EWHC 1056

Woollin [1998] 4 All ER 103

Foreign Statutes

American Declaration of Independence (US 1776)

Patriot Act (US 2001)

Grundgesetz für die Bundesrepublik Deutschland (Federal Law Gazette Part III)

Foreign Cases

The Public Committee Against Torture in Israel v Government of Israel et al (Judgment) [1999] HCJ 5100/94

UNSC Materials

UNSC 'Provisional Verbatim Record of 3033rd Meeting of UNSC' (21 January 1992) UN Doc S/PV.3033

UNSC Res 1192 (27 August 1998) UN Doc S/RES/1192

UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368

UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373

UNSC Res 1535 (26 March 2004) UN Doc S/RES/1535

UNSC Res 1674 (28 April 2006) UN Doc S/RES 1674

UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894

UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970

UNSC Res 1973 (17 March 2011) UN Doc S/RES 1973

UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975

UNSC Res 1996 (8 July 2011) UN Doc S/RES/ 1996

UNSC Res 2014 (21 October 2011) UN Doc S/RES/2014

UNSC Res 2016 (27 October 2011) UN Doc S/RES/2016

UNSC Res 2085 (20 December 2012) UN Doc S/RES/2085

UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100

UNSC Res 2121 (10 October 2013) UN Doc S/RES/2121

UNSC Res 2126 (25 November 2013) UN Doc S/RES/2126

UNSC Res 2127 (5 December 2013) UN Doc S/RES/2127

UNSC Res 2134 (28 January 2014) UN Doc S/RES/2134

UNSC Res 2178 (24 September 2014) S/RES/2178

UNSC Res 2199 (12 February 2015) UN Doc S/RES/2199

UNSC Res 2253 (17 December 2015) S/RES/2253

UNSC Res 2396 (21 December 2017) UN Doc S/RES/2396

UNSC Res 487 (19 June 1981) UN Doc S/RES/487

UNSC Res 579 (18 December 1985) UN Doc S/RES/579

UNSC Res 638 (31 July 1989) UN Doc S/RES/638

UNSC Res 687 (3 April 1991) UN Doc S/RES/687

UNSC Res 731 (21 January 1992) UN Doc S/RES/731

UNSC Res 748 (31 March 1992) UN Doc S/RES/748

UNSC Res 883 (11 November 1993) UN Doc S/RES/883

UNSC, 'Further Report by the Secretary-General Pursuant to Paragraph 4 of Security Council Resolution 731 (1992)' (3 March 1992) UN Doc S/23672

UNSC, 'Identical Letters Dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland

to the United Nations addressed to the Secretary-General and the President of the Security Council' (26 November 2014) UN Doc S/2014/851

UNSC, 'Letter Dated 17 January 1992 from the Permanent Representatives of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council' (17 January 1992) UN Doc S/23436.

UNSC, 'Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council' (22 September 2014) UN Doc S/2014/691

UNSC, 'Letter dated 7 October 2001 by the permanent representative of the United States to the President of the Security Council' (7 October 2001) UN Doc S/2001/946

UNSC, 'Letter dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council' (7 October 2001) UN Doc S/2001/947

UNSC, 'Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council' (7 October 2001) UN Doc S/2001/946

UNSC, 'Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council' (7 September 2015) UN Doc S/2015/688

UNSC, 'Presidential Statement 7' (15 December 2022) UN Doc /PRST/2022/7

UNSC, 'Provisional Record of 3864th Meeting of UNSC' (20 March 1998) UN Doc S/PV.3864

UNSC, 'Provisional Record of 4929th Meeting of UNSC' (23 March 2004) UN Doc S/PV.4929

UNSC, 'Report by the Secretary-General Pursuant to Paragraph 4 of Security Council Resolution 731 (1992)' (11 February 1992) UN Doc S/23574

UNGA Materials

ESC, 'Extrajudicial, Summary or Arbitrary Executions Report of the Special Rapporteur, Philip Alston' (8 March 2006) UN Doc E/CN.4/2006/53

UNGA, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' (28 May 2010) UN Doc A/HRC/14/24/Add.6

UNSG Ban Ki-moon, 'Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security – A Global Strategy for Fighting Terrorism' (10 March 2005) <https://www.un.org/sg/en/latest/sg/statement?nid=1345>

UNGA, 'Report of the Secretary General "We the Peoples: the role of the United Nations in the twenty-first century"' (27 March 2000) UN Doc A/54/2000

UNGA, 'Vienna Declaration and Programme of Action' World Conference on Human Rights (25 June 1993) UN Doc A/CONF.157/23

UNGA 'Request for the Convening of a Special Session of the General Assembly' (9 January 1992) UN Doc A/46/840

UNGA, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (22 December 2010) UN Doc A/HRC/16/51

UNSG Kofi Anan, 'In Larger Freedom: towards development, security and human rights for all' (21 March 2005) UN Doc A/59/2005

UNGA Res 180(II) (21 November 1947) UN Doc A/RES/180(II)

Universal Declaration of Human Rights (10 December 1948) UN Doc A/RES/217(III)

UNGA Res 1904 (XVIII) (20 November 1963) UN Doc A/RES/1904 (XVIII)

UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625 (XXV)

UNGA Res 3314 (14 December 1974) UN Doc A/RES/3314

UNGA Res 44/128 (15 December 1989) UN Doc A/RES/44/128

Cairo Declaration on Human Rights in Islam (adopted 5 August 1990) UN Doc A/CONF.157/PC/62/Add.18

UNGA, 'Letter Dated 15 November 1991 from the Permanent Representatives of the Libyan Arab Jamahiriya to the United Nations Addressed to the Secretary-General' (16 November 1991) UN Doc S/23221

UNGA, 'Letter Dated 17 November 1991 from the Permanent Representatives of the Libyan Arab Jamahiriya to the United Nations Addressed to the Secretary-General' (9 January 1992) UN Doc A/46/841-S/23396

UNGA, 'Letter dated 17 November 1991 from the Permanent Representatives of the Libyan Arab Jamahiriya to the United Nations Addressed to the Secretary-General' (20 November 1991) UN Doc A/46/660-S/23226

UNGA, 'Letter dated 20 November 1991 from the Permanent Representatives of the Libyan Arab Jamahiriya to the United Nations Addressed to the Secretary-General' (13 January 1992) UN Doc A/46/844-S/23416

UNGA, 'Letter Dated 20 December 1991 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the Secretary-General' (31 December 1991) UN Doc A/46/826-S/23307

UNGA, 'Letter dated 20 December 1991 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General' (31 December 1991) A/46/827 S/23308

UNGA, 'Letter dated 20 December 1991 from the Permanent Representatives of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General' (31 December 1991) A/46/828 S/23309

UNGA, 'Letter dated 20 December 1991 from the Permanent Representative of France to the United Nations addressed to the Secretary-General' (31 December 1991) A/46/825 S/23306

UNGA Res 54/4 (6 October 1999) UN Doc A/RES/54/4

UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83

UNGA Res 60/158 (28 February 2005) UN Doc A/RES/60/158

UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1

UNGA Res 60/288 (20 September 2006) UN Doc A/RES/60/288

UNGA Res 62/272 (15 September 2008) UN Doc A/RES/62/272

UNGA Res 63/117 (10 December 2008) UN Doc A/RES/63/117

UNGA Res 66/138 (19 December 2011) UN Doc A/RES/66/138

Hansard

HL Deb 20 October 1987, vol 489ff

HC Deb 25 January 1988, vol 126, col 21ff

HC Deb 7 March 1988, vol 129, col 21ff

HC Deb 3 November 2010, vol 517, col 921ff

HC Deb 7 September 2015, vol 599, col 25ff

HC Deb 2 December 2015, vol 603, col 324

Official Materials

Baroness Casey of Blackstock DBE CB, 'Baroness Casey Review, An independent review into the standards of behaviour and internal culture of the Metropolitan Police Service' (*Met Police*, March 2023) <https://www.met.police.uk/SysSiteAssets/media/downloads/met/about-us/baroness-casey-review/update-march-2023/baroness-casey-review-march-2023a.pdf>

H.M. Coroner, 'Coroner's inquest into the Death of Jean Charles de Menezes' (*National Archives*, 22 October 2008) <https://webarchive.nationalarchives.gov.uk/ukgwa/20090317235546/http://www.stockwellinquest.org.uk/>

HM Government, *'A Strong Britain in an Age of Uncertainty: The National Security Strategy'* (Cabinet Office, October 2010)

'No.1 Mr Webster to Lord Ashburton. Washington, July 27, 1842' British and Foreign State Papers Vol.30 1841/42 <https://babel.hathitrust.org/cgi/pt?id=mdp.35112103940203&seq=224>

'No.2 Mr Webster to Mr Fox. Washington, April 24, 1841' British and Foreign State Papers, Vol.29 1840/41 <https://babel.hathitrust.org/cgi/pt?id=mdp.39015019751299&seq=1159>

'No.3 Mr Webster to Lord Ashburton. Washington, August 6, 1842.' British and Foreign State Papers, Vol.30 1841/42 <https://babel.hathitrust.org/cgi/pt?id=mdp.35112103940203&seq=224>

'Proscribed terrorist groups of organisations' (*UK Home Office*, 26 November 2021) <https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2/proscribed-terrorist-groups-or-organisations-accessible-version#proscription-criteria>

HM Government, 'CONTEST: the United Kingdom's strategy for countering terrorism' (Cm 9608, 2018)

Home Office, *Counter-Extremism Strategy* (Cm 9148, 2015)

Intelligence and Security Committee of Parliament, *UK Lethal Drone Strikes in Syria* (HC 2017 1152)

International Commission of Jurists, 'Assessing Damage, Urging Action: report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights' (ICJ 2009)

IPCC, 'Stockwell One: An Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22 July 2005' (19 January 2006)
<webarchive.nationalarchives.gov.uk/20100908152737/http://www.ipcc.gov.uk/stockwell_one.pdf>

IPCC, 'Stockwell Two: An Investigation into Complaints about the Metropolitan Police Service's Handling of Public Statements Following the Shooting of Jean Charles de Menezes on 22 July 2005' (2 August 2007)
<webarchive.nationalarchives.gov.uk/20100908152737/http://www.ipcc.gov.uk/ipcc_stockwell_2.pdf>

JCHR, *Government Memorandum to the JCHR* (2015-16, HL 141, HC 574)
<https://www.parliament.uk/globalassets/documents/joint-committees/human-rights/Government_Memorandum_on_Drones.pdf>

JCHR, *Oral Evidence: the work of the Attorney General* (2015-16, HC 409)
<https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-work-of-the-attorney-general/oral/21698.pdf>

JCHR, *The Government's Policy on the Use of Drones for Targeted Killing: Government response to the Committee's second report of session 2015-16* (2016-17, HL 49, HC 747)

JCHR, *The Government's Policy on the Use of Drones for Targeted Killing (second report)* (2015-16, HL 141, HC 574)

JHRC, *Oral Evidence* (2015-16, HC 574) <https://committees.parliament.uk/oralevidence/5260/pdf>

