

“A Righteous Torturer: A Discussion on the Legalisation of Torture as a Counterterrorist Strategy in a Democracy during the Religious Wave of Terror”

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2014172734

Submitted in partial fulfillment of the requirements for the

Master's Degree

in

Governance and Political Transformation

at the

University of the Free State

DECEMBER 2015

SUPERVISOR: DR SUZANNE GRAHAM

“This publication is published with the necessary approval.”

Declaration

“I, Stephanie de Freitas, declare that the dissertation hereby handed in for the qualification Master of Governance and Political Transformation at the University of the Free State, is my own independent work and that I have not previously submitted the same work for a qualification at/in another University/faculty.”

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Abstract

Following the aftermath of the terror attacks in September 2001, a heightened wave of religious terror spread worldwide as terrorist organisations transitioned from threatening domestic security concerns to violent regional terrorisations. In response to a series of recent transnational attacks, this paper facilitates various discussions on whether democratic states should permit non-lethal investigative torture in an effort to strengthen national security against terrorism. To examine this controversial topic, an equally controversial theory supported by legal theorist, Professor Alan Dershowitz, is presented to evaluate whether a democratic society which authorises the implementation of investigative torture to counterterrorism, could do so under the cover of law. In this paper an analysis of the application of a torture warrant system as a counterterrorism alternative is applied in the case study of Israel, to determine whether torture could be justified and deemed appropriate when faced with a 'ticking bomb' scenario. This evaluation is supported by various academic points of view together with a range of opinions, and concludes with a possible alternative to strengthen democracies against the present threat of violent religious terrorism.

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List of Acronyms

ACRI – Association for Citizens Rights in Israel
AMISOM – African Union Mission in Somalia
AU - African Union
CAR – Central African Republic
CAT – Convention Against Torture
DRC – Democratic Republic of Congo
FISA – Foreign Intelligence Surveillance Act
FLN – Front de Liberation Nationale
GIGN – National Gendermerie Intervention Group
GSS - General Security Services
IDF – Israel Defense Force
IS – Islamic State
ISC – Israeli Supreme Court
ISIS – Islamic State of Iraq and Syria
ITERATE - International Terrorism: Attributes of Terrorist Events
LRA – Lord’s Resistance Army
MENA – Middle East and Northern Africa
NATO – Northern Atlantic Treaty Organisation
NSG – National Security Guard
PFLP – Popular Front for the Liberation of Palestine
PLF – Palestinian Liberation Front
PLO – Palestinian Liberation Organisation
SERE – Survival Evasion Resistance Escape
TNP – Turkish National Police
UAV – Unmanned Aerial Vehicles
UN – United Nations

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Chapter One: Terrorism Yesterday, Today, and Tomorrow

1.1 Introduction

The 21st Century is a juxtaposition of human welfare and state insecurity as political and religious ideologies battle side by side. Since the end of World War Two and the collapse of the Cold War, democracy has grown in popularity as the strongest form of governance worldwide. As a result of these two major accomplishments, the world has witnessed decades of global civil uprisings and regional political unrest as the call to end autocratic rule and the promotion of human rights heightened. However, as democracy grew, the waves of terrorism expanded with the aim of harming innocent civilians as a means to broaden violent extremist goals globally.

The theme for this study is derived from researching the relationship between democratic state governance and national security. More specifically it examines national governance and the need to strategize a new legal framework in order to enhance national security in democracies as a defence against terrorist attacks.

Worldwide, the presence of terror has increased dramatically since September 2001. After the fall of the iconic Twin Towers in New York City, terrorism has demonstrated its stronghold as an unconventional actor in terms of warfare. Currently the Middle East and Northern Africa (MENA) is overrun by violent extremists and terror groups linked to militant factions of al-Qaeda, rendering the region unstable and fragile. The Islamic State (IS), formally known as the Islamic State of Iraq and Syria (ISIS), is responsible for numerous bombings, kidnappings, and beheadings in Iraq, Syria, Turkey, Yemen, and most recently Paris, to name but a few (Watkins et al, 2015). Reports estimated as of mid-2015 that over 80,000 jihadist troops are loyal to IS's military wing (Prince, 2015). This resulted in a drastic call for increased state security and stronger regional counterterrorist strategies.

Terrorism is a notoriously bloody business, as there are often numerous casualties. In January 2015, nearly 2,000 civilians, mostly children, women, and elderly citizens were reported killed after Boko Haram members attacked a local village with grenades, rifles and rockets in Bage, Nigeria (Mark, 2015). Linked to al-Qaeda, Boko

Haram have recently allied themselves in support of the IS. This is but one of many terrorism occurrences in recent months, creating an increasing sense of urgency around the region that there will be no end in sight regarding terrorist acts, unless state leaders and governments strengthen national security (Mark, 2015).

This is a challenging feat, as unlike autocratic states, democracies are somewhat limited in their responses to terror, a fact terror groups appear to be only too well aware of. Terrorist groups seek to force democracies to reveal their true, authoritarian nature, through restrictions on civil liberties, as would be imposed in a crisis or state of siege due to a terrorist attack (Chenoweth, 2006). This terror agenda seeks to push democracies to violate fundamental principles and rights, to corrupt and ultimately end the political democratic regime (Chenoweth, 2006). Yet, any state which does not react to terror threats will be left vulnerable, resulting in a national security dilemma. There seems to be no legitimate way for democracy to win a fight against terror.

In an attempt to examine the challenge democracies are left to face, I seek to research the topic of terrorism in order to bring awareness to the changing nature of global terror, and to emphasise the need to adopt alternative methods to enhance national security within democracies. As a national security alternative to terror, I seek to explore the theory of torture warrants introduced by Harvard professor and legal theorist, Alan Dershowitz, as a democratic counter-terror strategy implemented to administer torturous interrogation techniques on suspects apprehended as terrorists.

In the attempt to analyse this approach, the study aims to identify whether torture is a possible counterterrorist strategy in a democracy, by exploring the limits of a state's response to a national security threat. To achieve these necessary goals, this research needs to recognise the limitations of democratic state security when threatened by rebel terror, and discuss the potential efficiency and value of torture as an effective counterterrorism tool. To explore these aims and objectives, I seek to analyse on-going arguments by leading legal theorists who debate the theory of legalising torture warrants as a counterterrorist tool for democratic states.

This discussion has been analysed previously through the philosophical theory of *Dirty Hands*, titled after Jean-Paul Sartre's play of the same name. Its modern reoccurrence was introduced by Michael Walzer in his (1973) article "Political Action: the Problem of Dirty Hands" where Walzer focuses on a politician's ability to govern innocently, or whether this is even possible at all. Walzer argues that torture is permissible if the politician recognises torture as a moral crime and accepts a moral burden. Therefore according to Walzer, torture can be justified if used for the greater good of mankind.

Therefore, as a national security alternative to terror, I will explore the theory of torture warrants as a democratic counter-terror strategy implemented to administer torture interrogation techniques on prisoners detained as terrorists. I will discuss whether within a democracy the use of torture against persons the government has identified as terrorists is justified, and analyse whether the legalisation of torture warrants is a practical theory to critically explore the legal viability of this method for the purposes of counterterrorism.

1.2. Problem Statement

1.2.1. Democracy under Attack

Democracy is a form of government not sharply defined; resulting in the formation of a variety of democratic variations and systems (Jud, 2004). Although different, there are four basic principles within the various democratic systems that are similar: a political system for free and fair elections; the active participation of citizens in socio-political life; the protection of human rights for all citizens; and a rule of law where all citizens are equal (Kekic, 2007: 3).

There are various descriptions of democracy. As such it has been described in a wide sense as a "public system based on voluntariness within all forms of life activity", whereas a narrower description of democracy is a "form of state where people have got equal rights for power" (Nbenegroup.com, 2015). Finally a third description states that democracy is "recognised as an ideal model of social structure, a certain world outlook based on values of freedom, equality of rights, human rights"

(Nbenegroup.com, 2015). For the purpose of this paper, the term *democracy* will be regarded within the narrower understanding in collaboration with the four principle characteristics of democracy above.

It is important to recognise that this interpretation of democracy can be used within many of the various democratic systems, including; representative democracy, parliamentary democracy, and constitutional democracy which all promote the protection of civil human rights.

However, these liberal principles and freedoms create a space for exposure and vulnerability, most especially those in transition. An example can be seen in many African states who gained independence after the Cold War and whose socio-political and economic stability are developing, such as Somalia, Sudan, and Libya. When political systems are in transition, the state's security forces are often weakened. Societies transitioning from a non-democratic state towards democracy are particularly vulnerable since the security forces of the previous regime are disbanded, as is often the case, leaving the new democratic freedoms vulnerable to opportunities exploited for violent dissidents (Lutz and Lutz, 2010).

Lutz argues that democracies “provide more tempting locations for terrorist activities than totalitarian states” (Lutz and Lutz, 2010). Lutz goes on to state that democracies may be vulnerable due to the weak border check points, that they provide opportunities for a terrorist to walk away due to rushed or insufficient use of evidence during a trial, and allows the freedoms of free press to publish the propaganda of terror (Lutz and Lutz, 2010). Therefore democracy has unintentionally promoted the impact of suicide bombing through the continual sensationalism via the media (Lutz and Lutz, 2010).

1.2.2. Defining Terrorism

Terrorists, also labelled as rebels, freedom fighters, revolutionaries, guerrillas, or extremists, promote illegal acts of violence to harm and to seek to endanger societies through the promotion of fear. Although the international community have been unable to agree on a central definition of terrorism, it has been referred to as the “use

of violence or the threat of violence by an organized group to attain political objectives” (Lutz and Lutz, 2010).

The acts of terrorism, however, have been clearly defined. Terrorist acts are used “(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping” (Federal Bureau of Investigation, 2015). It has further been defined by the United Nations High Commissioner for Human Rights as “acts of violence that target civilians in the pursuit of political or ideological aims” (quoted in Tax, 2012: 1). The new wave of terror, which aims to destroy human rights, democracy and the rule of law, has become the 21st Century’s greatest security challenge.

Over the years, terrorism has evolved. The schemes and ideologies present today, are not the same motivational rationales first associated with the causes of terrorism in the past. On 11 September 2001 (also referred to informally as 9/11), as the Twin Towers fell in New York City, the world witnessed a transition of terror as it entered a new stratagem. The “Waves” of modern terror, as described by David C. Rapoport (2002: 2), transform approximately every 40 – 45 years or so. Modern terror is estimated to have started in the 1880’s with the “Anarchist Wave,” which transitioned into the “Anti-Colonial Wave” of the 1920s, into the “New Left Wave” of the 1960s which finally concluded in the 1990s (Rapoport, 2002: 2). A fourth wave of terror is currently under way, recognised as the “Religious Wave,” and is estimated to continue for 25 years (Rapoport, 2002: 2).

Following the previous New Left Wave which was founded on radicalism and nationalism, today we are living in an age of terror founded on religious fundamentalism. The use of religion has justified the acts of terror groups worldwide, seeking to establish a New World as expressed by the Islamic State and al-Qaeda. Islam has received specific attention in the new wave, however, that is not to say other religions are exonerated from terrorist activities. The Sikhs acted out through terror in a failed attempt to establish a religious state in Punjab, Jewish zealots have fought foreign rule and authority by attempting to destroy Islamic monuments in Israel, and have staged assassination campaigns against Palestinian politicians

(Rapoport, 2002: 7). Yet, radical Islamic groups have produced the most substantial, deathly, and international attacks in the new wave (Rapoport, 2004: 61).

The religious wave of terror is said to have started in response to the 1979 Iranian Revolution, when religion was chosen over political appeal. The revolution, which took place in the year marking the beginning the new Islamic century, inspired movements throughout the Middle East as witnessed in Lebanon, Kuwait, Iraq, and Saudi Arabia (Rapoport, 2004: 62). It was also the same year that the Soviet Union invaded Afghanistan, where Sunni Muslims with help from the US, pushed out the invading Soviet forces (Rapoport, 2004: 62).

It was at the hub of religious revolt when events in Lebanon introduced the wave's strongest terror tactic, suicide bombing (Rapoport, 2002: 8). Martyrdom, also present in the first wave of terror, became the extremist's most effective motivation to challenge secular power and enhance capacity-building initiatives towards the desired New World mentioned above. The effective features of previous terror tactics still remain relevant in today's violent religious fundamentalism as kidnappings, hostage-taking, and assassinations remain prevalent (Keating, 2015).

Modern religious extremism, through technological development and globalisation, has encouraged terrorist groups to expand as transnational terrorisations; crossing borders, and formulating a regional and international security threat. Geographical distance and state borders are no longer obstacles for communication. According to Jeffery Haynes, in his book "Religious Transnational Actors and Soft Power", globalisation "increases their [religious transnational actors] ability to spread their messages, and to link up with like-minded groups, across international borders" (2012: 2). Haynes further states that the "overall result is that cross-border links between various religious actors have recently multiplied, and, in many cases, so have their international and transnational concerns" (2012: 2). This has prompted a global security dilemma as many religious extremist groups have outgrown their domestic agendas, and expanded towards a larger regional stratagem.

1.2.3. Transnational Terrorism

It is important to demonstrate just how problematic terror attacks have become during the current wave of terror and the resultant need to defend democracies against them. To best illustrate the broad danger terrorism has become, the paper has provided various regional examples of the kind of attacks currently present in affected areas.

Since the 1970s, the International Terrorism: Attributes of Terrorist Events (ITERATE) dataset has provided substantial research and credible information on variables such as; dates, locations, targets, types of attack, numbers of casualties, perpetrators' nationalities, terrorist group, victims' nationalities, and logistical outcomes specifically for transnational terrorist attacks (Sandler, 2014).

Figure 1, below, provided by ITERATE, demonstrates the number of transnational terrorist attacks worldwide from 1968–2011:



Figure 1; Number of transnational terrorist incidents (ITERATE), 1968–2011 (Sandler, 2014).

This graphic reveals the growth of transnational terrorism prior to the infamous 9/11 attack which truly brought transnational terrorism to the foreground of national security.

The Middle East is no stranger to terrorism. Currently the region is overrun by concerns of a violent Sunni Muslim terror organisation, the Islamic State (IS) or ISIS. IS is a violent extremist organisation currently operating a territory the size of Great Britain across Iraq and Syria (Atwan, 2015). In his book "Islamic State: The Digital Caliphate" Abdel Bari Atwan discusses the hard-hitting facts about the IS. Atwan acknowledges the territory as a functioning, self-sustaining state. IS as a terrorist organisation is unique; it is equipped with a functioning system of governance, with its own cabinet and ministers, it has a functional financial system worth over 17 billion US dollars, complemented by oil resources worth up to three million dollars a day, not to mention the looting of Muslim banks claimed by the group once the area was taken sieged (Atwan, 2015). This is used to finance the high salaries of the troops and military facilities which house over 2000 armed vehicles.

The IS is master to no one as they are not the guests of any state, but run and manage the organisation from its seized territory. In the three years since its establishment in 2011, the organisation has developed rapidly into the greatest terrorist threat of the 21st Century.

A self-proclaimed state, IS intends to spread throughout the eastern region of the Middle East further into Jordan, Lebanon, and Palestine (BBC News, 2014). Its brutal tactics, ranging from religious and ethnic mass killings, kidnappings, and beheadings, have featured prominently in global media reports in recent months (BBC News, 2014). These tactics are the organisation's tools to establish a "caliphate," a nation governed by a single political and Islamic leader under Sharia Law (BBC News, 2014). After seizing territories in Iraqi Sunni occupied areas, such as Mosul and Tikrit, the caliphate plan was well underway, revealing that the state had no geographical limit.

The seemingly heroic but very violent characteristics of the organisation attracted both local and foreign support, as they expand further into neighbouring states. On 27 January 2015, IS rebels stormed the Corinthia Hotel in Tripoli, Libya where eight civilians were killed (McDaid, 2015). A few days later, IS militants attacked Egypt's Sinai Peninsula, where police and military stations besieged with bombs and grenades, left 27 killed (McDaid, 2015). Militants in Egypt, Libya, Nigeria, Pakistan, and Afghanistan have sworn allegiance to the organisation and are actively perusing

the plans and agendas set out by the organisation's leader, Caliph Abu Bakr al-Baghdadi (Laub, 2015). These are but a few instances of IS's transnational intentions and explorations.

Further terror sparked conflict in the Middle Eastern region as the terrorist organisation Hamas, first appearing in 1987 in Palestine, engaged in heavy military operations against Israel in June 2014 following the kidnapping and murder of Israeli civilians (Nctc.gov, 2015). This act led to months of violent militant chaos between Israel, Palestine, and Hamas's military wing in the Gaza Strip, which escalated into the longest and most lethal conflict with Israel since 2009 (Nctc.gov, 2015). Hamas is a Palestinian branch of the Muslim Brotherhood supporting a robust socio-political structure inside the Palestinian territories (Nctc.gov, 2015). The group's strength stems from territories located across the Gaza strip and portions of the West Bank. The group's military wing is known as Izz al-Din al-Qassam Brigades, and is notorious for conducting anti-Israeli attacks since the 1990s (Nctc.gov, 2015).

Terror has been a constant security threat in the Middle East. From 1990-2010, there were an estimated 15, 731 terrorist attacks in the region with 11,719 occurring from 2005-2010 alone (Ragab, 2014: 101). Terrorism has become politicised by surrounding regimes, resulting in the classification of which groups are labelled as terrorist and which are not (Ragab, 2014: 103).

In Africa, terror groups have threatened regional peace and security, as socio-economic and political institutions are weakening due to the presence of religious terror organisations. The threat of terror in the region has targeted states once thought to be immune from terrorism. The threat has spread from the North, to the East, to the West, and into Central Africa. The collective mass scale of these terrorist groups have formed what has become known as terrorisations. Terrorisation is a term described as "seriously destabilising or destroying the fundamental political, constitutional, economic and social structures of a country or international organisation" through fear (Duffy, 2015: 51). Terrorisations focused their attacks on African interests, on Western foreign interests, and United Nations refugee camps and humanitarian establishments. These terrorisations have used African geopolitics as a "breeding ground and source of recruitment and financing", according to the

African Union Chairperson of the Commission on Terrorism and Violent Extremisms in Africa (African Union, 2014).

Regional Terrorism in Africa is most present in the Sahelo-Saharan region and the horn of Africa extending into Somalia, Kenya, and Djibouti. Further inland, terror groups are active in the Central African region, which is currently overrun by the Lord's Resistance Army (LRA) in the Central African Republic (CAR), and Boko Haram in Nigeria (African Union, 2014).

The LRA first based in Uganda, began their terror campaign in the late 1980s before crossing over into the Democratic Republic of Congo (DRC), causing conflict, and using violence against various ethnicities, and those associated with particular political parties. According to the National Counterterrorism Centre, the LRA spilled over from Uganda into neighbouring states in 2005 and 2006, as they shifted forces, during which time the rebellion took the form of a regional militia that terrorised populations in the DRC, CAR, Uganda, and South Sudan (2015).

In West Africa, the Islamic militant group referred to as Boko Haram, has become infamous for attacking schools, police stations, military institutions, religious houses, and civilians since 2009 (Sergie and Johnson, 2015). Present in Nigeria, the group is responsible for over 10,000 deaths and more than 1.5 million internally displaced persons across the nation (Sergie and Johnson, 2015). A report by the Council of Foreign Relations, stated that Boko Haram killed dozens of schoolchildren, burnt down villages, and are notorious for the abduction of more than two hundred schoolgirls, which took place in April 2014 (Sergie and Johnson, 2015). Due to the state's lack of redress, the radical group has spread into Cameroon, Chad, and Niger. In response, the African Union and the USA deployed military troops to respond to the violence, however, the militant group is still at large in Western Africa.

In Eastern Africa, another Islamic militant group, Al-Shabaab, feeds on Somalia's vulnerability to sustain its terror. Strongest in Somalia and Kenya, Al-Shabaab has launched attacks against government institutions, civilians, international organisations, as well as the African Union Mission in Somalia (AMISOM) (African Union, 2014). The group was seen expanding its relationships with other transnational terrorisations, and has stated its support and association with IS. The militant group aims to infiltrate local organisations, recruit dissatisfied youth, and train

them in the new terror wave's most effective tactic, suicide. The group is sustained through illegal trade and piracy (Masters and Sergie, 2015).

Africa continues to battle the security dilemma of religious militancy and extremism. As states heighten security measures, terror groups in turn increase their militant tactics, leading to new terror groups springing up, causing violent chaos as they try to claim a name for themselves in the region.

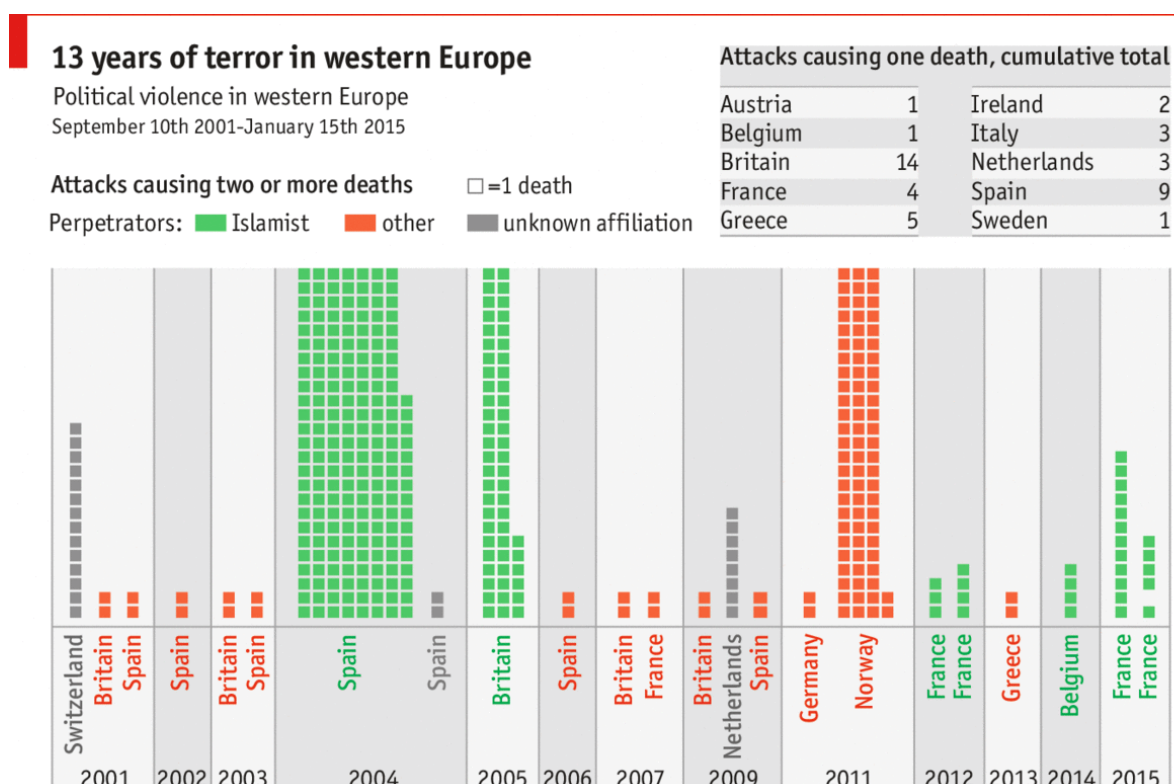
Among the terror organisations present across the Middle East and Africa, al-Qaeda is the leading international transnational terrorisation. Established in 1988, the Islamic terror group seeks to establish a Muslim-dominated world. The group called on all Muslims to battle Western influence and secular ideologies. The group is most famous for the 9/11 attack on the USA, where 19 al-Qaeda suicide rebels hijacked and crashed four US commercial planes, killing 3,000 citizens (Nctc.gov, 2015). This prompted the war in Afghanistan (in late 2001) and Iraq (in 2003), as President George Bush called for a War on Terror. Throughout its existence, al-Qaeda has targeted Western institutions worldwide; in Europe, North Africa, South Asia, Southeast Asia, and the Middle East (Nctc.gov, 2015). Despite the group's leader Osama Bin Laden having been killed by US forces in 2012, the group is still at large, as recently seen in attacks across Europe (Congressional Research Service, 2014).

On 7 January 2015, terror attacks by al-Qaeda-linked rebels, caused a widespread uproar in France. Two gunmen killed 11 cartoonists from the Charlie Hebdo Newspaper in Paris in retaliation for a controversial cartoon depicting the prophet Mohammed. Over the days that followed, civilians were taken as hostages by reported terrorists (Baronia, 2015). The attacks prompted a worldwide protest in response to the violation of the fundamental human right to freedom of expression. French citizens are calling for stronger government security and new laws to prevent the reoccurrence of such violations.

The attacks are part of a global jihadist trend currently sweeping Europe and neighbouring regions, towards firearm assaults in Western urban areas. In January 2015, two jihadists were killed in Belgium following previous attacks; in Mehdi Nemmouche, a jihadist killed four people in Brussels before escaping (Rodrigues, 2015). The attacks reported indicated the use of "urban spaces as a battle-ground" (Liang, 2015). This was seen through terror attacks in Tours and Dijon in France,

Sydney in Australia, Ottawa in Canada, and Woolwich in England. These attacks all took place in democratic states from May to December 2014 (Liang, 2015).