Letter from Metropolitan Commissioner Sir Ian Blair to Home Office Permanent Secretary Sir John Grieve (22nd July 2005) <https://web.archive.org/web/20090510125404/http://cms.met.police.uk/news/policy_organisational_news_and_general_information/commissioner/commissioner_s_letter_to_the_home_office>

Letter from MPA to Attorney General about health and safety prosecution of MPS (4 August 2006) <http://policeauthority.org/metropolitan/publications/letters/060804/index.html>

Lord Widgery, *Report of the Tribunal Appointed to Inquire into the Events on Sunday 30 January 1972, which led to loss of life in connection with the procession in Londonderry on that day* (HM Stationery Office 1972)

MPA Committee Report, 'MPS Response to the Threat of Suicide Terrorism' (27 October 2005) <http://policeauthority.org/metropolitan/committees/mpa/2005/051027/13/index.html>

MPA Memo, 'Counter Suicide Terrorism' (8 August 2005) <http://policeauthority.org/metropolitan/downloads/foi/log/kratos-attach.pdf>

Sir William Macpherson, *The Stephen Lawrence Inquiry: report* (Cm 4262-I 1999)

Speeches

Biden, J., 'Remarks by President Biden on the Terror Attack at Hamid Karzai International Airport' (*White House*, 26 August 2021)

<https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/26/remarks-by-president-biden-on-the-terror-attack-at-hamid-karzai-international-airport/>

Cameron, D., 'Speech on Radicalisation and Islamic Extremism' (Security Conference, Munich, 5 February 2011) <webarchive.nationalarchives.gov.uk/20130109092234/http://number10.gov.uk/news/pms-speech-at-munich-security-conference/>

Kennedy, E.M., 'The Bush Doctrine of Pre-emption' (Delivered on the Floor of the US Senate, Washington, 7 October 2002) <https://universityofleeds.github.io/philtaylorpapers/vp01ca2f.html>

May, T., 'Speech to the UN General Assembly 2017' (UNGA, New York, 20 September 2017) <https://www.gov.uk/government/speeches/theresa-mays-speech-to-the-un-general-assembly-2017>

Parham, P., 'Terrorism Continues to Pose a Grave Threat to International Peace and Security' (Statement to UNSC Meeting on Briefings by Chairmen of Subsidiary Bodies of the Security Council, 10 May 2013) <www.gov.uk/government/speeches/terrorism-continues-to-pose-a-grave-threat-to-international-peace-and-security>

Books

Adams, G., *The Politics of Irish Freedom* (Brandon Books 1986)

Adler, E. and M. Barnett (eds), *Security Communities* (CUP 1998)

Ahire, P.T., *Imperial Policing: the emergence and role of the police in colonial Nigeria 1860-1960* (OUP 1991)

Alexandrov, S.A., *Self-defense Against the Use of Force in International Law* (Kluwer 1996)

Anderson, B., *Imagined Communities* (Verso 2006)

Anderson, D.M., and D. Killingray, *Policing the Empire: government, authority and control, 1830-1940* (MUP 1991)

Anghie, A., *Imperialism, Sovereignty and the Making of International Law* (CUP 2005)

Angier, T., *Natural Law Theory* (CUP 2021)

Aristotle, *Politics: books I and II* (TJ Saunders tr, OUP 1995)

Asmal, K., *Shoot to Kill? International Lawyers' Inquiry into the Lethal use of Firearms by the Security Forces in Northern Ireland* (Mercier Press 1985)

Bamforth, N., and P. Leyland, *Public Law in a Multi-Layered Constitution* (Hart 2003)

Banakar, R., and. M Travers (eds), *Theory and Method in Socio-Legal Research* (Hart 2005)

Barreto, J-M., (eds), *Human Rights from a Third World Perspective: critique, history and international law* (Cambridge Scholars Publishing 2013)

Bates, E.S., *Terrorism and International Law: accountability, remedies, and reform* (OUP 2011)

Bauer, M.W., and G. Gaskell (eds), *Qualitative Researching with Text, Image and Sound: a practical handbook* (Sage 2000)

Beckman, J., *Comparative Legal Approaches to Homeland Security and Anti-terrorism* (Ashgate 2007)

Bennett, G., *Technicians of Human Dignity: bodies, souls and the making of intrinsic worth* (Fordham University Press 2016)

Borradori, G., *Philosophy in a Time of Terror: dialogues with Jürgen Habermas and Jacques Derrida* (trans. P-A. Brault and M. Naas, University of Chicago Press 2003)

Bowring, J., (eds), *The Works of Jeremy Bentham* (Vol 2, Russell and Russell 1962)

Brecher, B., *Torture and the Ticking Bomb* (Blackwell 2007)

Brierly, J.L., *The Law of Nations* (2nd edn, The Clarendon Press 1936)

Brierly, J.L., *The Law of Nations* (OUP 1963)

Brown. J., Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (Lawbook Exchange 2000)

Brownlie, I., *International Law and the Use of Force by States* (OUP 1963)

Bryman, A., *Social Research Methods* (3rd edn, OUP 2008)

Buzan, B., O. Wæver, and J. de Wilde, *Security: a new framework of analysis* (Lynne Reinner 1997).

Buzan, B., *People, States and Fear: an agenda for international security studies in the post-Cold War era* (Harvester 1991)

Buzan, B., *People, States and Fear: an agenda for international security studies in the post-Cold War era* (2nd edn, ECPR Press 2007)

Buzan, Wæver, and de Wilde, *'Security: A New Framework for Analysis'* (Lynne Rienner Publishers 1998)

Byers, M., (eds), *The Role of Law in International Politics: essays in International Relations and International Law* (OUP 2000)

Campbell, D., *Writing Security: US foreign policy and the politics of identity* (MUP 1998)

Casey-Maslen, S., *The Right to Life Under International Law* (CUP 2021)

Cassese, A., *International Law* (2nd edn, OUP 2005)

Charmaz, K., *Constructing Grounded Theory: a practical guide through qualitative analysis* (Sage 2006)

Chenoweth, E., R. English, A. Gofas, S.N Kalyvas (eds), *The Oxford Handbook of Terrorism* (OUP 2019)

Chinkin, C., and F. Baetens (eds), Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford (CUP 2015)

Chinkin, C., and M.Kaldor, *International Law and New Wars* (CUP 2017)

Clapham, A., *Brierly's Law of Nations* (7th edn, OUP 2014)

Closs, A., Stephens and N. Vaughn-Williams (eds), *Terrorism and the Politics of Response* (Routledge 2009)

Cownie, F., *Legal Academics, Culture and Identities* (Hart 2004)

Crawford, J., A. Pellet, and S. Olleson (eds), *The Law of State Responsibility* (OUP 2010)

Crawford, J., *Brownlie's Principles of Public International Law* (9th edn, OUP 2019)

Crawford, J., *The Creation of States in International Law* (OUP 2006)

Cronin, A.K., and J.M. Ludes (eds), *Attacking Terrorism: elements of a grand strategy* (Georgetown University Press 2004)

Cruft, R., S.M. Liao, M. Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015)

Dash, S., '*Justice Denied: a challenge to Lord Widgery's Report on Bloody Sunday* (International League for the Rights of Man 1972)

Davies, B., *Thomas Aquinas's Summa Theologiae: a guide and commentary* (OUP 2014)

Dershowitz, A., *Why Terrorism Works: understanding the threat, responding to the challenge* (YUP 2002)

Dickinson R., E. Katselli, C. Murray, and O.W. Pederson (eds), *Examining Critical Perspectives on Human Rights* (CUP 2012)

Dietrich, J.W, *The George W. Bush Foreign Policy Reader: Presidential speeches with commentary* (Taylor Francis 2005)

Dinstein, Y., *War, Aggression and Self-defence* (CUP 2001)

Doswald-Beck, L., *Human Rights in Times of Conflict and Terrorism* (OUP 2011)

Dreijmanis, J., G.C. Wells, *Max Weber's Complete writings on Academic and Political Vocations* (Algora Publishing 2007)

Duffy, H., *The "War on Terror" and the Framework of International Law* (2nd edn, CUP 2015)

Dworkin, *Taking Rights Seriously* (Duckworth 1978)

E. de Vattel, *The Law of Nations* (J. Chitty (ed), CUP 2011)

Elliott, J.H., *Empires of the Atlantic World: Britain and Spain in America 1492-1830* (YUP 2006)

Evans, M.D., (ed), *International Law* (5th edn, OUP 2018)

Evans, T., (ed) *Human Rights Fifty Years On: a reappraisal* (1998 MUP)

Fairclough, N., *Discourse and Social Change* (Polity Press 1992)

Fairclough, N., *Language and Power* (Longman 1989)

Farrell, M., *Northern Ireland: the Orange state* (Pluto Press 1980)

Fay, M-T., Mike Morrissey, and Marie Smyth, *Northern Ireland's Troubles: the human cost* (Pluto Press 1999)

Feinberg, J., (ed) *Rights, Justice and the Bounds of Liberty: essays in social philosophy* (Princeton University Press 1980)

Feinberg, J., *Social Philosophy* (Prentice-Hall 1973)

Finszter, G., and I. Sajbanics (eds), *Security Challenges in the 21st Century* (Dialóg Campus 2018)

Fletcher, G., *Basic Concepts in Criminal Law* (OUP 1998)

Fletcher, G.P., and J.D. Ohlin, *Defending Humanity* (OUP 2008)

Foucault, M., *The Archaeology of Knowledge and the Discourse on Language* (trans. AM Sheridan-Smith, Pantheon Books 1972)

Franck, T.M., *Recourse to Force: state action against threats and armed attacks* (CUP 2002)

Franklin, F., and W.T. Franklin, *Memoirs of the Life and Writings of Benjamin Franklin* (H Colburn 1818)

Fraser, D., *Law After Auschwitz: towards a jurisprudence of the Holocaust* (Carolina Academic Press 2005)

Freeman, M., *Human Rights: an interdisciplinary approach* (Polity Press 2002)

Frum, D., and R. Perle, *An End to Evil: how to win the war on terror* (Random House 2003)

Fukuyama, F.Y., *The End of History and the Last Man* (Free Press 1992)

Gearty, C., *Civil Liberties* (OUP 2007)

Gellner, E., *Thought and Change* (Verso 1964)

Ginbar, Y., *Why Not Torture Terrorists?* (OUP 2008)

Glaser, B.G., and A.L. Strauss, *The Discovery of Grounded Theory* (Aldine 1967)

Goldstein, J.S, *The Real Price of War: how you pay for the war on terror* (New York University Press 2004)

Gray, C., 'The Use of Force and the International Legal Order' in M. Shaw (ed), *International Law* (5th edn, OUP 2018)

Gray, J., *Straw Dogs: thoughts on humans and other animals* (Granta Books 2002)

Greenberg, K.J. and J.L. Dratel (eds), *The Torture Papers: the road to Abu Ghraib* (CUP 2005)

Griffin, J., *On Human Rights* (OUP 2008)

Griset, P. and S. Mahan, *Terrorism in Perspective* (Sage 2003)