Western democracies are a strong target of religious terrorist due to their seemingly secular principles and opposition to religious extremists' struggle for world domination. This was evidenced by the number of attacks which occurred in states once thought to be immune to the dangers of religious terror. This can be seen in the graph below, Figure 2, which reveals the heightened presence of terror in Western Europe over the last 13 years.



Sources: Global Terrorism Database, University of Maryland; press reports; *The Economist*

Economist.com/graphicdetail

Figure 2: Graph illustrating the number of attacks which caused two or more deaths in specific western European states from 2001- 2015 (*The Economist*, 2015).

On 16 January 2015 in Germany, suspects were detained after reports of extremist activities in the area believed to be linked to the IS in Syria. In November 2015, IS inspired jihadists bombed a series of sites in Paris, leaving 153 civilians dead and 200 wounded, causing a national state of emergency (Front, 2015). The attacks were

well organised, taking place in various popular locations, each involving a different method of attack; suicide bombers, gunmen, drive by shootings, and creating a hostage situation (Front, 2015).

This was heightened by the terrorist attacks in Beirut, Lebanon occurring the day before, where a further 40 civilians were killed by two suicide bombers (Barnard, 2015). Western-styled democracies are becoming a growing target of attacks as terror support strengthens and geopolitical landscapes broaden. Currently IS has proclaimed provinces in Libya, Tunisia, Algeria, Syria, Iraq, Nigeria, Yemen, Afghanistan, Pakistan, Egypt, and Saudi Arabia (Watkins et al, 2015). The rising threat of ISIS to infiltrate these areas spreading further into Europe and Africa, is strongly becoming a very possible scenario.

1.2.4. Counterterrorism

There are several approaches used to respond to terrorism. Currently, the use of hard power through the support of military force has been chosen as the most prominent tool supported by the international community. Counterterrorism is understood to mean the “practices, tactics, techniques, and strategies that governments, militaries, police departments, and corporations adopted in response to terrorist threats and/or acts, both real and imputed”, according to the US State Department's Office of the Coordinator for Counterterrorism (quoted in Kolodkin, 2015).

Many states affected by religious extremist violence support intergovernmental military strength as the primary response to terrorism (O’Conner, 2012). The targeting and destruction of terrorist training camps accompanied by the capturing and killing of terror group leaders are key objectives that the military apply as counterterrorist strategies (O’Conner, 2012). This use of force is a military tactic which states encourage as a symbol of strength, to disorganise and to divide rebel and terror organisations.

The on-going African Union Mission in Somalia (AMISOM), currently supported by Kenyan, Ugandan, and African Union (AU) military forces, is a primary example of a

successful military-led counter-terrorist approach (AMISOM, 2014). In 2013, AMISOM launched military operations where over 22,126 troops were deployed to liberate parts of Somalia from al-Qaeda-linked Al-Shabaab rebels (AMISOM, 2014). The mission is close to proclaiming victory as AMISOM reclaims terrorist strongholds and drives out rebels from six strategic towns; Hudur, Rabdhure, Ted, Weeldheyn, and Burdhubow cities in Bakool and Gedo regions in Sector 3, and Buulo Burde in Hiraan region (AMISOM, 2014). This demonstrates that force is proving effective as a tactic to curb terrorism in Somalia.

The use of force is a hard power tactic supported by the numerous methods of strategy such as the War model which employs the use of unmanned armed vehicles, special co-op operations, and law enforcement units (Crelinsten, 2014). However, although strategically popular, military might as a hard power tactic is not the only mode of counterterrorism available. Soft power and smart power are two other counter terror methods available to states to deter and prevent the harm of terrorism. Though the use of good governance, justice and dialogue, prevention and nation-building can be established as a means to remove the root causes of terrorism within vulnerable democracies (Crelinsten, 2014). These are but a few of the prevention strategies available to affected states.

Yet, as threats of terror loom worldwide, efforts to counter terrorism remain vital to security experts and policymakers in many states. Terror organisations founded on religious fundamentalism, are growing in number and geography as they transcend into transnational terrorisations (Baronia, 2015). Media reports described this as a global security threat which needs to be explored further as transnational terrorism does not respect sovereignty, and as such, is not confined or limited by borders (Baronia, 2015).

As terrorist groups continue to be more pronounced, and are difficult to diffuse, detect and penetrate, democratic states need to take precautions in the event of a pending terrorist attack. Counterterrorism, as a response to rebel terror, is defined in the United States of America's Army Field Manual, as "operations that include the offensive measures taken to prevent, deter, pre-empt, and respond to terrorism" (Rineheart, 2010: 2).

Worldwide, the presence of terror increased by 44% since 2013, with over 10,000 terrorist attacks taking place in 2014 (Cheung, 2014).

Would the institutionalisation of torture as a counterterrorist interrogative strategy, successfully enhance democratic national security against the threat of religious terror?

1.3. Aims and Significance of Study

This study aims to identify whether torture is a possible counterterrorist strategy in a democracy. The research aims to explore, in relation to terrorism:

- The limits of a state's response to a national security threat;
- Whether torture is a practical measure to guarantee state security?
- Whether national security should take precedence over civil liberties?
- Whether torture defends or attacks the principles of a democracy?

To achieve these aims, this research has the following objectives:

- To recognise the limitations in state security when threatened by rebel terror,
- To discuss the efficiency and value of torture as an effective counter-terrorism tool,
- To recognise the value of civil liberties within a democracy,
- To examine the limitations of torture as a counter-terrorist strategy in a democracy.

To explore these aims and objectives, I will examine the on-going arguments by leading legal theorists, such as Michael Walzer and Alan Dershowitz, who debate the theory of legalising "torture warrants" as a counterterrorist tool for democratic states (Blitzer, 2003).

1.4. Methodology

In an attempt to evaluate the application and suitability of the theoretical framework of torture warrants as a counterterrorist security measure in democracies, this study will apply a critical approach towards security. This approach is used to challenge and unsettle previous assumptions and aspirations towards national security and politics with regard to international relations.

The study will apply the qualitative research method to understand the experiences and attitudes of democratic leaders on whether or not to implement torture in counterterrorist tactics. This is a study focused on the perspectives and experiences of democratic governance in the pursuit of enhanced national security. A present example, is of the ticking bomb scenario introduced by Alan Dershowitz (2004); where a political leader permits the torture of a terrorist who knows the time and place an active bomb is about to go off, thereby killing many innocent civilians. The use of torture in this case may be the only effective and most swift method for national security (Dershowitz, 2004: 1). However, not all terrorist threats apply to the ticking bomb scenario, thereby limiting the utility of this scenario.

For the effectiveness and resourcefulness of the study, the paper follows the desktop method of research, where I collected data from existing secondary or documentary resources such as academic publications and articles, newspapers, internet web-pages, conference reports, and media sources. However, due to the illegal nature of torture outlined by International Law, the sourcing of credible and accurate information on the utility and presence of torture is indeed problematic. Nonetheless, this paper aspires to apply available relevant and the most reliable information.

The research is supported through the case study approach to investigate a concrete problem located in a particular situation (Britton, 1996). The case study used to explore the theoretical framework presented in this paper, is the institutionalisation of torture in Israel. Although Israel is not governed by a formal constitution, the state does abide by unwritten constitutional principles of democracy as well as the principles of human rights outlined in the Universal Declaration of Human Rights. Israel upholds a representative parliamentary system and has a structured system of checks and balances required by a democracy. However, this paper does

acknowledge the failures present in the Israeli legal system as the issue of Freedom of Occupation has received much global contestation and reprimand in the state's dealings with Palestine. Nevertheless, Israel upholds the primary democratic principles required for this paper, and is a strong case study with regard to experience in democratic national security in response to the threat of terrorism.

This is supported through historical research to critically examine the development of modern terrorism and Israel's defensive security tactics. An example of historical research can be seen when examining Comte's thoughts on the progression towards scientific positivism, or reflecting on Hitler's Nazi Germany, by examining the sociological and political accounts of German governance (Britton, 1996).

As the study is following the desktop approach, the ethical considerations of accuracy and validity are upheld through the positivist values of empiricism, used as a tool to portray reliable and true information generated through values-free evidence (Shepard, 2013: 4). The research is supported through progressivism, in the belief that social science knowledge is present to benefit and develop humankind (Shepard, 2013: 4). This is expressed in the argument towards peace and security as democratic states develop towards more secure and safer environments for mankind. The sources and data analysed, are documented accurately and without bias. Due to the nature of desktop research, plagiarism is a large concern, therefore this research recognises the copying of someone else's work as a serious offence that will not be tolerated. Issues of consent and participant confidentiality were not necessary, as no interviews or focus groups were held.

1.5. Structure of Study

As seen above, chapter one provides a background of how terrorism grew throughout the 21st Century, accompanied by a brief overview of counterterrorism approaches evolved throughout the respective waves of terror.

Moving forward, chapter two will explore a detailed theoretical overview of the legal theory of torture warrants. It will explore the application of the institutionalisation of torture as a democratic interrogation tactic to strengthen national security.

Chapter three will discuss the current strategies enforced today to counter terrorism internationally, regionally, and domestically to identify which strategy is most prominent and why.

Chapter four will explore the suitability and reality of torture in democratic states by the application of the theoretical counterterrorist strategy; torture warrants, internationally, regionally, and domestically. This will be analysed through the case study of institutionalising torture in Israel. Israel was selected as a case study for its application of legal physical pressure permitted through the Landau Model authorised by the constitutional defence of necessity present in the state.

Chapter five will evaluate whether a democracy should make a difficult “choice-of-evil” decision as Dershowitz describes it, in a threatening situation for which no good verdict can be made; therefore determining whether torture warrants would be compatible with democratic principles and constitutional foundations. After applying the theory of torture warrants to the case study of Israel, the chapter will argue that despite the forethought and study by Dershowitz (2004: 1) in an attempt to establish a stronger democracy through the administered principles of accountability and transparency in deterring illegal use of excessive force during terrorist interrogations, his theory when applied practically is unsuccessful. Instead, the chapter will recommend alternatives for the establishment of a more suitable counterterrorism approach better linked to democratic ideals and virtues, though the use of smart power.

Finally, the research paper will conclude with a summary of the above, reflect on the results drawn from the study and recommendations which can be made for areas of future research.

Therefore, in an era where targets of terrorism are so easily accessible, and acts of terror are growing in number and efficacy, I believe there is a need for this study; to attempt to analyse whether the application of legal torture within a democracy as an interrogative counterterrorist alternative to military power, could possibly strengthen democratic security and governance. This will be attempted through exploring various studies by recognised theorists and the application of Alan Dershowitz’s theory of torture warrants. Although controversial, I will express the limitations, possibilities, and challenges towards terrorism in today’s post-modern society, and seek to provide

practical recommendations that could hopefully contribute towards a broader increase in democratic security and governance.

Chapter Two: Theoretical Framework; The Theory of Torture Warrants

2.1. Introduction

As a response to the increasing threat of terror across the globe, this chapter seeks to explore whether the theoretical overview of the legal theory of torture warrants would be applicable within a democracy.

This chapter will attempt to understand the use of torture as an interrogative counterterrorist strategy. The application of torture is a sensitive topic, as it often invokes an emotional response from those aware of the moral implications of such an act, indeed some absolutists may deem this research highly irrational all together. It is true, that torture is a condition universally recognised as wrongful; not only is it an act made internationally illegitimate through the United Nations Declaration of Human Rights and the International Criminal Court, but it is an act deemed constitutionally corrupt by most democratic states. However, despite the public stance, many democracies practise the act of torture as a form of deterrence and prevention to avert mass civilian casualties and national security when threatened by fundamental terrorism in the 21st Century.

In an attempt to explore the institutionalisation of the much debated torture warrants, this chapter will first define torture in the 21st Century and explain the practicality of the theory of torture warrants as described by Professor Alan Dershowitz. Finally, the chapter will discuss the surrounding opinions, debates, and critiques present in reply to the practice of legalizing torture in democracies and whether there is space to justify such a practice today. Therefore this chapter explores the discussions surrounding the application of the institutionalisation of torture as a democratic interrogation tactic to strengthen national security in response to religious terror.

2.2. Defining Torture

In November 1954, following the Algerian War, Francois Mitterrand, Secretary of Interior to Algeria, boldly responded to the Front de Libération Nationale (FLN), a savage terrorist movement spreading across the then French colony. He declared that he would not “allow negotiations with the enemy of the nation. The only negotiation is war” (Brass, 2001).

France, a democratic state, had authorised soldiers and police to commit any means necessary to curb the liberal rebel movement in Algeria. One soldier in particular, Paul Aussaresses, was authorised to commit lethal acts of torture during the war. During an interview with Brass, Aussaresses defended his violent acts. He believed his actions necessary, based on national security as a measure of protection for the thousands of civilians living in Algeria. After being questioned on whether he believed his actions brought a stop to the terror, Aussaresses replied;

I have been called a murderer, a monster, a communist...I am a patriot. I take full responsibility for my actions. I do not seek to justify my actions but simply to try explain that from the moment when a nation demands of its army to fight an enemy that terrorizes the population and forces it into submission, it is impossible for the army not to resort to extreme means (Brass, 2001).

Although extreme, torture is a small act, known to occur in secret, well hidden from the public eye, yet it carries profound national and global implications. For centuries, the threat of torture remained a civil fear as governments and empires abused their political power as a means to inflict unimaginable pain upon captured individuals (Harper, 2009: 910).

Since the enlightenment era of the eighteenth century, societies worldwide adopted social reforms in the hard effort to ban this primeval form of punishment (Harper, 2009: 910). Or so we thought.

In 1948, the United Nations adopted the Universal Declaration of Human Rights, where Article 5 promptly states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (Un.org, n.d.). Further in 1984, the

United Nations established the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, also known as the "Torture Convention", to which over 100 nations signed and agreed to acknowledge torture as an "illegal, immoral practice that stigmatized any ruler or regime that stooped to such barbarism" according to Alfred W. McCoy in his book *Torture and Impunity: The U.S. Doctrine of Coercive Interrogation* (2012: 2).

However, despite the developments towards the abolition of torture over the past two centuries, torture is still practiced today; hidden behind closed doors, away from public attention.

The use of torture by democratic governments was highly discussed after the 9/11 attacks in the United States. The War on Terror provided an opportunity for the US to implement torture as a preventive security tactic under the title of "enhanced interrogation techniques" (Laughland, 2015). The War incorporated numerous methods of counterinsurgency in the Middle East, with the military leading the charge; involving open and covert military operations, new security legislation, efforts to block the financing of terrorism, and more (Globalpolicy.org, 2015). It was here that the leading democratic nation in the world defied international legal standards by "adopting torture as its prime weapon" through the use of punitive psychological methods employed primarily through the military (McCoy, 2012: 2).

After the declaration of war in Iraq, US interrogators were trained in torture techniques by Survival Evasion Resistance Escape (SERE) instructors (Thejusticecampaign.org, n.d.). The programme was designed to train military personnel who had been caught as prisoners of war to withstand torture during interrogation (Thejusticecampaign.org, n.d.). Examples of the torture techniques used, were sexual assault and humiliation, sleep deprivation, sensory deprivation, solidarity confinement, mock executions, and forced medication to name a few (Thejusticecampaign.org, n.d.). Although these techniques were not new, the US military sought legal assistance to approve harsher interrogation techniques. The state authorised certain torture techniques after 2002, including stress positions, mock executions, solitary confinement, hooding, forced nudity, forced grooming, and taking advantage of the detainees' fears (Thejusticecampaign.org, n.d.). These

techniques became infamous after the public became aware of the torture used at Abu Ghraib and Guantanamo Bay.

Despite the moral stain of torture, describing the act as a counterterrorist interrogative strategy has been difficult to define due to the struggle to prove its existence within government operations. It has been described as the intentional enforcing of extreme physical suffering upon a defenceless person, used as a strategic approach which has been employed throughout history as an effective counterterrorist tool (Miller, 2005: 179).

The Convention against Torture (CAT) reviewed four major criteria necessary to define and distinguish torture from other cruel and inhuman forms of punishment. The criteria were as follows:

- Torture requires the causing of severe physical and/or mental pain or suffering;
- Torture requires the attribution of the conduct to the state;
- Whether the act was committed by a law enforcement official or was committed with his or her acquiescence; and
- The intention and purpose to torture (Nowak, n.d.:24).

It is important to recognise, according to Manfred Nowak, the UN Special Rapporteur on Torture, that not all forms of ill treatment and extreme pain is termed as torture. In contribution to the above criteria, Nowak believes there is another measure researchers and authorities should include; the powerlessness and defencelessness of the victim (n.d.: 24). This he absorbs from the Rome Statute of the International Criminal Court, where the principle of detention is present. It is the harmful use of power over another which is used to differentiate torture from other forms of punishment. An example can be seen though the excessive use of force on the street to disperse a demonstration or a riot (Nowak, n.d.: 25). Nowak therefore states that torture can be likened to that of slavery as the 21st Century's greatest attack on human dignity, a special form of violence of which its prohibition is the highest principle of international law (n.d.:25).

As mentioned above, the Torture Convention is a multilateral treaty established to provide the primary guiding authority in the international struggle against torture

(Harper, 2009: 911). Article 1 of section 1 of the Convention offers a blurred and interpretive definition of torture, which states;

The term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions (United Nations General Assembly, 1984).

This definition provides signatory states with leeway to interpret the act according to their domestic policies and standards, hence providing a space for abuse and deterrence at a national level (Harper, 2009: 911). The failure to narrowly define torture allows individual states the ability to resort to torture as a tool of state policy engrained in law enforcement practices. This is greatly problematic.

However, despite the moral distain and condemnation of torture, the book "Responding to Terrorism: Political, Philosophical and Legal Perspectives," by Robert Imre, Brain Mooney and Benjamin Clarke (2008) argues that although immoral, the use of torture can be highly effective no matter the political regime; whether it be a liberal democracy, autocratic rule, or fundamentalist; torture can been used to unite individuals to reject state legitimacy. This is relevant towards understanding torture in the 21st Century as democracies are looking for methods to retain security and warn off possible future terrorist attacks, but at what cost to entrenched human rights?

A debated, yet possible proposition to answering this question, has been addressed by Harvard Professor Alan Dershowitz (2004: 1) in his creation of torture warrants, a legal mechanism to enhance national security while maintaining important democratic principles.

2.3. The Theory of Torture Warrants

Torture is an ancient technique used by governments as a form of punishment, but can it be applied today?

After 9/11, a poll was taken by the Pew Research Centre which found that nearly half of all Americans thought the torture of suspected terrorists could be justified (Debate.org, n.d.). In a further study, the BBC conducted a survey with over 27,000 civilians from across 25 countries. The survey found that one of three persons in nine of the selected countries supported partial torture if it ensured their safety (The Economist, 2007: 1). Amongst the states selected, Israel held the strongest support with over 40% of its citizens in support of partial torture against terrorism as a security tactic (The Economist, 2007: 1).

With the rise in religious transnational terrorisations venturing into neighbouring states, targeting the democratic West and Europe, where counterterrorism security tactics are predominantly defensive, often taking place after an attack, civilians have been left vulnerable. Unfortunately there is no quick fix or solution. However, there are steps, although controversial, that a state could possibly venture into applying to assist towards national governance and security.

The current situation within threatened democracies, although sources are limited, alludes to the presence of torture occurring secretly upon state targeted terrorists or prisoners. At the moment the United States tolerates torture without accountability, as there are no legal policies or mechanisms legitimately in place to monitor or restrict the use of torture, such as water boarding, against state terrorists (Dershowitz, 2013).

These acts are often carried out under the radar, without public knowledge, reportedly for the greater good of national security. But - at what cost? From a legal point of view, this is greatly problematic.

The new paradigm of terrorism calls for a balance between civil liberties and security. In response to this issue, Professor Alan Dershowitz introduced the theory of "torture warrants" as a practical legal mechanism to curb the abuse of state investigative torture, and structure it in a manner that could possibly be utilised in a democracy as a method of national security.

Alan Dershowitz stated that “if torture is being or will be practiced, is it worse to close our eyes to it and tolerate its use by low-level law enforcement officials without accountability, or instead to bring it to the surface by requiring that a warrant of some kind be required as a precondition to the infliction of any type of torture under any circumstances?” (2004: 230). Such was his response to the brutal images released of the treatment of Abu Ghraib detainees. The treatment of Abu Ghraib detainees became infamous after the release of a report by Major General Antonio M. Taguba in December of 2003. The report illustrated the torture techniques, weekly executions, and appalling living conditions which occurred during the US occupation of the prison (Hersh, 2004).

The treatment of the detainees was described as ‘numerous instances of sadistic, blatant, and wanton criminal abuses’ (Hersh, 2004). These criminal abuses were authorised and undertaken by low level military officials. The horrendous acts reported, included; the pouring of harmful chemicals upon detainees, beating detainees with broom sticks, forcing prisoners to undress and masturbate, harmful threats by military dogs for intimidation purposes, and sodomizing detainees with brooms (Hersh, 2004). These are but some of the abusive techniques used by the US military in Abu Ghraib.

These forms of abusive treatments were seen as partially justifiable by the Bush Administration, as they did not occur on American soil as outlined in the UN Convention against Torture (idebate.org, n.d.). For this reason the torture of prisoners in Guantanamo Bay and Abu Ghraib was deemed legally acceptable (idebate.org, n.d.). However, democratic states are not only conducting interrogative torture proxy to their nation states, but torture occurs within democracies as well. This places democratic leaders in direct contradiction of the principles and systems for which democracies are respected, namely the constitutional principles of human rights, accountability, and transparency.

Alan Dershowitz introduced the theory of torture warrants as a mechanism to provide a possible answer to this brutal form of punishment by low level state officials. The torture warrant seeks to provide stronger national security within a democracy by upholding its liberal principles, despite the contrary disdain for torture by the international community. Had a warrant requirement been present at the time of

Guantanamo Bay and Abu Ghraib, the state officials present on the ground could not plausibly have claimed they were authorised to conduct the acts of torture committed, since the only legal and acceptable form of authority would have been in writing, and would not have been secretive.

The torture warrant is aimed to be a legal document administered and authorised by the Chief Justice of a state, which must have the signature of the current prime minister or president, warranting investigatory torture but only in extreme emergency situations. This situation is recognised in what is termed the ticking bomb scenario. The warrant is intended to be a legal mechanism authorised by the state leader in advance, to permit physical harm during interrogation; however, it will also ensure no lethal force is used (Ginbar, 2008: 181). The perpetrators will be granted immunity, but if they do not testify, they can be threatened with imprisonment. Dershowitz argues that if the perpetrators refuse to do what they are compelled to do by law—to provide vital information — they can then be threatened with torture (Ginbar, 2008: 184).

The warrant is designed to provide state accountability and transparency when permitting nonlethal torture, which is referred to as causing physical, emotional, and mental harm that is not life-threatening. Dershowitz, believes that in order to curb illegal political activity and to protect civil liberties and national security, non-lethal torture can be both legally justified and effective. It is important to recognise that the warrant to torture does not intend to provide political leaders and military personnel with a legal get-out-of-jail free card when resorting to acts of torture. It is intended as a mechanism to provide political accountability and transparency, only to be used as a last resort, with a just cause and the appropriate intentions, not a means to exact vengeance (Lauritzen, 2010: 100). It is theoretically intended to be used to protect the suspects, who are themselves defenceless. It has the potential to avoid the normalization of torture currently present in interrogational counterterrorism tactics.

John T. Parry in his article “Torture Warrants and the Rule of Law” discusses the utility of torture warrants and their place in the global legal context (2008: 887). Despite his apprehension over concerns of an *ex ante* approach to torture, where the torture warrant could encourage abuse and dilute the force of national and

international legal practises, Parry believes “the torture warrant version of the *ex ante* approach is plainly logical” (Parry, 2008: 887).

This approach, under the warrant system, would limit and indeed almost deny interrogators the simple use of coercion. Through Dershowitz approach, Parry believes that the cooperation of two federal government branches, the executive and the judiciary, working together could result in less government corruption and abuse. The torture warrant is not just a legal piece of paper, or the enactment of statute, but it goes further to demand the totality of facts and circumstances which would deem torture to be the only necessary, extreme, and the last resort possible. To best understand the practicality of the warrants, Dershowitz presents a situation where the warrant could theoretically be practical known as the ticking bomb scenario.

The ticking bomb scenario is a theatrical scene, created to provide the ideal and practical situation for which a torture warrant would be most effective and appropriate. The scenario begins with the example of a political leader who has captured a terrorist who refuses to reveal the location of a bomb timeously set to self-destruct if not stopped, resulting in mass civil casualties (Lauritzen, 2010: 100). Although an imaginable situation, in today’s active society, it has become a greater reality.

An extract from the hearing of Muhammad Abd al Aziz Hamdan v the General Security Service case of 14 November 1996 in Israel follows. This situation is highly compelling as the outcome of the case alludes to torture being deemed a necessary defence to terrorism. The case provides a platform where the ticking bomb situation was legally debated. The extract is taken from the book “Why Not Torture Terrorists: Moral, Practical and Legal Aspects of the Ticking Bomb Justification for Torture”, which states;

During the hearing at the High Court of Justice, the judges pressured Adv. Rosenthal to clarify whether an interrogator would be allowed to use force when a ‘ticking bomb’ scenario is considered. Justice Heshin illustrated; supposing a bomb was planted inside the Shalom Tower (a multi-storey building in the heart of Tel-Aviv), and the interrogee knows. It will explode in two hours. It is impossible to evacuate people out of the building. What do I do in such a situation?’ Rosenthal refused to admit that in such a situation it would be permissible to use force during interrogation. Heshin responded: ‘this is the most extreme immoral position I have ever heard. A thousand people are about to die, and you propose to do nothing? (Ginbar, 2008:1).