Grow, M., *US Presidents and Latin American Interventions* (University Press of Kansas 2008)

Hammersley, M., *What's Wrong with Ethnography?* (Routledge 1992)

Hart, H.L.A., *The Concept of Law* (3rd edn, OUP 2012)

Henkin, L., *International Law: Politics and Values* (Martinus Nijhoff 1995)

Heraclides, A., and A Dialla, *Humanitarian Intervention in the Long Nineteenth Century: setting the precedent* (MUP 2015)

Hervey, T., R. Cryer, B. Sokhi-Bulley, and A. Bohm, *Research Methodologies in EU and International Law* (Hart 2011)

Hessbruegge, J.A., *Human Rights and Personal Self-Defense in International Law* (OUP 2017)

Higgins, R., *The Development of International Law through the Political Organs of the United Nations* (OUP 1963)

Hillyard, P., *Suspect Community: people's experience of the Prevention of Terrorism Acts in Britain* (Pluto Press 1993)

Himmler, H., 'Der Untermensch' (trans. H. Feuer, 1942 Nordland Verlag) <http://www.holocaustresearchproject.org/holoprelude/deruntermensch.html>

Hobbes, T., *Leviathan* (Lerner 2018)

Hoffman, B., *Inside Terrorism* (3rd edn, Columbia UP 2017)

Holy Bible New International Version (Hodder and Stoughton 2011)

Ignatieff, M., *The Lesser Evil: political ethics in an age of terror* (Princeton University Press 2004)

Jackson, B.A, J.C. Baker, K. Cragin, J. Parachini, H.R. Trujillo, and P.Chalk (eds), *Aptitude for Destruction, Volume 2: case studies of organizational learning in five terrorist groups* (RAND Corporation 2007)

Jackson, R., and N. Howe, *The Graying of the Great Powers: demography and geopolitics in the twenty-first century* (Center for Strategic and International Studies 2008)

Jackson, R., L. Jarvis, J. Gunning, and M. Breen-Smyth, *Terrorism: a critical introduction* (Red Globe Press 2011)

Jackson, R., *Writing the International War on Terrorism: language, politics, and counterterrorism* (MUP 2005)

Jenkins, I., *Social Order ant the Limits of Law: a theoretical essay* (Princeton University Press 1980)

Jennings, A., (ed), Justice Under Fire: the abuse of civil liberties in Northern Ireland (Pluto Press 1988)

Jennings, R.Y., and A.D. Watts (eds), Oppenheim's International Law: Volume I Peace (9th edn, OUP 2008)

Joseph, S., and M. Castan, *International Covenant on Civil and Political Rights: cases, materials, and commentary* (OUP 2013)

Kant, I., *Groundwork for the Metaphysics of Morals* (A.J. Wood (ed), YUP 2002)

Kant, I., *The Moral Law*: *groundwork for the metaphysics of morals* (H.J. Paton tr, Routledge 1991)

Kelstrup and M.C. Williams (eds), *International Relations Theory and the Politics of European Integration* (Routledge 2000)

Kitchin,H., *The Gibraltar Report: an independent observer's report of the inquest into the deaths of Mairead Farrell, Daniel McCann and Sean Savage, Gibraltar September 1988* (Liberty (National Council for Civil Liberties) 1989)

Klein, N., *The Shock Doctrine: the rise of disaster capitalism* (Penguin Books 2007)

Knight, A., and L. Ruddock (eds) *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008)

Kolakowski, L., *Modernity on Endless Trial* (Chicago University Press 1990)

Kretzmer, D., and E. Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002)

Küng, H., and J. Moltman (eds), *The Ethics of World Religions and Human Rights* (Trinity Press International 1990)

Laqueur, W., *The New Terrorism: fanaticism and the arms of mass destruction* (OUP 1999)

Lauterpacht, H., *International Law and Human Rights* (Stevens & Sons 1950)

Linke, U., and D. Taana Smith *Cultures of Fear: a critical reader* (Pluto Press 2009)

Locke, J., *Two Treatises of Government and A Letter Concerning Toleration* (I Shapiro ed, YUP 2003)

Locke, J., Two Treatises of Government' (R. Hay McMaster University Archive of the History of Economic Thought, Sharpe & Son 1823) <https://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf>

Loughlin, J., *The Ulster Question since 1945* (2nd edn, Red Globe Press 2004)

Lubell, N., *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010)

M. Birks and J. Mills, *Grounded Theory: a practical guide* (2nd edn, Sage 2015)

Macfie, A.L., *Orientalism* (Taylor-Francis 2002)

Marks, S., and A Clapham, *International Human Rights Lexicon* (OUP 2005)

Marx, K., and F. Engels, *The Communist Manifesto: with an introduction by David Harvey* (Pluto 2010)

McConville, M., and W.H. Chui, *Research Methods for Law* (Edinburgh University Press 2007)

McCormack, T.H.L., *Self-defence in International Law: the Israeli raid on the Iraqi nuclear reactor* (Palgrave 1996)

McCoubrey, H., and N.D. White, *Textbook on Jurisprudence* (2nd edn, Blackstones 1996)

McCrudden, C., *Understanding Human Dignity* (British Academy/OUP 2013)

Meinecke, W.F., and A. Zapruder, *Law, Justice, and the Holocaust* (United States Holocaust Memorial Museum 2014) <https://www.ushmm.org/m/pdfs/20140711-ljh-booklet-2nd-Edition.pdf>

Mill, J.S., *Utilitarianism, Liberty, Representative Government* (Dent and Sons Ltd 1962)

Miller, G., and R. Dingwall (eds), *Context and Method in Qualitative Research* (Sage 1997)

Moeckli, D., S. Shah, and S. Sivakumaran (eds), *International Human Rights Law* (OUP 2010)

Moody, T.W., F.X. Martin and D. Keogh, with P. Kiely (eds), *The Course of Irish History* (5th edn, Roberts Rinehart 2012)

Moore, M.S., *Placing Blame: a theory of criminal law* (OUP 2010)

Neff, S.C., (ed), *Hugo Grotius on the Law of War and Peace* (OUP 2012)

Neuman, F., and P. Hayes, *Behemoth: the structure and practice of National Socialism 1933-1944* (Ivan R. Dee 2009)

Newburn, T., (ed), *Handbook of Policing* (Taylor and Francis 2003)

Newburn, T., (ed), *Handbook of Policing* (Willan 2008)

Nowak, M., *UN Covenant on Civil and Political Rights: CCPR commentary* (2nd edn, NP Engel 2005)

Nozick, R., *Anarchy, State and Utopia* (Blackwell 1974)

O'Brien, B., *The Long War: the IRA and Sinn Féin, 1985 to today* (Syracuse University Press 1995)

Ohlin, J.D., (ed), *Research Handbook on Remote Warfare* (Edward Elgar 2017)

Onuma, Y., *A Transcivilizational Perspective on International Law: questioning prevalent cognitive frameworks in the emerging multi-polar and multi-civilizational world of the twenty-first century* (Brill 2010)

Oppenheim, L., *International Law: a treatise* Vol 1–Peace (3rd Ed RF Roxburgh (ed) The Lawbook Exchange 2005)

Ormerod, D., and K. Laird, *Smith, Hogan, and Ormerod's Criminal Law* (16th edn, OUP 2021)

Parry, A., *Terrorism: from Robespierre to Arafat* (Vanguard Press 1976)

Penner. J., and E. Melissaris, *McCoubrey and White's Textbook on Jurisprudence* (5th edn, OUP 2012)

Perry, M.J., *Towards a Theory of Human Rights: religion, law, courts* (CUP 2007)

Plato, *The Republic* (C Rowe tr, Penguin Classics 2012)

Poole, E., and John E. Richardson, *Muslims and the News Media* (Tauris 2005)

Posner, R.A., *How Judges Think* (HUP 2008)

Radin, P., *The Story of the American Indian* (John Murray)

Ramcharan, B.G., (ed), *The Right to Life in International Law* (Martinus Nijhoff 1985)

Randelzhofer, A., and C Tomuschat, (eds) *State Responsibility and the Individual: reparation in instances of grave violations of human rights* (Martinus Nijhoff 1999)

Rawls, J., *A Theory of Justice* (OUP 1999)

Rawls, J., *The Law of Peoples: with the idea of public reason revisited* (Harvard University Press 1999)

Robson, C., *Real World Research: a resource for social scientists and practitioner-researchers* (Blackwell 1993)

Rolston, B., (ed) *The Media and Northern Ireland: covering the Troubles* (Palgrave 1991)

Rolston, B., *Unfinished Business: state killings and the quest for truth* (Beyond the Pale 2000)

Rosenfeld, M., and A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012)

Ross, W.D., *Aristotle* (Methuen 1937)

Rousseau, J.J., *The Social Contract and the First and Second Discourses* (ed S. Dunn, YUP 2002)

Rousseau, J-J., *The Social Contract* (M Cranston tr, Penguin Classics 2003)

Russell, K. K., *The Color of Crime: racial hoaxes, white fear, black protectionism, police harassment, and other macroaggresions* (NYUP 1998)

Ruys, T., *'Armed Attack' and Article 51 of the UN Charter: evolutions in customary law and practice* (CUP 2010)

Ryngaert, C., and RA Wessel and J. Wouters (eds), *Leading Judicial Decisions of the Law of International Organizations* (OUP 2016)

Said, E.W., *Orientalism: Western conceptions of the orient* (Penguin 1991)

Said. E.W., Covering Islam (Routledge 1981)

Salinas de Frías, A.M., K.H.L. Samuel and N.D. White (eds), *Counterterrorism: international law and practice* (OUP 2012)

Salter, M., and J. Mason, *Writing Law Dissertations: an introduction and guide to the conduct of legal research* (Longman 2007)

Sands. P., *Torture Team: Rumsfeld's memo and the betrayal of American values* (Palgrave 2008)

Schabas, W.A., (ed), *The Universal Declaration of Human Rights: the travaux préparatoires* (CUP 2013)

Schauer, F., *The Force of Law* (2014 HUP)

Schmitt, C., *Political theology: four chapters on the concept of sovereignty* (MIT Press 1985)

Schmitt, C., *The Concept of the Political* (University of Chicago Press 1996)

Schwelling, B., (ed), *Reconciliation, Civil Society, and the Politics of Memory: transnational initiatives in the 20th and 21st century* (Columbia UP 2012)

Searle, J.R., *The Construction of Social Reality* (Free Press 1995)

Seton-Weston, H., *Nations and States: an enquiry into the origins of nations and the politics of nationalism* (Westview Press 1977)

Shaw, M.N., *International Law* (6th edn, CUP 2008)

Shelton, D., *Remedies in International Human Rights Law* (OUP 2006)

Simma, B., D-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (eds), *The Charter of the United Nations: a commentary, Vol. II* (3rd edn, OUP 2012)

Simpson, A.W.B., *Human Rights and the End of Empire* (OUP 2001)

Sivakumaran, S., *The Law of Non-International Armed Conflict* (OUP 2012)

Spruyt, H., *Ending Empire: contested sovereignty and territorial partition* (Cornell University Press 2005)