In 2001, the Atlantic Monthly issued a cover which stated “Must We Torture” which published the views of terrorism analyst Bruce Hoffman from Rand Corporation, who argued strongly the opinion that not only is it okay to torture, but it is a necessity (Arrigo, 2003). To support this argument, Hoffman illustrated a ticking bomb situation where the act of torture promptly saved the lives of innocent civilians in Sri Lanka. The illustration went as follows;

Thomas's unit had apprehended three terrorists who, it suspected, had recently planted somewhere in the city a bomb that was then ticking away, the minutes counting down to catastrophe.... He asked them where the bomb was. The terrorists—highly dedicated and steeled to resist interrogation—remained silent....So Thomas took his pistol from his gun belt, pointed it at the forehead of one of them, and shot him dead. The other two, he said, talked immediately; the bomb, which had been placed in a crowded railway station and set to explode during the evening rush hour, was found and defused, and countless lives were saved (Arrigo, 2003).

This is a more drastic illustration to the method expressed by Dershowitz's ticking bomb scenario, as he would not condone the death of any detainee during the torture process.

Although interrogational methods and techniques have been highly successful and deemed necessary, it is important to recognise the shortcomings of investigative torture if used to obtain critical information. In light of the utility of investigative torture, Dr Jean Maria Arrigo provides three methods, which if applied, are susceptible to failure. The different “practical mid-level considerations for programs of torture interrogation of terrorist suspects” can also provide ineffective techniques to warrant accurate information for which the act of torture is authorised (Arrigo, 2003).

The first method is called the animal instinct model of truth-telling. This approach supports the use of the ticking bomb scenario, where in the attempt to escape the pain and suffering, the subject will succumb to the demands of the torturer and reveal their plans. During the process, the model calls for the assistance of medical practitioners before, during, and after the torture process to ensure safety and credibility. The method, however, may fail if the physical damage impairs the subject's ability to tell the truth, or the torturers cannot control the subject's interpretation of

pain and they lose consciousness before they can relay any information (Arrigo, 2003). Therefore it would not be justified.

The second method of interrogative torture is called the cognitive failure model; which addresses the physical and mental stress of torture, which may render the subject mentally incompetent to muster deception, or to maintain their own interpretations of pain (Arrigo, 2003). This model restrains the subjects who are resistant to coercion, by means of pain or threats. The model's greatest obstacle is the mental resistance of subjects who are likened to that of heroes, fanatics or martyrs (Arrigo, 2003). This method of mental torture, could fail if time delays and the torture fails to prevent the attack, or the torturer is unable to distinguish the truth from deceit (Arrigo, 2003).

An example of cognitive interrogational torture can be seen in 1979, when the Turkish National Police (TNP) captured a known terrorist who had killed 32 Turkish officers. The terrorist was violent; spitting, screaming, and damaging her cell, while refusing to speak. The subject tried to commit suicide through cutting her wrists, and running her head into the cell walls. The TNP received orders to transport the subject to the unit for potential fatal torture where she tried to jump out of the moving vehicle. In response, officers fired over 32 rounds into her (Arrigo, 2003). When there is a subject who is willing to sacrifice their very life for the aims of their cause, then often, the interrogational process will be rendered null and void.

The third interrogational method of torture is the data processing model. Here, torture provokes the subject to tell the truth on an opportunistic basis, for comprehensive analysis across subjects (Arrigo, 2003). The use of dragnet interrogations where "weaker or less committed terrorists, associates, and innocents, are detained and interrogated" (Arrigo, 2003). These are often organised through the coordination of torture by the military, government, or police. This method may fail if analysts are overwhelmed by information, and the torture results in the formation of a counter insurgency or the encouragement of new terrorists.

These approaches provide possible scenarios where torture is the only method available to obtain urgently needed information in order to dismantle a planned terrorist attack, which if it occurs, would kill thousands of innocent lives.

Due to the complicated ethical nature of the situation, the questions of "should" is a factor based upon the concept of dirty hands, which I seek to discuss only in brief in

this chapter, as morality is not a principle imbedded within the legal system or governance. But instead, the question of “can,” in applying the mechanisms and systems available to us, will be more thoroughly addressed.

When weighing the concept of whether a state “should” torture in light of the moral wrong agreed amongst liberal theorists, the state accountable should consider the harm it causes, both directly and indirectly. The problem of dirty hands insists that the politician has committed a moral wrong by authorising the act to torture, thereby tainting his or her hands with the “blood” of the interrogated victim (Meisels, 2007: 9).

The problem of dirty hands addresses the question of whether a political leader should violate the deep constraints of morality in order to achieve civil greater good when presented with a serious danger. This is a popular philosophical debate discussed by numerous theorists on the complexities surrounding the link between politics and ethics (Coady, 2009). This link puts forward the thought that a correct political act must at times challenge profound moral expectations and norms.

Dated as far back as Machiavelli, the concept of dirty hands was reinvented by Michael Walzer in more modern days, through his book on political action based on a political leader’s hard choice between two evils. Walzer argues that his concept of “supreme emergency” which could become present during warfare or national threat, could create a just cause for dirty hands, and could be justifiable (Coady, 2014). Walzer describes the concept of supreme emergency as “granting moral *permission* to violate the *jus in bello* rules” (Cook, 2007). However, Cook argues that any violation of ordinary restraints should remain violations and that instead, he states that political leaders may be permitted, but not forgiven, for violating moral and ethical restraints during a time of conflict (Cook, 2007).

As long as there are power relations universally, the righteous torturer, as believed by Walzer, can be vindicated. This is explained in John Parrish’s paper entitled *Paradoxes of Political Ethics: From Dirty Hands to the Invisible Hand*, where he states;

“ he who holds power does have the fates of other people in his hands, and there must be some cases (even if fewer than he prefers us to believe) in which keeping his hands clean amounts to abdicating responsibility: If he remains innocent ... he not only fails to do

the right thing (in utilitarian terms), he may also fail to live up to the duties of his office (which imposes on him a considerable responsibility for consequence and outcomes)" (Parrish, 2007: 283).

Therefore, at a philosophical level, the concept of dirty hands could be used in favour of Dershowitz's theory of torture warrants, however, not everyone would agree.

2.4. What are the Critics Saying?

Dershowitz himself, has stated in his book "Why Terrorism Works: Understanding the Threat, Responding to the Challenge" (2002: 1), that he is not in support of normative torture, but rather that if a situation of extreme emergency arises, and states are already illegally enforcing the practice, and it would lead to a successful security measure, then there should be an authorised system in which it is controlled and monitored. However, the possibility that torture can be effective, if used properly, is highly deliberated.

At an ideological level, whether torture is ethically justifiable, has been debated from both the deontological and consequentialist perspective. The deontological perspective argues that torture is a cruel and degrading act, and therefore humanely unjust. The consequentialists, however, argue that if torture is the better of two evils, then torture should be justified if it will result in a positive outcome (Holzinger, 2013).

The deontological argument explained by David Sussman, believes that torture can lead to self-betrayal of the tortured individual, that one would be forced into a position of colluding against oneself through one's own affects and emotions, so that one experiences oneself simultaneously powerless and yet actively complicit in one's own violation (2004: 4). Deontologicalists therefore, argue the element of self-betrayal, which separates torture from other forms of punishment (Sussman, 2004: 19).

The consequentialists argue, however, that the use of torture, although inhumane, can be justified in exceptional situations, as long as the positive outcomes outweigh the negative circumstances (Holzinger, 2013). The torturer must recognise the act as wrongful, but must perform the lesser of two evils in order to achieve a possible

positive outcome. This person who authorises the act, is recognised as the righteous torturer (Lauritzen, 2010: 100). This perspective supports the ticking bomb scenario, as the leader would be faced with two evils, to torture or to allow for civilians to die. The leader would then be encouraged to choose the lesser of the two evils, to torture. By the consequentialist's perspective, the torturer would have to recognise the act as being inhumane, yet permit it against his or her will, become a righteous torturer, and thereby possibly save the lives of those who would be effected by the detonation of such a bomb. On these grounds, torture may be justified.

However, at a practical level, there are strong concerns that if torture was legalised or supplied as an institutional alternative; the government could and would take advantage of the use of torture to further their own political will. This we have seen in the case of detainee Abu Zubaydah, who was tortured by the United States military when he was not only deemed to recognizably not be in possession of vital information but, who actually was found to have no information at all pertaining to acts of terror. Therefore when faced with a real situation, some argue that the controlled environment created by the ticking bomb scenario would not be practical (Paeth, 2008: 176).

A person who supports the impracticality of the ticking bomb justification for torture, is Kenneth Roth, the executive director of Human Rights Watch. Roth argues that the prohibition of torture is a straight forward, absolute veto that exists in international law. He states that the rejection of torture is both necessary in a time of peace as well as war, regardless of the security threat (Blitzer, 2003). Instead, Roth reminds us that there are legitimate methods available for governments to gain vital information, through the use of intelligence and taped wires which can remove the need to utilise torture. He argues that torturing the attacker would not justify the act of terror, and that providing torture under a false euphemism such as "enhanced interrogation techniques" as used under the Bush administration in the US, will not hide its illegality under international law. Instead, Roth believes that the democratic state which authorises the act of torture, then violates an equally basic prohibition, reaffirming the "false logic of terrorism", leaving democracies to lose the war against terror (Blitzer, 2003). Roth overall argues that governments can get actionable evidence through the legal system, without resorting to torture (Roth, 2014).

Another critic who disagrees with the effectiveness of the ticking bomb scenario is Karen McLaughlan. She argues, in her work entitled "Torture: prohibited in theory but terrifyingly useful in practice?", that Dershowitz's approach to the ticking bomb scenario is flawed (n.d.:135). She states that "if the intelligence is of such high quality that interrogators are entirely certain they have the correct individual to the extent that they are willing to torture them", then would it not make sense for the authorities to continue to build on that intelligence which may lead them to the bomb itself, without having to torture a potentially innocent individual (McLaughlan, n.d: 135). McLaughlan believes the ticking bomb scenario cannot justify torture, but rather that it will only be a means to a political end, whereby the torture warrant will reinforce institutionalised torture seen on the detainees of Abu Ghriab, where there was no threat of a ticking bomb.

The practicality of the ticking bomb scenario has recently been debated further as popular re-enactments of the scenario have been produced in the media through popular television plots such as the series 24. However, the screen writers and producers have openly stated that "most terrorism experts will tell you the 'ticking time bomb' situation never occurs in real life. It is used to distort a complicated reality into an artificially simple binary ethical calculation that, for 'patriots' like Jack Bauer, the ends [saving lives] justify the means [torture]" (In-debate.com, 2015).

Other critics have addressed the issue of permitting torture warrants as these may provide loopholes for false information and abuse to occur. This is due to the severe pain of torture, as detainees would confess or profess information that may not be true in order to stop the torture. It is further debated that torture is impracticable in democracies as it infringes on the principles of human rights, undermines state legitimacy and is ineffective (In-debate.com, 2015). Other concerns surround the normalisation of torture; that once legalised, provides space for the progression from only extreme situations, to those becoming more common and less life-threatening. Absolutists are strongly against the use of torture all together, and believe such discussions within democracies are highly ironic and completely impermissible.

However, Steinhoff has highlighted a practical dispute in reply to the absolutist point of view (Steinhoff, 2010: 2). He debates that the above arguments do not provide any plausible deontological influences for the claim that there is an absolute right not to

torture or be tortured. He argues that such an argument cannot be provided on the sole basis of human rights (Steinhoff, 2010: 2). The argument would need to address why the absolute prohibition of torture in self-defence must be completely prohibited, yet the killing of a person within international law in self-defence is not prohibited (Steinhoff, 2010: 3).

Each opinion, school of thought, and argument hold reasons for the prohibition of torture, most of which are highly reasonable and respectful. However, despite these important concerns, torture is currently being used, despite international law, by democracies in the justification of self-defence and national security. In order to reasonably understand the gravity of torture in a theoretical sense, we need to address the present methods of counterterrorism currently underway in response to the growing threat of fundamental terrorism around the world.

Therefore, this chapter defined interrogational torture as causing severe physical, mental, and emotional pain or suffering, by the state, with the intention and purpose of enhancing national security. This use of torture, although illegal, we recognise is secretly present within democratic states, and is used as a means of curbing political dissent; and as a form of legal deterrence, the theory of torture warrants has been selected to provide accountability and transparency by our democratic leaders during the War on Terror.

To determine the relevance of torture warrants in the 21st Century, we will move onwards to discuss the current counterterrorist mechanisms openly in force by democratic states and the current progress against the war against terror.

Chapter Three: A State's Response to Terrorism as a National Security Threat

3.1. Introduction

Following a detailed discussion on the theory and application of torture warrants in chapter two, it is necessary to investigate whether the warrant system may be a suitable alternative for democracies to counterterrorism today. To do this, this chapter will explore the current counterterrorist methods applied by affected states to determine whether post-modern methods are effective.

Today, governments worldwide are at a stalemate against the War on Terror. The dramatic expansion of transnational terrorisations has caused an unsettling ripple affect across the globe.

In Africa, the violent presence of rebel insurgence and violent religious extremists, has shaken civil and governmental institutions, resulting in the internal displacement of thousands of people.

The Middle East is currently facing intrastate turmoil as IS destroys Syrian and Iraqi infrastructure, causing a steady regional state of collapse (United Nations, 2015). As a consequence of the region's instability and conflict, a new found refugee crisis has erupted across Eastern Europe, where thousands upon thousands have travelled to escape the dangers of violent rebel extremisms (Taylor, 2015).

These are but a few of the current security concerns global leaders are seeking to address.

In an attempt to understand the current national security measures in place, it is important to start with the fundamental concepts. This chapter will begin by examining the concept of counterterrorism. To do this, the chapter will discuss the history and definition of counterterrorism. Next, it will discuss the various models of counterterrorism currently being used by states, namely; the methods and strategies of soft versus hard power in international relations. This will better identify the efforts

made by, and challenges facing, states in countering terrorism and violent insurgency. It also addresses the relevance and impact of applied counterterrorism models on the ground. Finally, I will address the current alternatives surrounding the support for hard and soft forms of modern counterterrorism, and whether there is a need for democracies to transition from the current models popularly used. Therefore, I will seek to provide a detailed overview of the various regional and global policies and practices available in their attempt to prevent terrorism worldwide. This will be done so in order to identify whether the current methods of counterterrorism are in reality relevant and effective against today's terror organisations.

3.2. What is Counterterrorism?

It has been 14 years since the attacks of 9/11, and still the international community has failed to develop a uniformed understanding of counterterrorism within a democracy. Professor Paul Wilkinson, one of Britain's leading academic specialists on terrorism and political violence, argues that there are no counterterrorism policies currently universally applicable within democratic states (Rineheart, 2010: 1). Due to this failure, it has made defining counterterrorism for the purpose of this paper fairly challenging. To best adapt to this challenge, I feel it is necessary to examine the history of post-modern counterterrorism to better understand this thematic democratic security lapse.

3.2.1. The History of Counterterrorism

Over the past 40 years, government counterterror operations have had to change and adapt dramatically to evolving terror organisations. Modern terrorism began almost 135 years ago, but it was in the New Left Wave of the 1960s, where radicalisation was mixed with nationalism, that counterterrorism strategies began to evolve. Counterterrorism plans became necessary after the 1967 plane hijackings by the Popular Front for the Liberation of Palestine (PFLP), where a commercial passenger plane travelling from Rome to Tel Aviv introduced new norms of terrorism into the picture. It was evident that the international community was unprepared to

respond to such an attack. The hijacking of the plane revealed the dynamic growth by terror groups towards resorting to symbolic political objectives. Further, through the expansion of international transportation and globalisation, terrorists discovered that they were able to reach a wider audience (Rineheart, 2010: 2). PFLP revealed for the first time that a terrorist group had begun to operate at an international level. Finally, terror organisations could promote their causes in countries outside of their own political affiliation in an attempt to gain recognition. This internationalised religious political grievances; and in return, heightened the group's desire to retaliate.

International terrorism intensified during the 1960s after the Six Day War. Israel, through its tactical military operations, gained occupation of the Golan Heights, West Bank and the Sinai Peninsula (Rineheart, 2010: 3). These events inspired neighbouring Arab and Palestinian groups to operate transnationally to promote their political aspirations.

On the other side of the world, Latin American guerrilla fighters began an urbanisation campaign of terror (Rineheart, 2010: 3). Here hijackings, kidnappings, and embassy raids were popular terror tactics used to gain public attention. Ransom demands were used to gain funds as well as demanding the exchange of criminal prisoners for hostages. Kidnappings occurred in over 73 countries including Spain, Italy, and states within Latin America (Rapoport, 2002: 7). Blackmail was publically used to persuade state officials to carry out terrorists' demands. Overall, there were numerous international incidents which were estimated to include up to 409 kidnappings and over 951 hostages abducted between 1968 to 1982 (Rapoport, 2002: 7).

However, everything changed after the 1972 September Olympic Games in Munich. What is now known as the Black September assault, was the hostage-taking and killing of Israeli athletes by Palestinian terrorists (Cosgrove and Bhowmick, 2013). By the end of the attack, 17 people had been killed; six Israeli coaches, five Israeli athletes, five of the eight terrorists, and one West German policeman. The three surviving terrorists were captured but later released by West German police (Cosgrove and Bhowmick, 2013). According to numerous reports, Israeli security agents later tracked down and killed the remainder of those believed to be responsible for the Munich attack, however, this was denied by Israeli officials

(Cosgrove and Bhowmick, 2013). This was the very first time a terror attack was reported and broadcast live across the globe.

As the attack took place on German soil, Germany was held responsible by the international community at large for the deaths of those who were abducted and killed during the infamous shoot out. Germany was expected to respond to this international atrocity. However, its attempts proved futile. The violent attack and the poor response from Germany to react, made it known to the international community that states were ill-prepared to respond to the sporadic nature of terrorism.

As a result, many states developed rapid reaction rescue teams in an attempt to better prepare for terrorist efforts by improving responses to possible plane hijackings, taking of hostages, and raiding embassies (Rineheart, 2010: 2). In April of 1973, Germany developed its first counterterrorist department and France established the National Gendarmerie Intervention Group (GIGN); both of which were successful in responding to hostage-taking attacks (Hughes, 2011: 37). This was evident when the GIGN successfully prevented the planned plane attack on an Air France flight by four suspected Algerian terrorists of the Algerian Armed Islamic Group in 1994 (Peachey, 2015).

It was discovered that terrorist groups did not act with the intention of creating mass casualties, or even killing, in general. Instead their use of force was applied to broaden their audience and educate the international community regarding their causes through the use of the media and blackmail (Rineheart, 2010: 3).

As terrorism transitioned into the fourth wave of post-modern terror, the religious fundamentalist wave of the 1980s terror tactics began to change. As a response, international counterterrorism had to evolve. Hijackings and blackmail attempts needed to be replaced as terror groups were no longer achieving their political objectives. New religious groups began to emerge (such as Hamas in Palestine), who incorporated lethal tactics, including suicide bombing to gain international recognition.

It was during this era that state-centric counterterrorism strategies became more effective. This was evident as the world saw Israel invade Lebanon in 1982, and militarily eliminated PLO training strongholds (Rapoport, 2002: 7). International cooperation also improved amongst democratic states; the Northern Atlantic Treaty

Organisation (NATO) and the US, through the assistance of the United Kingdom, bilaterally agreed to bomb Libya in response to state-sponsored terror attacks (Rapoport, 2002: 11). Finally, a collective international counterterrorism approach was present.

After the 1990s, violent extremism became the dominant political strategy of terror groups. Through the trans-nationalisation of al-Qaeda into Africa and America, terror became a bloody warfare. Once again, governments were unprepared as the entire world saw the fall of the Twin Towers in New York in September 2001. The development of counterterrorism ideals were previously limited and slow before 2001. But after that day, governments had to quickly find ways of adapting to the continuous changing nature of terrorism as it advanced into the 21st Century. The result - the War against Terror.

3.2.2. Defining Counterterrorism

One reason for the slow response by governments towards international violent extremism mentioned above is simple; terrorism is a complex phenomenon, and therefore difficult to identify and defeat. Internationally, and predominantly in the West, counterterrorism is simply understood to be a collection of strategies and tactics used to prevent the spread of terror. However, Alex Schmid attempts to provide a more detailed definition of counterterrorism. He argues that counterterrorism is a “proactive effort to prevent, deter and combat politically motivated violence directed at civilian and non-combatant targets” (Forest, 2015: 277).

This can be done through a wide range of defective measures, such as law enforcement, political, economic or social assistance, the use of the legal system, or even parliament (Forest, 2015: 278). According to the National Counterterrorism Centre, counterterrorism can be further identified as practices, tactics, or techniques and strategies used by governments, militaries, or law enforcement in response to threats of terror both real and imputed (Kolodkin, 2015). Although fairly descriptive, these definitions still remain broad and therefore leave room for wide interpretation.

Counterterrorism is further understood to mean the “practices, tactics, techniques, and strategies that governments, militaries, police departments and corporations adopt in response to terrorist threats and/or acts, both real and imputed”, according to US State Department's Office of the Coordinator for Counterterrorism (quoted in Kolodkin, 2015). In addition, defining counterterrorism includes “actions and activities to neutralize terrorists, their organizations, and networks” as understood by the joint partnership between the United States Department of Marines and the Department of the Army (The United States Department of the Army and Military, 2014: 2). This narrower definition provides a clearer understanding for when and how to appropriately respond to extremist activities and will be the definition used for the purpose of this paper.

3.3. Modes of Counterterrorism

Attacks by transnational terror groups increased dramatically in the 21st Century. After 9/11, the world witnessed the 2004 March terror bombing on the Madrid subways, followed by the 2005 London commuter bombings. In November of 2008, we watched the Mumbai massacre take place, shortly followed by the December 2009 failed bombing of the Northwest Airline (Sandler, 2011: 1). These events were shadowed by the 2011 Moscow suicide attacks and the 2014 Boston bombings (Sandler, 2011: 1). These events are but a few terror attacks which crossed into democratic states.

At present, rebel terror is dominant in Northern Africa, the Middle East, and South Asia. Within these regions, the greatest threats are linked to Salafi-jihadist groups, primarily al-Qaeda and its expanding terror networks. The strong emphasis of a pure Islamic world is fast becoming real as the various groups strengthen and expand (Jones, 2014: 1).

As of 2010, the world witnessed the development of rebel Islamic groups operating in Tunisia, Algeria, Mali, Libya, Egypt (including the Sinai Peninsula), Lebanon, and Syria (Jones, 2014: 1). This assisted towards the establishment of the ISIS in Syria, as thousands of supporters from across the world travel to join the movement towards a unified Islamic State. Besides the links to al-Qaeda in Somalia and Yemen, other

jihadist groups not affiliated to the leading terrorist groups emerged. These threats pose a great risk to democratic states in neighbouring regions.

Counterterrorism, at its heart, is designed to weaken the assault capacity of extremists and rebel organisations, and remove their base of support (Jones, 2014: 1).

As the global capacity and reach of armed non-state networks evolve, democratic governments worldwide have had to take serious measures to heighten national security, both pre-emptively and defensively. Through previous attempts to defeat terrorism, it has become clear that terrorism is extremely complex. In order to effectively remove rebel violent extremism, democratic states require a range of models and alternatives. There is no one uniform approach. Therefore states are encouraged to apply multilateral frameworks to counter religious rebel extremism (Jones, 2014: 1). Yet, the lack of a universal definition of terror has made counter operations politically and theoretically difficult.

As previously mentioned, the acts of terror are identifiable, and therefore organisations and states are encouraged to respond to these appropriately. However, today's security environment can limit the approach and institution best qualified to respond to violent religious extremism. Due to the various responses available to coordinate counterterror objectives, this paper will focus primarily on two popular counterterror frameworks; hard power and soft power.

The discussion of soft power versus hard power first began in the 1990s when Nye, the co-founder of the political ideological theory of neoliberalism, introduced the practice of "power" as a political model in international relations (Wagner, 2014). Power in relation to governance and international relations was understood as the "ability to affect others to get the outcomes one wants" according to Nye, quoted in Jan-Philipp Wagner's paper on *the Effectiveness of Soft & Hard Power in Contemporary International Relations* (2014).

Hard power is commonly understood to be effective through direct coercive threats of force and punishment, whereas soft power is moulded upon persuasive cooperation and tactical coordination (Wagner, 2014). However, whether the use of soft or hard power is more effective against the acts of terror is highly deliberated.