Squires, P., and P. Kennison, *Shooting to Kill? Policing, firearms and armed response* (Wiley-Blackwell 2010)

Stahn, C., and JK Kleffner (eds), *The Jus Post Bellum: towards a law of transition from conflict to peace* (TMC Asser Press 2008)

Stalker, J., *Stalker* (Harrap 1988)

Steiner, H.J., P. Alston and R. Goodman, *International Human Rights in Context: law, politics, morals* (3rd ed, OUP 2007)

Stoddard, L., *The Revolt Against Civilization: the menace of the under man* (Chapman and Hall 1923)

Swidler, L., H. Küng and J. Moltman (eds), *The Ethics of World Religions and Human Rights* (Trinity Press International 1990)

Tamanaha, B.Z., *A General Jurisprudence of Law and Society* (OUP 2001)

Tickner, A.B., and D.L. Blaney (eds), *Thinking International Relations Differently* (Routledge 2012)

Townshend, C., *Political Violence in Ireland: government and resistance since 1848* (Clarendon 1983)

Van Hoecke, M., (eds), *Methodologies of Legal Research: which kind of method for what kind of discipline?* (Hart 2011)

Walker, C., *The Prevention of Terrorism in British Law* (MUP 1992)

Walzer, M., *Arguing About War* (YUP 2004)

Wardlaw, G., *Political Terrorism: theory, tactics, and counter-measures* (2nd edn, CUP 1989)

Watkins, D., and M. Burton (eds), *Research Methods in Law* (Routledge 2013)

Webb, D., and E. Willis-Herrera (eds), *Subjective Well-Being and Security* (Springer 2011)

Wellman, C., *The Proliferation of Rights: moral progress or empty rhetoric?* (Westview Press 1999)

Wertsch, J.V., *Vygotsky and the Social Formation of Mind* (HUP 1985)

White, N.D, 'Terrorism, Security and International Law' in A Hehir, N Kuhrt, and A Mumford, *International Law, Security and Ethics* (Routledge 2011)

Wilkinson, P., *Terrorism Versus Democracy: the liberal state response* (Taylor Francis 2011)

Wilmshurst, E., *The Chatham House Principles of International Law on the Use of Force in Self*-defence (CUP 2006)

Wodak, R., R de Cilla, M Reisigl and K Liebhart, *The Discursive Construction of National Identity*, 2nd edn (Edinburgh University Press 1999)

World Bank, *World Development Report: conflict, security, and development* (World Bank 2011)

Wright, R., *Stolen Continents: the Indian story* (Random House 1993)

Yu, S.S., and M.D. Matsaganis (eds), *Ethnic Media in the Digital Age* (Routledge 2018)

Academic Materials

Abrams, D., and G.A. Travaglino, 'Immigration, Political Trust, and Brexit: testing an aversion amplification hypothesis' (2018) 57 British Journal of Clinical Psychology 310

Akbarzadeh, S., and B. Smith, 'The Representation of Islam and Muslims in the Media (the Age and Herald Sun Newspapers)' (Report, School of Political and Social Inquiry, Monash University, 2005) <https://www.academia.edu/8645594/The_Representation_of_Islam_and_Muslims_in_the_Media>

Allhoff, F., 'A Defense of Torture: separation of cases, ticking time-bombs and moral justification' (2005) 19 International Journal of Applied Philosophy 243

Aradau, C., and R van Munster, 'Exceptionalism and the "War on Terror": criminology meets international relations' (2009) 49 British Journal of Criminology 686

Aust, A., 'Lockerbie: The Other Case' (2000) 49 International and Comparative Law Quarterly 278

Badinter Commission, 'Opinion No.1' (n) and 'Opinion No.10' (1992) 92 ILR 206

Baele, S.J., O.C. Sterck, T. Slingeneyer, and G.P. Lits, 'What Does the "Terrorist" Label Really Do? Measuring and explaining the effects of the "terrorist" and "Islamist" categories' (2017) 42(5) Studies in Conflict and Terrorism 520

Baker, P., Costas Gabrielatos and Tony McEnery, 'Sketching Muslims: A corpus-driven analysis of representations around the word "Muslim" in the British press 1998-2009' (2013) 34(3) Applied Linguistics 255

Balzacq, T., 'The Three Faces of Securitization: political agency, audience and context' (2005) 11(2) EJIR 171

Barsh, R.L., 'The Challenges of Indigenous Self-Determination' (1993) 26 University of Michigan Journal of Law Reform 277

Bassiouni, M.C., 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 Law and Contemporary Problems 63

Bassiouni, M.C., 'Legal Control of International Terrorism: a policy-orientated assessment' (2002) 43 Harvard International Law Journal 83

Bowett, D., 'The Impact of Security Council Decisions on Dispute Settlement Procedures' (1994) 5 EJIL 89

Boyd, C., 'The Lockerbie Trial' (International Society for the Reform of Criminal Law, 15th International Conference, Canberra, 26-30 August 2001) <https://web.archive.org/web/20081217192311/http://www.isrcl.org/Papers/Boyd.pdf>

Bradney, A., 'Law as a Parasitic Discipline' (1998) 25 Journal of Law and Society 71

Brandon, B., 'Terrorism, Human Rights and the Rule of Law: 120 years of the UK's legal response to terrorism' (2004) Criminal Law Review 981

Breen-Smyth, M., 'Theorising the "Suspect Community": counterterrorism, security practices and the public imagination' (2014) 7(2) Critical Studies on Terrorism 223

Bucholtz, M., and K Hall, 'Identity and Interaction: a sociocultural linguistic approach' (2005) 7(4-5) Discourse Studies 585

Burke-White, W.W., 'Human Rights and National Security: the strategic correlation' (2004) 17 Harvard Human Rights Law Journal 249

Buzan, B., 'Rethinking Security After the Cold War' (1997) 32(1) Cooperation and Conflict 5

Buzan, B., 'Will the "Global War on Terrorism" be the New Cold War?' (2006) 82(6) International Affairs 1101

Buzan, B., and O. Wæver, 'Macrosecuritisation and Security Constellations: reconsidering scale in securitisation theory' (2009) 35 Review of International Studies 253

Cassese, A., 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 EJIL 993

Cherney, A., and K. Murphy, 'Being a "Suspect Community" in a Post 9/11 World: the impact of the war on terror on Muslim communities in Australia' (2015) 49(4) Australia and New Zealand Journal of Criminology 480

Corbin, C.M., 'Terrorists are always Muslim but never White: at the intersection of critical race theory and propaganda' (2017) 86(2) Fordham Law Review 455

Cotterrell, R., 'Subverting Orthodoxy, Making Law Central: a view of sociological studies' (2002) 29 Journal of Law and Society 632

Cotterrell, R., 'Why Must Legal Ideas be Interpreted Sociologically?' (1998) 25 Journal of Law and Society 171

Cranston, M, 'Are There Any Human Rights?' (1983) 112(4) Daedalus 1

Dawson, G., 'Trauma, Place and the Politics of Memory: Bloody Sunday, Derry, 1972–2004' (2005) 59 History Workshop Journal 151

de Wet, E., 'The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law' (2004) 15 EJIL 97

Dickson, B., 'Law Versus Terrorism: can law win?' (2005) 1 European Human Rights Law Review 11

Dinstein, Y., 'The Erga Omnes Applicability of Human Rights' (1992) 30(1) Drittstaaten und Sanktionen im Völkerrecht 16

Duffy, H., '"Foreign Terrorist Fighters": a human rights approach?' (2018) 29 Security and Human Rights 120

Egan, S., 'The Doctrinal Approach in International Human Rights Scholarship' (2017) UCD Working Papers in Law: Criminology & Socio-Legal Studies Research Paper No.19/17 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082194>

Epifanio, M, 'Legislative Response to International Terrorism' (2011) 48(3) Journal of Peace Research 399

Evans, R.J., 'Coercion and Consent in Nazi Germany' (2007) 151 Proceedings of the British Academy 53

Ewart, J., and A. Cherney, and K. Murphy, 'News Media Coverage of Islam and Muslims in Australia: an opinion survey among Australian Muslims' (2017) 37(2) Journal of Muslim Minority Affairs 147

Feldman, D., 'The Nature of Legal Scholarship' (1989) 52 Modern Law Review 498

Fenwick, H.M., 'Editorial – Counterterrorism Strategies, Human Rights and the Roles of Technology' (2011) 25(3) International Review of Law, Computers and Technology 107

Finch, G.A., 'The Nuremberg Trial and International Law' (1947) 41(1) AJIL 20

Fisher, A., 'Selling the Self: the discursive construction of identities in the first UK televised Prime Ministerial debates' (PhD Thesis, University of Nottingham, 2013)

Fisher, E., B. Lange, E. Scotford, and C. Carlarne, 'Maturity and Methodology: starting a debate about environmental law scholarship' (2009) 21 Journal of Environmental Law 213

Franck, T. M., 'What Happens Now? The United Nations After Iraq' (2003) 97 American Journal of International Law 607

Franck, T.M., 'The Emerging Right to Democratic Governance?' (1992) 86 AJIL 46

Frank, J. A., 'A Return to Lockerbie and the Montreal Convention in the Wake of the September 11th Terrorist Attacks: Ramifications of Past Security Council and International Court of Justice Action' (2002) 30(4) Denver Journal of International Law and Policy 532

Fraser, D., 'Evil Law, Evil Lawyers? From the Justice Case to the Torture Memos' (2012) 3(2) Jurisprudence 391

Fuller, L.L., 'Positivism and Fidelity to Law: a reply to Professor Hart' (1958) 71 HLR 630

Gardner, J., 'Fletcher on Offenses and Defences' (2004) 39 Tulsa Law Review 817

Gearty, C., 'Terrorism and Morality' (2003) 4 EJIL 377

Gearty, C., 'The Superpatriotic Fervour of the Moment' (2008) 28 Oxford Journal of Legal Studies 183

Goodman, A., and V. Ruggiero, 'Crime, Punishment, and ethnic minorities in England and Wales' (2008) 2(1) Race/Ethnicity 53

Grant, R.W, and R.O. Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) The American Political Science Review 29

Gross, E., 'Trying Terrorists – Justification for Differing Trial Rules: the balance between security considerations and human rights' (2002) 13(1) Indiana International and Comparative Law Review 777

Hannum, H., 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25(1) Georgia Journal of International and Comparative Law 287

Hart, H.L.A., 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593

Hart, H.L.A., 'The Ascription of Responsibilities and Rights' (1949) 49 Proceedings of the Aristotelian Society 171

Hegarty, A., 'The Government of Memory: public inquiries and the limits of justice in Northern Ireland' (2002) 26 Fordham International Law Journal 1148

Hill, T. E., 'Humanity as an End in Itself' (1980) 91(1) Ethics 84

Hornqvist, M., 'The Birth of Public Order Policy' (2004) 46(1) Race and Class 30

Hutchinson, T., 'The Doctrinal Method: incorporating interdisciplinary methods in reforming the law' (2015) 8 Erasmus Law Review 130

Ibhawoh, B., 'Stronger than the Maxim Gun Law, Human Rights and British Colonial Hegemony in Nigeria' (2002) 72(1) Journal of the International African Institute 55

Isil, M.L.M., M.D. Bush, and N. Hendrix, 'An Examination of College Students' Fears About Terrorism and the Likelihood of a Terrorist Attack' (2017) 9(2) Behavioural Sciences of Terrorism and Political Aggression 125

Jackson, R., 'Constructing Enemies: 'Islamic Terrorism' in political and academic discourse' (2007) 42(3) Government and Opposition 394

Jennings, R.Y., 'The Caroline and McLeod Cases' (1938) 32 American Journal of International Law 82

Jones, H., 'The Caroline Affair' (1976) 38(3) The Historian 485

Joyner, C.C., and A.C. Arend, 'Anticipatory Humanitarian Intervention: an emerging legal norm' (1999) 10 US Air Force Academy Journal of Legal Studies 27

Kearley T., 'Raising the Caroline' (1999) 17 Wisconsin International Law Journal 325

Kelsen, H., The Law of the United Nations: a critical analysis of its fundamental problems (1950) 95

Kennedy, D., 'The Disciplines of International Law and Policy' (1999) 12 Leiden Journal of IL 9

Khan, S., 'Social Exclusion of Muslims in India and Britain' (2020) 6(1) Journal of Social Inclusion Studies 56

Killmister, S., 'Dignity, Torture, and Human Rights' (2016) 19(5) Ethical Theory and Modern Practice 1087

Kretzmer, D., 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions of Legitimate Means of Defence?' (2005) EJIL 171

Lauterpacht, H., 'Recognition of States in International Law' (1944) 53 Yale Law Journal 385

Lee, P., and R.P. George, 'The Nature and Basis of Human Dignity' (2008) 21(2) Ratio Juris 173

Leiter, B., 'Is There an "American" Jurisprudence?' (1997) 17(2) Oxford Journal of Legal Studies 367

Luban, D., 'Human Dignity, Humiliation, and Torture' (2009) 19 Kennedy Institute of Ethics Journal 211

Malik, M., 'Engaging with Extremists' (2008) 22 International Relations 85

Marks, S., 'The End of History? Reflections on Some International Legal Theses' (1997) 3 EJIL 449

Matthes, J., D. Schmuck, C. von Sikorski, 'Terror, Terror Everywhere? How terrorism news shape support for anti-Muslim policies as a function of perceived threat severity and controllability' (2019) 40(5) Political Psychology 935

McCrisken, T., 'Ten Years On: Obama's war on terrorism in rhetoric and practice' (2011) 87(4) International Affairs 781

McCrudden, C., 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) EJIL 655

McCulloch, J., and S. Pickering, 'Pre-Crime and Counterterrorism: imagining future crime in the 'War on Terror'' (2009) 49 British Journal of Criminology 628

McMahon, W., and R. Roberts, 'Truth and Lies About "Race" and "Crime"' (2011) 83 Criminal Justice Matters 20

Mgbeoji, I., 'The Civilised Self and the Barbaric Other: imperial delusions of order and the challenges of human security' (2006) 27(5) Third World Quarterly 855

Michaelsen, C., 'Australia and the Threat of Terrorism in the Decade after 9/11' (2010) 18(3) Asian Journal of Political Science 248

Milanović, M., 'Human Rights Treaties and Foreign Surveillance: privacy in the digital age' (2015) 56 Harvard International Law Journal 81

Moeckli, D., 'The Selective 'War on Terror': executive detention of foreign nationals and the principle of non-discrimination' (2006) 31 Brooklyn Journal of International Law 495

Moore, K., P. Mason and J. Lewis, 'Images of Islam in the UK: the representation of British Muslims in the national print news media' (2008 report published by Cardiff School of Journalism, Media and Cultural

Studies, commissioned by Channel 4)
<https://orca.cardiff.ac.uk/id/eprint/53005/1/08channel4-dispatches.pdf>
Moore, M.S., 'Torture and the Balance of Evils' (1989) 23 Israel Law Review 280
Mueller, J., 'Harbinger or Aberration? A 9/11 provocation' (2002) National Interest 45
Mueller, J., and M.G. Stewart, 'Balancing the Risks, Benefits, and Costs of Homeland Security' (2011) 7 Homeland Security Affairs 1
Mueller, J., and M.G. Stewart, 'Terrorism and Bathtubs: comparing and assessing the risks' (2021) 33(1) Terrorism and Political Violence 138
Mueller, J., and M.G. Stewart, 'The Terrorism Delusion: America's overwrought response to September 11' (2012) 37(1) International Security 81
Murphy, S.D., 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter' (2002) 43 Harvard International Law Journal 41
Murphy, S.D., 'Verdict in the Trial of the Lockerbie Bombing Suspects' (2001) 95 American Journal of International Law 405
Myjer, E.P.J., & ND White, 'The Twin Towers Attack: an unlimited right to self-defence?' (2002) 7 Journal of Conflict and Security Law 5
Neumann, M., 'Did Kant Respect Persons?' (2000) 6 Res Publica 285
Newheiser, A.K., and T.C. DeMarco, 'Who Deserves Basic Rights? People condone violations of procedural and physical rights in the treatment of terrorist suspects' (2018) 42(1) Law and Human Behaviour 50
Ní Aoláin, F. 'Truth telling, Accountability and the Right to Life in Northern Ireland' (2002) 5 EHRLR 572
Niblock, T., 'The Regional and Domestic Political Consequences of Sanctions Imposed on Iraq, Libya and Sudan' (2001) 23(4) Arab Studies Quarterly 59

Nmoma, V., 'Power and Force: Libya's relations with the United States' (2009) 26(2) Third World Problems and Issues: Past and Present 137

Novotný, J., and F. Polonský, 'The Level of Knowledge about Islam and Perception of Islam among Czech and Slovak University Students' (2011) 43(6) Sociológia 674

Occelli, M.B., '"Sinking" the Caroline: why the Caroline doctrine's restrictions on self-defense should not be regarded as customary international law' (2003) 4 San Diego International Law Journal 467

Orakhelashvili, A., 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 EJIL 59

Pantazis, P., and S Pemberton, 'From the "Old" to the "New" Suspect Community: Examining the Impacts of Recent UK Counterterrorism Legislation' (2009) 49 British Journal of Criminology 646

Pickering, S., J. McCulloch and D. Wright-Neville, *Counter-Terrorism Policing* (Springer 2008)

Posner, R.A., 'Security versus Civil Liberties' (2001) 288(5) The Atlantic Monthly 46

Power, P., and R. Kubey, and S. Kiosis, 'Audience Activity and Passivity: an historical taxonomy' (2002) 26(1) Annals of the International Communication Association 116

Pronin, E., K. Kennedy, and Sarah Butsch, 'Bombing Versus Negotiating: how preferences for combating terrorism are affected by perceived terrorist rationality' (2006) 28(4) Basic and Applied Social Psychology 385

Ramcharan, B.G., 'The Legal Status of the International Bill of Human Rights' (1986) 55 Nordic Journal of International Law 366

Ratner, S., and A. Slaughter, 'Appraising the Methods of International Law: a prospectus for readers' (1999) 93 AJIL 291

Rosén, F., 'Extremely Stealthy and Incredibly Close: drones, control, and legal responsibility' (2014) 19(1) Journal of Conflict and Security Law 113

Saeed, A., 'Media, Racism and Islamophobia: the representation of Islam and Muslims in the media' (2007) 1/2 Sociology Compass 443

Sandler, T., 'Collective versus Unilateral Responses to Terrorism' (2005) 124 Public Choice 75

Sandler, T., 'Too Much of a Good Thing? The proactive response dilemma' (2004) 48(5) Journal of Conflict Resolution 657

Schachter, O., 'Human Dignity as a Normative Concept' (1983) 77 AJIL 848

Scharf, M.P., 'Terrorism on Trial: the Lockerbie Criminal Proceedings' (2000) 6 ILSA Journal of International and Comparative Law 355

Schmitt, M.N., and E.W. Widmar, '"On Target": precision and balancing in the contemporary law of targeting' (2014) 7 Journal of National Security Lawn and Policy 327

Schwalbe, M., S. Goodwin, D. Holden, D. Schrock, S. Thompson, and M. Wolkomir, 'Generic Processes in the Reproduction of Inequality: an interactionist analysis' (2000) 79(2) Social Forces 419

Schwarz, R.L., 'Internal and External Method in the Study of Law' (1992) 11(3) Law and Philosophy 179

Shestack, J.J., 'Globalisation of Human Rights Law' (1997/8) 21 Fordham International Law Journal 558

Simma, B., and AL Paulus, 'The "International Community": facing the challenge of globalisation' (1998) 9 EJIL 266

Sinnar, S., 'A Label Covering a "Multitude of Sins": the harm of national security deference' (2022) 136(1) Harvard Law Review Forum 59

Slaughter, A., and S.R. Ratner, 'The Method is the Message' (1999) 93(2) AJIL 410

Solove, D.J., ''I've Got Nothing to Hide' and Other Misunderstandings of Privacy' (2007) 44 San Diego Law Review 745

Sprinzak, E., 'The Process of Delegitimization: towards a linkage theory of political terrorism' (1991) 3(1) Terrorism and Political Violence 50

Stritzel, H., 'Towards a Theory of Securitization: Copenhagen and beyond' (2007) 13(3) EJIR 357

Tams, C.J., 'The Use of Force Against Terrorists' (2009) 20 European Journal of International Law 359

The Cameron Report, 'Official Conclusions on Causes of the 1968-69 Disorders' (1980) 10(1) International Journal of Politics 38

Torrance, D., 'The Anglo-Irish Treaty 1921' (UK Parliament Research Briefings, 5 December 2022) <https://researchbriefings.files.parliament.uk/documents/CBP-9260/CBP-9260.pdf>

van den Henrik, L.J., and N.J. Schrijver, 'Leiden Policy Recommendations on Counter-terrorism and International Law' (2010) 57(3) Netherlands International Law Review 531

Vick, D.W., 'Interdisciplinarity and the Discipline of Law' (2004) 31(2) Journal of Law and Society 163

White, R. W., 'From Peaceful Protest to Guerrilla War: micromobilization of the Provisional Irish Republican Army' (1989) 94(6) American Journal of Sociology 1277

Wimmer, A., and B Min, 'From Empire to Nation-State: explaining wars in the modern world, 1816-2001' (2006) 71(6) American Sociological Review 867

Witte, K, 'Fear Control and Danger Control: a test of the extended parallel process model (EPPM)' (1994) 61(2) Communication Monographs 113

Zubel, M.P., 'The Lockerbie Controversy' (1991) 5(1) Annual Survey of International and Comparative Law 259

Dictionaries

Cambridge Dictionary <https://dictionary.cambridge.org/>

Collins Dictionary <https://www.collinsdictionary.com>

Merriam Webster Dictionary <https://www.merriam-webster.com>

Encyclopaedias

Augustyn, A., 'Pan Am Flight 103' (*Britannica*, 22 May 2018) <https://www.britannica.com/event/Pan-Am-flight-103>