3.3.1. Hard Power Approach

Hard power is a coercive strategy, whereby a state relies on the use of violence, to combat terror. Hard, direct tactics are able to scare off terrorists and weaken their organisations. Hard tactics are implemented through various forceful techniques and military models. As a military approach, hard power is based on military interventions, coercive diplomacy, and strict economic sanctions (Wagner, 2014). Hard power is associated with realism, addressing the threat of terror through forms of violence, and force. It is essentially the oldest form of power, as it was connected to the idea of anarchy. It was the primary strategy enforced for effective colonisation, as superior powers would forcefully, and often violently used oppression and submission systems to install an untamed international system in foreign lands.

It is the simplest form of power. Its practical norms produce direct and immediate results. The strength of hard powers lies in its ability to threaten the use of its resources. This threat is the first sign that hard power is present.

However, due to the amount of force applied, the institutions responsible must work in accordance with national laws and international regulations to maintain an appropriate use of force. Failure to abide by these laws and regulations would render hard power counterterrorism operations criminal. To maintain within these regulations, various direct counterterrorism models were established. One model, the war model, will be explored next.

3.3.1.1. *The War Model*

When George Bush declared a war on terror after 9/11, he effectively declared a military battle against fundamental religious extremism.

The concept was unheard of; how could a nation go to war against a non-state, ideological entity? One way, as we saw in Afghanistan and Iraq, was by applying the War Model method. The War Model, also recognised as the military model, is a coercive measure used to combat terrorism. It is considered quick, effective, and well suited to combat the threat of ideological rebel terror. As a direct and hands-on

approach, the war model is recognised as an “enemy-centric doctrine consisting primarily of offensive, hard powered tactics” (Rineheart, 2010: 4).

It targets terrorist groups as if they were an actual army at war. As the model is based on war-like characteristics; those seeking to target and combat terrorists, associate their targets in the same light as a soldier would observe an enemy soldier - as an equally equipped opponent in a zero sum conflict (Crelinsten, 2014). The core strategy of the model is to use maximum force designed to overpower a state's adversary (Crelinsten, 2014). However, the legal norms and behaviours which regulate the ethics of state warfare are absent when fighting a terrorist entity (Crelinsten, 2014). There are no non-combatant virtues or principles of protection.

In an attempt to correct this, Crelinsten (2014) states that the term ‘illegal enemy combatant’ was created as an exception for combatants who use “stealth and do not wear uniforms or insignia identifying them as enemy combatants; namely terrorists, guerrillas or insurgents”.

The war model, in following the zero sum approach, defines success in terms of victory or defeat. Therefore, a state which seeks to combat terrorism, can only win when the terrorist enemy is defeated.

If the struggle is a protracted one, even crossing generations, then counterterrorism efforts must be maintained as long as a state of war exists (Crelinsten, 2014). This can be very problematic, however, as I have mentioned previously, the current religious wave of terrorism still has another 20 years until the next expected wave is due to occur. This has led some to suspect that the war on terror will not just be a long war, but it could even be described as a ‘never ending’ war against Islamist terrorism (Crelinsten, 2014). This can have important policy implications on how a war on terror should be waged.

The war model has various direct methods which coercively combat terrorism. These include; the use of Predator and Reaper drone strikes, Special Forces operations, and increased policing and intelligence options.

Drone Strikes

The use of drones as a weapon of counterterrorism began in 2001 when George Bush authorised the use of unmanned aerial vehicles (UAVs) (drones) to target and kill members of al-Qaeda during the War against Terror (Lewis and Vitkowsky, 2011: 73).

The drones are used as a military weapon to enhance operations in areas too dangerous for soldiers to enter. The drones provide troops with a consistent 24-hour visual of their target. Each UAV can remain operational for up to 17 hours, surveying an area, and directly provide real time images of the actual situation on the ground (BBC News, 2012). The drone programme displayed its utility and effectiveness after the US launched Predator missile drones into Yemen in 2002, killing al Qaeda leader, Fahd al Quso, leader of a terrorism cell in Yemen and the architect behind the October 2000 USS Cole Navy vessel attack and the 2009 failed airplane bombing over Detroit (Lewis and Vitkowsky, 2011: 73).

However, the institutionalisation of drones in military operations was highly contested. Following the event in Yemen, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions released a statement issuing the attack as a “clear case of extrajudicial killing” (Lewis and Vitkowsky, 2011: 73). The use of drones, in targeting terrorist strongholds and personnel, have succeeded in the killing of several terrorist leaders and low-level operatives. However, although effectively reaching state targets, the drones are also responsible for the deaths and maiming of many civilians. This has resulted in provoking mass civil protests and outrage in Pakistan and neighbouring Muslim states (Gottlieb, 2010: 120).

Yet despite these reports, America continues its pursuit to combat terrorism with the assistance of drones. This was affirmed when numerous US drones were launched within Pakistan, as well as strategically applied attacks in Yemen and Somalia, targeting IS forces aiming to enhance their terrorist network with Al-Shabaab.

Table 1, below, illustrates the number of drone strikes conducted by the USA in terrorist threatened states such as Pakistan, Yemen, Somalia, and Afghanistan in an attempt to reduce violent rebel terror since the 9/11 attacks:

	<i>Pakistan (June 2004 to date)</i>	<i>Yemen (Nov 2002 to date)</i>	<i>Somalia (Jan 2007 to date)</i>	<i>Afghanistan (Jan 2015 to date)</i>
US drone strikes	421	107-127	15-19	48
Total reported killed	2,476-3,989	492-725	25-108	420-619
Civilians reported killed	423-965	65-101	0-5	14-42
Children reported killed	172-207	8-9	0	0-18
Reported injured	1,158-1,738	94-223	2-7	24-28

Table 1; Shows the recorded number of US drone strikes from 2002- up to 5 October 2015 in Pakistan, Yemen, Somalia and Afghanistan provided by the Bureau of Investigative Journalism (Serle and Fielding-Smith, 2015).

The table shows the total number and utility of drone strikes in specific countries in the Middle East as well as Somalia. In addition, drone strikes have more than doubled in Syria from 2015, in an attempt to combat and defeat IS rebel strongholds (Jones, 2015). However, the use of drones by the USA has been further contested, as reports of a proxy attack upon Syrian military troops have been reported (Lendman, 2015). America, Britain, and Russia have officially declared the authorised use of UAV drones in Syria. These events are said to be orchestrated in self-defence due to the growing security threat in the region and beyond. Democratic states seek to preemptly “degrade and ultimately destroy the Islamic State with a comprehensive and sustained counterterrorism strategy” (Roggio and Joscelyn, 2014). This is one way to apply hard power counter terrorism within the War Model.

Special Forces Operations

Special Forces operations are often covert and undercover. Indirectly, such operations involve intelligence gathering, monitoring, and determining the intentions, capabilities, and limitations of terror groups (Perl, 2007: 19). These operations are most prominent in times of hijackings, blackmail, and hostage situations.

Special Forces operations within democratic states focus on partner capacities and supporting foreign internal defence. This can include the development of security force assistance, support, and training. Special Forces operations are trained specifically to work “by, with, and through” partner forces, and have to understand local culture, society, language, economy, history, and politics (Jones, 2014: 5). Special Forces as a counterterrorism measure train, advise, and assist local security forces, and build the capacity of local governments to provide services, secure their populations, and deal with the causes of terrorism in their countries (Jones, 2014: 5). Examples can be seen by the USA in training and assisting troops in Northern Africa. The US Department of Defence provided Somalia and Nigeria with military equipment to empower and strengthen military units on the ground. Specialised training such as planning, battlefield tactics, civil military relations, and best practices in counter-insurgency have further been provided (whitehouse.gov, 2014).

Special Forces units support national security strategies by maintaining specific skills and capacities to deliver a broad range of strategies and operations to adequately manage challenging environments. One way of doing this is by developing multifaceted units to extend military power and efficiency (Joint Publication Special Operations, 2014).

As a direct form of action, operational forces are critical in provisionally targeting terrorist groups and their financial, logistical, and political support networks. Covert raids are authorised to; capture or at times kill terrorists, seize terror strongholds, undermine their financial support, conduct air strikes from drones aircraft and helicopters, oversee psychological operations to undermine terrorist support, collect and analyse intelligence about terrorist groups, and engage with tribal and other local actors for support (Jones, 2014: 6). These are unconventional warfare tactics which are used to “coerce, disrupt, or undermine a government or occupying power, by

operating through or with an underground, auxiliary, and guerrilla force in a defined area” (Jones, 2014: 6).

Examples of co-op operations by Special Forces were seen in 2008, when the militant group Lashkar-e-Taiba came ashore in Colaba, Mumbai, where over a dozen planned terror attacks took place throughout the city (Evie, 2013). Although the Mumbai Anti-Terrorism squad was present and were able to kill one member of the terror group, overall they remained ineffective to the threat. In response to further attacks and growing presence of the group, India’s elite National Security Guard (NSG) was called in (Evie, 2013). The NSG managed to eradicate the remaining terrorists and rescued hundreds of civilians taken hostage. However, NSG forces were criticized for taking over 10 hours to get to the terrorist strongholds. During the attacks, hundreds of people were wounded, and an estimated 166 civilians were killed. All the terrorists were dispatched and the group’s leader, Kasab, was later executed (Evie, 2013).

In September 2014 alone, about 1,200 US special operatives and support personnel joined with elite troops from the Netherlands, the Czech Republic, Finland, Great Britain, Lithuania, Norway, Poland, Sweden, and Slovenia (Turse, 2015). Later, in December 2014, heavily armed, US Navy Seal operatives used information provided by drone satellites to combat several al-Qaeda militants in the Arabian Peninsula in an attempt to rescue several hostage victims taken by the terrorist group (Turse, 2015). This was the last of 133 operations worldwide which took place during the year. The use of operative missions further increased in 2015, as the US conducted special operations in over 150 countries worldwide (Turse, 2015).

Despite being effective, there are operational risks. In specific regions, operations may encourage the plot of Salafi-jihadist groups, who will invariably attempt to portray the conflict as one between Islam and democratic or western principles. Furthermore, it is important to be aware that direct action has the potential for blowback; for if states combat target areas operated by rebel terrorists who did not originally perceive that state to be a threat, their perception may change from a formerly neutral behaviour into one of vengeance and aggression towards that state (Jones, 2014: 7).

Increased Policing

Policing within Western states has traditionally been concerned with curbing criminalisation, and suppression which targets perceived terrorist threats. The enhancement of law enforcement in affected communities was developed due to the fact that terror groups predominantly target vulnerable civil society as they are more susceptible to random acts of violence. Counterterrorism policing has incorporated various techniques such as profiling certain margins of society who are internationally identified as high risk targets (Pickering, McCulloch and Wright-Neville, 2008: 64). This has initiated the development of specialised police units into enhanced national security entities within law enforcement (Pickering, McCulloch and Wright-Neville, 2008: 64).

After 9/11 in the US, western law enforcement units had to adapt to the transition of terrorism. Local law enforcement agencies had to assume that an attack that takes place in a remote location could be part of a global effort, with a local operational component, following regional attacks and cross border extremist plots. As terror spread, local law enforcement had to expand. Below is a graph, Figure 3, which illustrates how terrorist attacks have become more inspired and widespread due to the geographical capacity of al-Qaeda thereby having a ripple effect on the local law enforcement to adjust to this dilemma.

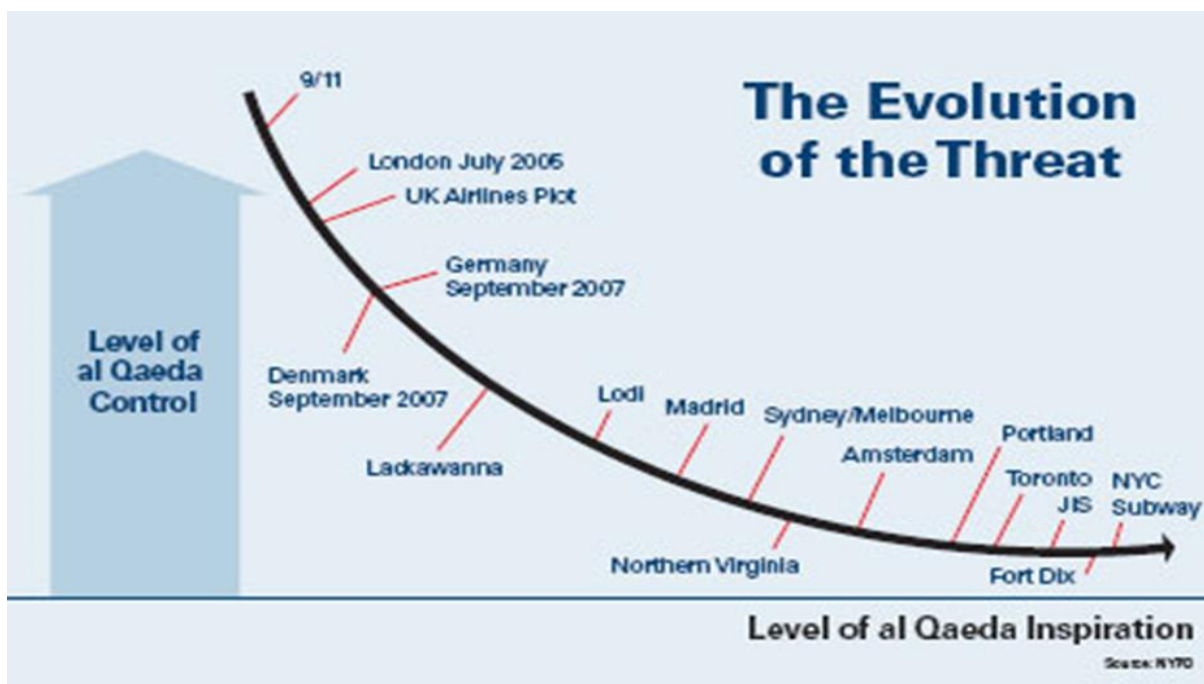


Figure 3; is a graph which illustrates that over time, terrorist attacks have become more inspired by rather than controlled by al Qaeda (Downing, 2009).