Baghramian, M., and J.A. Carter, 'Relativism' (*Stanford Encyclopedia of Philosophy*, 21 March 2022) <https://plato.stanford.edu/entries/relativism/>

Bergen, P.L., 'September 11 Attacks' (*Britannica*, 16 August 2023) <https://www.britannica.com/event/September-11-attacks>

Boslaugh, S.E., 'Anthropocentrism' (*Britannica*, 28 October 2013) <https://www.britannica.com/topic/anthropocentrism>

Casad, B.J., 'Confirmation Bias' (*Britannica*, 18 August 2023) <https://www.britannica.com/science/confirmation-bias>

Cowell-Meyers, K., and P. Arthur, 'Irish Republican Army' (*Britannica*, 29 May 2023) <https://www.britannica.com/topic/Irish-Republican-Army>

Driver, J., 'The History of Utilitarianism' (*Stanford Encyclopedia of Philosophy*, 22 September 2014) <https://plato.stanford.edu/entries/utilitarianism-history/>

Duignan, B., 'Postmodernism' (*Britannica*, 31 March 2023) <https://www.britannica.com/topic/postmodernism-philosophy>

Holocaust Encyclopedia, 'The Enabling Act' (*United States Holocaust Memorial Museum*, nd) <https://encyclopedia.ushmm.org/content/en/article/the-enabling-act>

Jackson, J., 'War on Terrorism: United States History' (*Britannica,* 16 August 2023) <https://www.britannica.com/topic/war-on-terrorism>

Johnson, R., and A. Cureton, 'Kant's Moral Philosophy' (*Stanford Encyclopedia of Philosophy*, 21 January 2022) <https://plato.stanford.edu/entries/kant-moral/>

Nathanson, S., 'Act and Rule Utilitarianism' (*Internet Encyclopedia of Philosophy*, 2023) <https://iep.utm.edu/util-a-r/#:~:text=The%20utilitarian%20method%20requires%20you,all%20members%20of%20the%20society>

Ray, M. 'London bombings of 2005' (*Britannica*, 17 August 2018) <https://www.britannica.com/event/London-bombings-of-2005>

Ray, M., 'Persian Gulf War (*Britannica*, 8 April 2022) <https://www.britannica.com/event/Persian-Gulf-War>

News Sources

'De Menezes statements from the CPS and the Met' *The Guardian* (17 July 2006) <https://www.theguardian.com/uk/2006/jul/17/terrorism.menezes1>

'Gibraltar victims named' (*BBC Six O'Clock News,* 8 March 2013) <https://www.bbc.co.uk/programmes/p0162m01>

'Gibraltar's Changing of the Guard Targeted' (*BBC Six O'Clock News,* 8 March 2013) <https://www.bbc.co.uk/programmes/p0162lcg>

'IRA members shot in Gibraltar' (*BBC Breakfast Time,* 8 March 2013) <https://www.bbc.co.uk/programmes/p0162mb6>

BBC, '1988: IRA gang shot dead in Gibraltar' (*BBC News,* 7 March 1988) <http://news.bbc.co.uk/onthisday/hi/dates/stories/march/7/newsid_2516000/2516155.stm>

BBC, '7 July London bombings: What happened that day?' (*BBC News*, 7 February 2022) <https://www.bbc.co.uk/news/uk-33253598>

BBC, '7/7 attacks: London bombing victims remembered 17 years on' (*BBC News*, 07 July2022) <https://www.bbc.co.uk/news/uk-england-london-62078637>

BBC, 'Cardiff Jihadist Reyaad Khan Dies in Syria' (*BBC News*, 2 September 2015) <https://www.bbc.co.uk/news/uk-wales-34125743>

BBC, 'Cardiff Jihadist Reyaad Khan, 21, Killed by RAF Drone' (*BBC News,* 7 September 2015) <https://www.bbc.co.uk/news/uk-wales-34176790>

BBC, 'CPS statement on Menezes report' (*BBC News*, 17 July 2006) <http://news.bbc.co.uk/1/hi/uk/5187484.stm>

BBC, 'David Cameron Says Bombing IS in Syria Will Make UK "Safer"' (*BBC News*, 26 November 2015) <https://www.bbc.co.uk/news/uk-politics-34927939>

BBC, 'Drone Killings: legal case "needs clarifying"' (*BBC News,* 10 May 2016) <https://www.bbc.co.uk/news/uk-36253518>

BBC, 'Failed 21/7 London bombers lose court claim' (*BBC News*, 13 September 2016) <https://www.bbc.co.uk/news/uk-37353533>

BBC, 'Four guilty over 21/7 bomb plot '(*BBC News,* 10 July 2007) <http://news.bbc.co.uk/1/hi/uk/6284350.stm>

BBC, 'Friend Urges Jihadist Reyaad Khan to Return to Cardiff' (*BBC News,* 2 July 2014) <https://www.bbc.co.uk/news/av/uk-wales-28120838>

BBC, 'Iraq Study Estimates War-related Deaths at 461,000' (*BBC News*, 16 October 2013) <www.bbc.co.uk/news/world-middle-east-24547256>

BBC, 'Man Shot Dead by Police on Tube' (*BBC News*, 22 July 2005) <http://news.bbc.co.uk/1/hi/uk/4706787.stm>

BBC, 'Open Verdict at Menezes Inquest' (*BBC News,* 12 December 2008) <news.bbc.co.uk/1/hi/uk/7764882.stm>

BBC, 'Paris Attacks: who were the attackers?' (*BBC News,* 27 April 2016) <https://www.bbc.co.uk/news/world-europe-34832512>

BBC, 'Pearse Jordan: "impossible to reach conclusions" over IRA man's death' (*BBC News*, 7 November 2016) <https://www.bbc.co.uk/news/uk-northern-ireland-37898548>

BBC, 'Police "thought Menezes had a bomb"' (*BBC News*, 22 September 2008) <http://news.bbc.co.uk/1/hi/uk/7629961.stm>

BBC, 'Police Chief "Sorry" Over Death' (*BBC News*, 24 July 2005) <news.bbc.co.uk/1/hi/uk/4712061.stm>

BBC, 'Police 'failure' in Menezes death' (*BBC News*, 1 October 2007) <http://news.bbc.co.uk/1/hi/uk/7021401.stm>

BBC, 'Prisoners will not get the vote, says David Cameron' (*BBC News,* 24 October 2012) <www.bbc.co.uk/news/uk-politics-20053244>

BBC, 'Profile: Germaine Lindsay' (*BBC News*, 02 March 2011) <https://www.bbc.co.uk/news/uk-12621385>

BBC, 'Profile: Hasib Hussain' (*BBC News*, 02 March 2011) <https://www.bbc.co.uk/news/uk-12621387>

BBC, 'Profile: Mohammad Sidique Khan' (*BBC News*, 02 March 2011) <https://www.bbc.co.uk/news/uk-12621381>

BBC, 'Profile: Shehzad Tanweer' (*BBC News*, 02 March 2011) <https://www.bbc.co.uk/news/uk-12621383>

BBC, 'Tunisia attack: what happened' (*BBC News*, 1 February 2017) <https://www.bbc.co.uk/news/world-africa-33304897>

BBC, 'US Drone Kills 4 Men in Pakistan' (*BBC News, 15 October 2009)* <http://news.bbc.co.uk/1/hi/world/south_asia/8308157.stm>

Binder, D., 'The Munich Massacre' *The New York Times* (5 September 1972) <https://archive.nytimes.com/www.nytimes.com/packages/html/sports/year_in_sports/09.05.html>

Blair, T., 'We will not allow violence to change our societies or our values.' 'Full Text G8 Leaders' Statement' *The Guardian* (7 July 2005) <www.theguardian.com/world/2005/jul/07/g8.july7>

Brennan, C., '30 years ago a trio of killings sparked one of the darkest, most bizarre, fortnights of The Troubles' *The Journal* (6 March 2018) <https://www.thejournal.ie/gibraltar-killings-30-years-3885830-Mar2018/>

Bush, G., 'Full text of George Bush's speech on Israel and a Palestinian state' *The Guardian* (25 June 2002) <www.theguardian.com/world/2002/jun/25/israel.usa>

Campbell, D., and M. Honigsbaum, 'Fatal mistakes that cost de Menezes his life' *The Guardian* (18 Aug 2005) <https://www.theguardian.com/uk/2005/aug/18/menezes.july71>

Cannon, L., 'Reagan Acted Upon "Irrefutable" Evidence' *Washington Post* (15 April 1986) <https://www.washingtonpost.com/archive/politics/1986/04/15/reagan-acted-upon-irrefutable-evidence/61170c59-b355-4e0a-8ab5-411bba4879e8/>

Casciani, D, 'Shoot-to-kill policy under debate' (*BBC News*, 08 November 07) <http://news.bbc.co.uk/nol/ukfs_news/mobile/newsid_7080000/newsid_7085200/7085244.stm>

Cobain, I., 'Norther Ireland: when Britain fought terror with terror' *The Guardian* (9 July 2015) <https://www.theguardian.com/news/2015/jul/09/northern-ireland-terror-shoot-to-kill>

Daragahi, B., 'Israel's 1981 Bombing of Iraq Nuclear Reactor may have Fuelled Saddam's Nuclear Ambitions' *Independent* (7 June 2021)

<https://www.independent.co.uk/news/world/israel-iraq-nuclear-osirak-military-b1861255.html>

Dearden, L., and S. Osborne, 'Paris attack live: Attackers wore 'identical' explosive devices and worked in three teams, French prosecutor says' *The Independent* (14 October 2015) <https://www.independent.co.uk/news/world/europe/paris-attacks-latest-isis-claims-responsibility-for-suicide-bombings-shootings-after-france-declares-state-of-emergency-live-updates-a6734381.html>

Dennis, J., 'Shot man was not bomber – police' *The Guardian* (23 July 2005) <https://www.theguardian.com/uk/2005/jul/23/july7.uksecurity11>

Dodd, V., 'Met police found to be institutionally racist, misogynistic and homophobic' *The Guardian* (21 March 2023) <https://www.theguardian.com/uk-news/2023/mar/21/metropolitan-police-institutionally-racist-misogynistic-homophobic-louise-casey-report>

Dodd, V., 'Police Federation chair accepts Met is institutionally racist, sexist and homophobic' *The Guardian* (19 April 2023) <https://www.theguardian.com/uk-news/2023/apr/19/police-federation-chair-accepts-met-is-institutionally-racist-sexist-and-homophobic>

Dodd, V., 'Shamima Begum Should be Allowed to Return to UK: Terrorism Advisor' *The Guardian* (27 February 2023) <https://www.theguardian.com/uk-news/2023/feb/27/shamima-begum-should-be-allowed-return-uk-terrorism-adviser>

Doherty, B., 'France Launches 'Massive' Airstrike on ISIS Stronghold of Raqqa' *The Guardian* (16 November 2015) <https://www.theguardian.com/world/2015/nov/16/france-launches-massive-airstrike-on-isis-stronghold-in-syria-after-paris-attack>

Edwards, R., 'De Menezes family: Met claims were 'sickening'' *The Telegraph* (1 November 2007)

<https://www.telegraph.co.uk/news/uknews/1568022/De-Menezes-family-Met-claims-were-sickening.html>

Edwards, R., 'Jean Charles de Menezes Shooting: No Officers Face Charges' *The Telegraph* (13 February 2009) <www.telegraph.co.uk/news/uknews/law-and-order/4611838/Jean-Charles-de-Menezes-shooting-no-officers-face-charges.html>

ET, 'Terrorism biggest threat to democracy: India' *The Economic Times* (13 October 2014) <https://economictimes.indiatimes.com/news/politics-and-nation/terrorism-biggest-threat-to-democracy-india/articleshow/44801716.cms?from=mdr>

D. Leatherdale, 'Gwynne Evans and Peter Allen: the last men to be hanged (*BBC News*, 13 August 2014) <https://www.bbc.co.uk/news/uk-england-cumbria-28687221>

Fo, L., 'Drone Strikes in Syria are not Just Legally Justified' *Independent* (9 September 2015) <https://www.independent.co.uk/voices/comment/drone-strikes-in-syria-are-not-just-legally-but-morally-justified-10493619.html>

Gray, J., 'A Modest Proposal' *The New Statesman* (17 February 2003).

Grierson, J., 'Sousse Terror Attack: the 30 British victims' *The Guardian* (28 February 2017) <https://www.theguardian.com/world/2017/feb/28/sousse-terror-attack-the-30-british-victims>

Heard, L.S., 'Using War on Terror to Flout Own Laws' *Gulf News* (4 July 2006) <gulfnews.com/opinions/columnists/using-war-on-terror-to-flout-own-laws-1.243286>

Henry, E., 'De Menezes: Met guilty over health and safety' *The Telegraph* (1 November 2007) <https://www.telegraph.co.uk/news/uknews/1568016/De-Menezes-Met-guilty-over-health-and-safety.html>

Hughes, M., 'Seven Mistakes that Cost De Menezes his Life' *The Independent* (13 December 2008) <www.independent.co.uk/news/uk/crime/seven-mistakes-that-cost-de-menezes-his-life-1064466.html>

Jenkins, S., 'The Real Threat to Our Way of Life? Not Terrorists or Faraway Dictators, but our own Politicians and Securocrats' *The Guardian* (27 August 2013) <https://www.theguardian.com/commentisfree/2013/aug/27/real-threat-terrorist-politicians-national-security#:~:text=Not%20terrorists%20or%20faraway%20dictators%2C%20but%20our%20own%20politicians%20and%20securocrats,-This%20article%20is&text=What%20is%20Britain's%20national,precise%20and%20the%20language%20clear>

Johnston, 'The Police Must End Their Abuse of Anti-Terror Legislation' *The Telegraph* (3 October 2005)

Kennedy, M., and David Hearst, 'From the archive, 8 March 1988: fourth IRA bomber on the run' *The Guardian* (8 March 2011) <https://www.theguardian.com/theguardian/2011/mar/08/archive-ira-gibraltar-bomber>

Kilpatrick, C., 'Michael Tighe shooting: RUC and MI5 in shoot-to-kill probe after tape of teen death 'sabotaged'' *Belfast Telegraph* (15 January 2015) <https://www.belfasttelegraph.co.uk/news/northern-ireland/michael-tighe-shooting-ruc-and-mi5-in-shoot-to-kill-probe-after-tape-of-teen-death-sabotaged/30908639.html>

Kilpatrick, C., 'Michael Tighe shooting: the case which sparked one of the most notorious allegations of a cover-up in the history of the Trouble' *Belfast Telegraph* (15 January 2015) <https://www.belfasttelegraph.co.uk/news/northern-ireland/michael-tighe-

shooting-the-case-which-sparked-one-of-the-most-notorious-allegations-of-a-cover-up-in-history-of-troubles/30908745.html>

Landler, M., '20 years on, the War on Terror Grinds along, with no end in sight' *The New York Times* (26 September 2021) <https://www.nytimes.com/2021/09/10/world/europe/war-on-terror-bush-biden-qaeda.html>

Libyan Prime Minister Shukri Ghanem stated that Libya had paid compensation as the 'price for peace' and to secure the end of sanctions, *BBC Radio Four* (24 February 2004).

MacAskill, E., and R. Norton-Taylor, 'How UK Government Decided to Kill Reyaad Khan' *The Guardian* (8 September 2015) <https://www.theguardian.com/world/2015/sep/08/how-did-britain-decide-to-assassinate-uk-isis-fighter-reyaad-khan-drone-strike>

Moore, C., 'A Weak Establishment is Letting Islamists Threaten British Freedoms' *The Telegraph* (18 April 2014) <www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/10775118/A-weak-establishment-is-letting-Islamists-threaten-British-freedoms.html>

Morris, N., 'MPs' Iraq vote: Cameron warns Isis air strikes not enough to defeat "bunch of psychopathic terrorists"' *Independent* (27 September 2014) <www.independent.co.uk/news/uk/politics/mps-iraq-vote-cameron-warns-isis-air-strikes-not-enough-to-defeat-bunch-of-psychopathic-terrorists-9757715.html>

MP Hazel Blears speaking on 'Today Programme' *BBC Radio Four* (4 June 2014)

NBC News, 'U.K. police defend shoot-to-kill after mistake' (*NBC News,* 21 July 2005) <https://www.nbcnews.com/id/wbna8655541>

Nossiter, A., 'French Proposal to Strip Citizenship Over Terrorism Sets off Alarms' *New York Times* (8 January 2016)

<https://www.nytimes.com/2016/01/09/world/europe/french-proposal-to-strip-citizenship-over-terrorism-sets-off-alarms.html>

Oliver, M., 'July 21 Suspects Arrested' *The Guardian* (29 July 2005) <https://www.theguardian.com/uk/2005/jul/29/july7.uksecurity3>

Pallister, D., David Sharrock, and Richard Norton-Taylor, 'From the archive, 1 October 1988: SAS killings of IRA members 'lawful'' *The Guardian* (1 October 2015) <https://www.theguardian.com/uk-news/2015/oct/01/ira-killings-gibraltar-sas-1988>

Pitas, C., 'Partner of Snowden Reporter Challenges British Detention' (*Reuters*, 6 November 2013) <https://www.reuters.com/article/us-britain-security-miranda-idUSBRE9A50QO20131106>

Place, N., 'What Happened on 9/11 and How Many People Were Caught up in the Attacks?' *Independent* (10 September 2022) <https://www.independent.co.uk/news/world/americas/9-11-september-11-what-happened-b2164404.html>

Press Association 'Menezes officers escape charges' *The Independent* (17 July 2006) <https://www.independent.co.uk/news/uk/crime/menezes-officers-escape-charges-408312.html>

Press Association, 'Man jailed over failed 2005 London bombings loses attempt to appeal' *The Guardian* (30 April 2015) <https://www.theguardian.com/uk-news/2015/apr/30/manfo-asiedu-21-july-2005-failed-bombings-loses-appeal-conviction>

Press Association, 'The July 21 failed bombings' *The Guardian* (04 February 2006) <https://www.theguardian.com/uk/2008/feb/04/terrorism.world1>

Quinn, B., 'Briton Reyaad Khan Believed Killed in Air Strike on Islamic State in Syria' The Guardian (21 July 2015) <https://www.theguardian.com/uk-news/2015/jul/21/briton-reyaad-khan-believed-killed-air-strike-islamic-state-syria>

Raynor, G., 'De Menezes: Acting Met Chief Sir Paul Stephenson admits 'most terrible mistake'' *The Telegraph* (12 December 2008) <https://www.telegraph.co.uk/news/uknews/law-and-order/3724533/De-Menezes-Acting-Met-Chief-Sir-Paul-Stephenson-admits-most-terrible-mistake.html>

Rubin, A.J., and A. Barnard, 'France Strikes ISIS Targets in Syrian in Retaliation for Attacks' *The New York Times* (15 November 2015) <https://www.nytimes.com/2015/11/16/world/europe/paris-terror-attack.html>

Schmitt, E., and T Shanker, 'US Officials Retool Slogan for Terror War' *The New York Times* (26 July 2005) <https://www.nytimes.com/2005/07/26/politics/us-officials-retool-slogan-for-terror-war.html>

Sparrow, A., 'Guardian Faces Fresh Criticism over Edward Snowden Revelations' *The Guardian* (10 November 2013) <www.theguardian.com/media/2013/nov/10/guardian-nsa-revelations-edward-snowden>

Stucke, J., 'Met police guilty over De Menezes shooting' *The Guardian* (1 November 2007) <https://www.theguardian.com/uk/2007/nov/01/menezes.jamessturcke2>

Taylor, D., 'Hundreds Stripped of British Citizenship in Last 15 Years, Study Finds' The Guardian (21 Jan 2022) <https://www.theguardian.com/uk-news/2022/jan/21/hundreds-stripped-british-citizenship-last-15-years-study-finds>

Taylor, P., 'Secrets and Lies' *The Guardian* (23 May 2000) <https://www.theguardian.com/uk/2000/may/23/northernireland.features11>

Telegraph View, 'We Must Confront the Challenge of Islamism' *The Telegraph* (20 April 2014)

<www.telegraph.co.uk/news/religion/10775651/We-must-confront-the-challenge-of-Islamism.html>

Templeton, T., and T. Lumley, '9/11 in Numbers' *The Observer* (18 August 2002) <www.theguardian.com/world/2002/aug/18/usa.terrorism>

Thomas, J., '"Shoot to Kill" Policy in Ulster? The Debate Rages' *New York Times* (12 April 1985) <https://www.nytimes.com/1985/04/12/world/shoot-to-kill-policy-in-ulster-the-debate-rages.html>

Thompson, T., G. Hinsliff and A. Xavier, 'Man shot in terror hunt was innocent young Brazilian' *The Guardian* (24 July 2005) <https://www.theguardian.com/uk/2005/jul/24/july7.uksecurity3>

Travis, A., 'Jean Charles de Menezes ruling due in European court of human rights' *The Guardian* (30 March 2016) <https://www.theguardian.com/uk-news/2016/mar/30/jean-charles-de-menezes-ruling-due-in-european-court-of-human-rights>

UK Prime Minister David Cameron justified the actions of GCHQ on the basis of security and also the inaction of both the UK Government and Parliament to in response to the Snowden revelations 'The World at One' *BBC Radio Four* (25 October 2013)

Walsh, D., E MacAskill & J Burke, 'Osama bin Laden killed in US raid on Pakistan hideout' *The Guardian* (2 May 2011) <http://www.guardian.co.uk/world/2011/may/02/osama-bin-laden-dead-pakistan>

Watt, N., 'David Cameron Accuses Jeremy Corbyn of being 'Terrorist Sympathiser'' *The Guardian* (2 December 2015) <https://www.theguardian.com/politics/2015/dec/01/cameron-accuses-corbyn-of-being-terrorist-sympathiser>

Watt, N., 'Syria Airstrike Vote: Cameron haunted by previous defeat' *The Guardian* (3 November 2015)

<https://www.theguardian.com/politics/2015/nov/03/syria-airstrikes-vote-cameron-haunted-by-memory-of-previous-defeat>

Watt, N., P. Wintour, and V. Dodd, 'David Cameron Faces Scrutiny Over Drone Strikes Against Britons in Syria' *The Guardian* (8 September 2015) <https://www.theguardian.com/world/2015/sep/07/david-cameron-justifies-drone-strikes-in-syria-against-britons-fighting-for-isis>

Watt, N., R. Mason, and N. Hopkins, 'Blow to Cameron's Authority as MPs Rule Out British Assault on Syria' *The Guardian* (30 August 2013) <https://www.theguardian.com/politics/2013/aug/30/cameron-mps-syria>

Watts, R. and R Winnett, 'William Hague: British Public have 'Nothing to Fear' from US Spies' *The Telegraph* (9 June 2013) <www.telegraph.co.uk/news/politics/10108564/William-Hague-British-public-have-nothing-to-fear-from-US-spies.html>

Wehbe, M., 'Libya Letter: Full Text' (*BBC News*, 16 August 2003) <http://news.bbc.co.uk/1/hi/scotland/3155825.stm>

Willsher, K., 'Hollande drops plan to revoke citizenship of dual-national terrorists' *The Guardian* (30 March 2016) <https://www.theguardian.com/world/2016/mar/30/francois-hollande-drops-plan-to-revoke-citizenship-of-dual-national-terrorists#:~:text=Under%20current%20French%20law%20nobody,with%20terrorism%20convictions%20since%201996>

Willsher, K., 'Macron Outlines New Law to Prevent "Islamic Separatism" in France' *The Guardian* (2 October 2020) <https://www.theguardian.com/world/2020/oct/02/emmanuel-macron-outlines-law-islamic-separatism-france>

Willsher, K., 'Teacher Decapitated in Paris Named as Samuel Paty, 47' *The Guardian* (17 October 2020) <https://www.theguardian.com/world/2020/oct/17/teacher-decapitated-in-paris-named-as-samuel-paty-47>

Wintour, P., 'Britain Carries Out First Syria Airstrikes After MPS Approve Action Against ISIS' *The Guardian* (3 December 2015) <https://www.theguardian.com/world/2015/dec/02/syria-airstrikes-mps-approve-uk-action-against-isis-after-marathon-debate>

Wintour, P., and N. Watt, 'UK Forces Kill British ISIS Fighters in Targeted Drone Strike on Syrian City' *The Guardian* (7 September 2015) <https://www.theguardian.com/uk-news/2015/sep/07/uk-forces-airstrike-killed-isis-briton-reyaad-khan-syria>

Wood, 'Terrorism Biggest Threat to National Security, Officials Say' (*US Department of Defense News*, 28 February 2006) <www.defense.gov/news/newsarticle.aspx?id=14735>

Young, C., 'RUC man failed to tell truth about alleged shoot to kill operation' *The Irish News* (24 February 2016) <https://www.irishnews.com/news/2016/02/24/news/ruc-man-failed-to-tell-truth-about-alleged-shoot-to-kill-operation-428620/>

Zane, D., 'Being Black in Nazi German' (*BBC News*, 22 May 2019) <https://www.bbc.co.uk/news/world-africa-48273570>

Websites

'Aircraft Accident Report' (*Department of Transport*, 1990) <https://reports.aviation-safety.net/1988/19881221-0_B741_N739PA.pdf>

'Clipper Maid of the Seas: Flight 103 Lockerbie, Scotland' (*PanAmAir*, 2005) <https://web.archive.org/web/20080326232104/http://www.panamair.org/accidents/lockerbievictims.htm>

'Met Guilty of de Menezes Health & Safety Breaches' (*Mayor Watch*, 1 November 2011) <https://www.mayorwatch.co.uk/met-guilty-of-de-menezes-health-safety-breaches/>

Appleton, J., 'Memorial to paranoia' (*Spiked-online*, 24 August 2005) <https://www.spiked-online.com/2005/08/24/memorial-to-paranoia>

Bajoria, J., and G Bruno, 'al-Qaeda' (*Council on Foreign Relations*, 6 June 2012) <www.cfr.org/terrorist organizations-and-networks/al-qaeda-k-al-qaida-al-qaida/p9126>

bin Laden, O., 'Jihad against Jews and Crusaders' (23 February 1998) <https://irp.fas.org/world/para/docs/980223-fatwa.htm>

College of Policing, 'Legal framework' (*CoP*, 25 March 2021) <https://www.college.police.uk/app/armed-policing/legal-framework>

Council of Europe, 'Guide to Good Practice in Respect of Domestic Remedies' (*COE*, 18 September 2018) <https://www.echr.coe.int/documents/d/echr/pub_coe_domestics_remedies_eng>

Cowell-Meyers, K., and P. Arthur, 'Irish Republican Army' (*Britannica*, 29 May 2023) <https://www.britannica.com/topic/Irish-Republican-Army>

Eislund, S., 'Why Did World War Two Happen? How the Fascists Hitler, Mussolini, and Horthy led to the outbreak of World War Two' (*History Is Now*, 7 July 2019) <http://www.historyisnowmagazine.com/blog/2019/6/30/why-did-world-war-two-happen-how-the-fascists-hitler-mussolini-and-horthy-led-to-the-outbreak-of-world-war-two>

FBI, 'Terrorism in the United States 1999' (*US Department of Justice*, 2000) <https://www.ojp.gov/ncjrs/virtual-library/abstracts/terrorism-united-states-1999>

Githens-Mazer, J., and R. Lambert, 'Islamophobia and Anti-Muslim Hate Crime: a London case study' (*EMRC*, January 2010) <https://www.hatecrimescotland.org/wp/wp-content/uploads/2014/08/Islamaphobia-Anti-Muslim-Hate-Crime-a-London-Case-Study-EMRC-2010.pdf>

Gramlich, J., 'Defending Against Terrorism Has Remained a Top Policy Priority for Americans Since 9/11' (*Pew Research Center*, 11 September

2018) <https://www.pewresearch.org/short-reads/2018/09/11/defending-against-terrorism-has-remained-a-top-policy-priority-for-americans-since-9-11/>

Houston, A., 'Pearse Jordan Inquest Findings Delivered: summary of judgment' (*The Law Society of Northern Ireland*, 7 November 2016) <https://www.lawsoc-ni.org/pearse-jordan-inquest-findings-delivered>

International Humanitarian Law Databases, 'Rule 77. Expanding Bullets' (Volume II, Chapter 25) (*ICRC*, 2023) <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule77>

Kemp, L., 'The "Stomp Reflex": when governments abuse emergency powers' (*BBC Future*, 28 April 2021) <https://www.bbc.com/future/article/20210427-the-stomp-reflex-when-governments-abuse-emergency-powers>

Kopf, J., 'Nothing to Hide, Everyone to Suspect' (*Media@LSE*, 2023) <https://www.lse.ac.uk/media-and-communications/assets/documents/research/msc-dissertations/2022/Kopf.pdf>

Milanović, M., 'European Court finds Russia Assassinated Alexander Litvinenko' (*EJIL: Talk!*, 23 September 2021) <https://www.ejiltalk.org/european-court-finds-russia-assassinated-alexander-litvinenko/#:~:text=On%20Tuesday%20a%20Chamber%20of,07%2C%2021%20September%202021).>

National Security Archive, 'Israeli Attack on Iraq's Osirak 1981: setback or impetus for nuclear weapons?' (*National Security Archive*, 7 June 2021) <https://nsarchive.gwu.edu/briefing-book/iraq-nuclear-vault/2021-06-07/osirak-israels-strike-iraqs-nuclear-reactor-40-years-later>

Nowrasteh, A., 'Fatalities and the Annual Chance of Being Murdered in a European Terrorist Attack' (*Cato Institute*, 21 June 2017)

<https://www.cato.org/blog/european-terrorism-fatalities-annual-chance-being-murdered#:~:text=For%202016%20and%202017%20(so,attack%20in%20the%20same%20year>

NSC, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (*White House*, December 2016) <https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf>

NSC, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (*White House*, December 2016) <https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf>

OHCHR, 'Fact Sheet No.2 (Rev.1) The International Bill of Human Rights' (*OHCHR*, June 1996) <www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>

OHCHR, 'International Bill of Rights' (United Nations, 2023) <https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights>

OHCHR, 'Terrorism and Violent Extremism' (*UN*, 2023) <https://www.ohchr.org/en/terrorism>

Pew Research Centre, 'Public's Top Priority for 2022: strengthening the nation's economy' (*Pew Research Center*, 16 February 2022) <https://www.pewresearch.org/politics/2022/02/16/publics-top-priority-for-2022-strengthening-the-nations-economy/>

Poushte, J., 'Majorities in Europe, North America Worried About Islamic Extremism' (*Pew Research Center*, 24 May 2017) <https://www.pewresearch.org/short-reads/2017/05/24/majorities-in-europe-north-america-worried-about-islamic-extremism/> accessed 13 May 2020.

Press Secretary, 'Remarks by President Obama and President Holland of France in Joint Press Conference' (*White House*, 24 November 2015) <https://obamawhitehouse.archives.gov/the-press-office/2015/11/24/remarks-president-obama-and-president-hollande-france-joint-press>

UN, 'Global Issues: human rights' (*United Nations*, 2023) <https://www.un.org/en/global-issues/human-rights>

UN OHCHR website, <https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies>

UNESCO, 'Universal Declaration of Animal Rights' (proclaimed 15 October 1978) <https://constitutii.files.wordpress.com/2016/06/file-id-607.pdf>

UNSC Resolutions <https://www.un.org/securitycouncil/ctc/content/security-council-resolutions>

Watson Institute for International and Public Affairs, 'Civilians Killed and Wounded' (*Costs of War*, May 2023) <https://watson.brown.edu/costsofwar/costs/human/civilians#:~:text=The%20U.S.%20post%2D9%2F11,a%20result%20of%20the%20wars.>

Webster's letter to Lord Ashburton, Parliamentary Papers (1843) Vol LXI; British and Foreign State Papers, Vol 30, 193

White House, 'National Security Strategy of the United States of America' (*White House*, 2006) <http://www.comw.org/qdr/fulltext/nss2006.pdf>

White House, 'National Security Strategy of the United States of America' (*White House*, 2002) <www.state.gov/documents/organization/63562.pdf>

White House, 'National Security Strategy' (*White House*, 2002) <https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>

White House, 'The National Security Strategy of the United States of America' (*White House*, 2002) <https://2009-2017.state.gov/documents/organization/63562.pdf>

Wike, R., and B.J. Grim, 'Widespread Negativity: Muslims distrust Westerners more than vice versa' (*Pew Research Center*, 30 October 2007) <https://www.pewresearch.org/global/2007/10/30/widespread-negativity-muslims-distrust-westerners-more-than-vice-versa/>