For US law enforcement agencies, this meant a greater emphasis had to be placed on identifying local al Qaeda-inspired terrorists, and developing a greater understanding of the local environment that produces them. These law enforcement units assisted substantially towards counterterrorism efforts due to their size, scope, resources, and civil authority. Units such as the Australian Federal Police and Australian Security Intelligence Organisation have developed into effective covert intelligence agencies incorporating a community policing mandate (Pickering, McCulloch and Wright-Neville, 2008: 64).

The increasing threat of terror within democracies during the 21st Century, encouraged police units to function as authorities in intelligence gathering. This is highly beneficial in areas grossly populated by marginalised and vulnerable communities; towards maintaining, enhancing, and creating a flow of information to effectively combat the threat of terror (Pickering, McCulloch and Wright-Neville, 2008: 64). Community information gathering by law enforcement is likely to become more effective and necessary in locating sources of terror threats, than through other forms of intelligence services. The West has established a structure for law enforcement to strengthen reporting and information gathering skills and resources, as set out in the graphic, Figure 4, provided below.

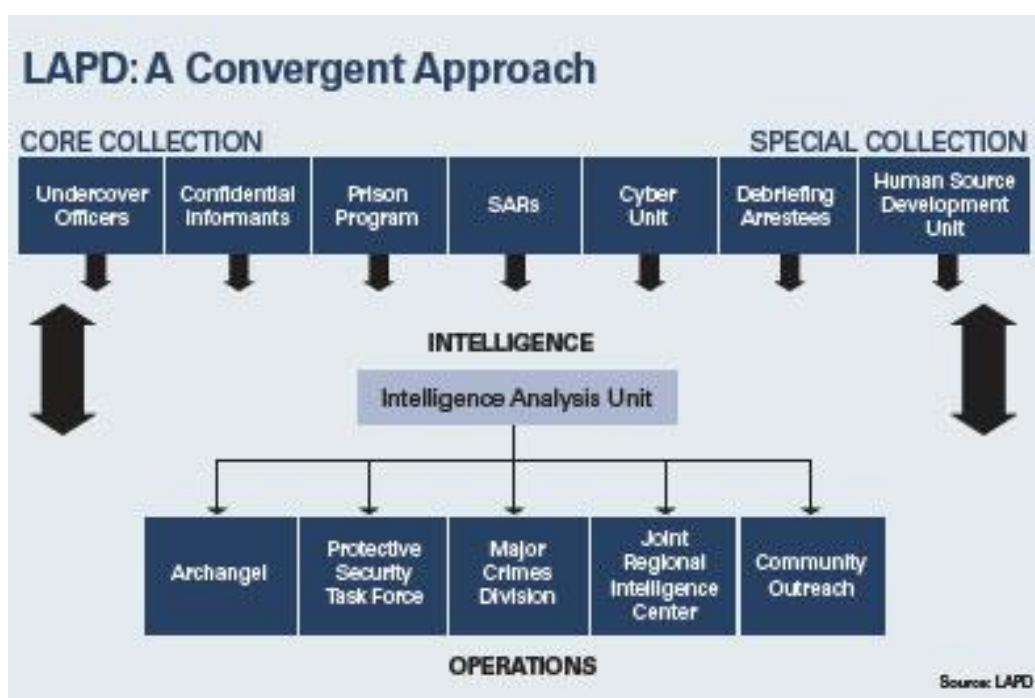


Figure 4; The graphic depicts a convergent approach of the USA LA Police Department to information/intelligence collection that feeds into operational decision making, both in terms of critical operational decision making and deployment or tactical resource allocation. The double-sided arrows illustrate the fact that in this system, intelligence can feed operations or operations can feed intelligence collection requirements (Downing, 2009).

This graph structures the core collection and the special collection of information gathering, which further divides into specific branch and areas of intelligence which can be further used as an early warning mechanism to analyse, identify and locate possible terrorist strongholds.

One form of sourcing information supported by hard power tactics, is the use of torture. Although already highlighted as a universal prohibition, torture-based interrogations are often done in hush-hush situations where it is very difficult to obtain accurate data on the utility and effectiveness. In 2002, evidence became available which showed that the US police and military personnel as a war model tactic to prevent and deter terrorism attacks, authorised torture in Guantanamo Bay (Costanzo and Gerrity, 2009: 194).

In 2006, the application of torture to enhance the counterterror efforts in the war on terror was openly debated. The US Congress went so far as to debate the limits and degrees of pain authorised for police and military officials against suspected terrorists (Lazreg, 2010). The debates were not about the permissibility of certain techniques of torture (such as waterboarding) and the prohibition of others, but rather they were about the normalisation of torture through its very discussion as a legitimate practice (Lazreg, 2010). This discussion primarily attempted to normalise torture as hard power tactic in democracies.

Overall, these are the dominant forms of hard power methods authorised to tackle terrorism by democracies currently. However, there has been much debate on whether hard power tactics are the best choice to combat violent rebel extremism, as these do not resolve the root causes of terror.

Another counterterrorism mode which is quickly becoming popular is the soft power approach.

3.3.2. Soft Power Approach

Soft power is an indirect approach to counter terrorism. It is a cooperative authority used to persuade others to do what the institution or state requests to be done. It is a persuasive power based on attraction and emulation, “associated with intangible power resources such as culture, ideology, and institutions” (Wagner, 2014). Just the same as hard power, legitimacy is a valuable requirement for soft power to be effective.

This approach is opposed to military tactics as it does not perceive terror as an enemy which must be destroyed, but rather as an ideological concept which needs to be understood and removed by following democratic principles. Layla Saleh describes soft power as a “strategic means of achieving a foreign policy goal” (2012: 1).

In September 2006, the United Nations General Assembly adopted Resolution 60/288 towards a global counterterrorism strategy following soft power measures. The strategy is focused on the need by member states from which terrorist groups have originated and reside, to address their will to fight terror. The UN plan of action is to fight terrorism through soft tactics, by addressing the root causes, strengthening responsible states, the rule of law, and human rights. To implement these objectives, the counterterrorism strategy highlights the following:

- 1) Dissuasion, working to reverse the causes or facilitators of terrorism, including through promoting social and political rights, the rule of law, and democratic reform; working to end occupations and address major political grievances; combating organized crime; reducing poverty and unemployment; and stopping State collapse. All of the strategies discussed above for preventing other threats have secondary benefits in working to remove some of the causes or facilitators of terrorism;
- 2) Efforts to counter extremism and intolerance, including through education and fostering public debate. One recent innovation by UNDP, the Arab Human Development Report, has helped catalyse a wide ranging debate within the Middle East on the need for gender empowerment, political freedom, rule of law, and civil liberties;

- 3) Development of better instruments for global counterterrorism cooperation, all within a legal framework that is respectful of civil liberties and human rights, including in the areas of law enforcement; intelligence-sharing, where possible; denial and interdiction, when required; and financial controls;
- 4) Building State capacity to prevent terrorist recruitment and operations;
- 5) Control of dangerous materials, and public health defence (United Nations, 2015).

The United Nations recognises that the very principles terrorism targets, primarily the promotion of human rights and the rule of law, have eroded within democratic states due to their response to counter terrorism. There are fears within the General Assembly that “approaches to terror focusing wholly on military, police, and intelligence measures risk undermining efforts to promote good governance and human rights, alienate large parts of the world’s population and thereby weaken the potential for collective action against terrorism” (United Nations, 2015). This strategy reinforces the United Nations call for a global counter terrorism approach through promoting soft power tactics.

As violent extremist groups continue to proliferate across Africa and the Middle East, we see groups such as Mungiki, Chingororo, Mombasa Republic Council and international networks led by al Qaeda in the Maghreb; Boko Haram in north-eastern Nigeria; al-Shabaab in Somalia; Mulathameen Brigade in Algeria; Ansar al-Diin in Mali; Christian Anti-Balaka in the Central African Republic and Ansar al-Sharia in Tunisia expand greatly in recent years despite military intervention (Naado, 2015).

This has made governments recognise that although sometimes effective, hard power alone will not remove the threat of terrorism. Government departments and defence institutions need to work with civil society organisations to address and to remove the root causes of terror, mainly poverty, inequality, and political illiterates. To do this, soft power provides methods and models engineered to support democratic principles to counter terrorism. Two of these models will be outlined next.

3.3.2.1 Criminal Justice Model

The criminal justice model is an effective rule of law response to global terrorism. The model goes further than simply ratifying or implementing universal instruments of counterterrorism.

This model is specifically designed to develop a state's criminal justice systems capacity to respond to threats of terror. The model provides an integrated, coherent, sector-wide, human rights-based and sustainable approach to preventing terrorist activities (Handbook on Criminal Justice Responses to Terrorism, 2009: 35). To be effective, the model requires support from law enforcement and the judiciary. However, non-democratic states with issues surrounding the separation of powers, could potentially battle in this area of the model. This requires a comprehensive capacity-building approach, where enforcement initiatives, justice institutions, and civil society law seek to credibly curb corruption as a tool for terrorism (Handbook on Criminal Justice Responses to Terrorism, 2009: 36).

The criminal justice model treats acts of terrorism and violent extremism as a crime. The violent nature of terrorism, which includes kidnapping, assassinations, bombings and armed attacks, injury, death or the destruction of property are all events universally administered in criminal law as illegal (Crelinsten, 2014). Terrorism is no ordinary crime. It is a "special offence requiring special procedures or punishments" (Crelinsten, 2014). By criminalising terrorist acts, democracies emphasise their criminal nature and not only their political or ideological motive.

To be effective, the model requires the proactive use of policy makers and the legislature to provide policy frameworks so that the criminal judicial system can exercise as a counterterrorism initiative (Handbook on Criminal Justice Responses to Terrorism, 2009: 38). As this method criminalises terror, counterterrorism units and institutions can trail suspected persons for an offence against civil aviation, offence based on the status of individuals (refugees and internally displaced persons), offences related to dangerous materials such as weapons of mass destruction, as well as the financing of terrorism (Handbook on Criminal Justice Responses to Terrorism, 2009: 38). These regulations and offences are monitored and institutionalised by law enforcement on the ground.

Finally the role of prosecutors in implementing and prosecuting terrorists arrested is vital. The efficient prosecution of terrorist offences is crucial as it removes terrorists from society. This is supported through the unbiased role of the judiciary in upholding international and state laws appointed by the legislature to curb terrorism (Handbook on Criminal Justice Responses to Terrorism, 2009: 38).

Establishing a universal legal strategy to criminalise terrorism would encourage worldwide cooperation and coordination in tackling violent extremism. An example is resolution 1624 (US Department of State, 2005), as adopted by the UN Security Council, which calls for all Member States to take steps aimed at prohibiting and preventing incitement which may encourage groups to commit terrorist acts.

However, there are limitations. The criminal justice model relies heavily on a complex administration with required rules of governance and many interrelating institutions, each with their own traditions, cultures, and languages (Crelinsten, 2014). It can be slow and laborious, with appeals stretching the process out for years. For some, the model seems to favour the terrorist, especially over the victim. While the criminal justice model can achieve some important goals in terms of deterrence, retribution, education, incapacitation, and rehabilitation, these benefits are largely dependent upon how the system is used, how fair it is seen to be used by others, and how committed individuals are to terrorist violence either as a means to other goals or as an end in itself.

3.3.2.2. The Human Security Model

The Human Security Model, also known as the Human Rights Model, is another soft power measure to counter terror. This approach mirrors the view that “international security cannot be achieved unless the peoples of the world are free from violent threats to their lives, their safety, or their rights” (Crelinsten, 2014).

The approach focuses on ensuring the security of the individual by promoting social and economic rights to reduce the inequities known to develop radicalisation and facilitate terrorist recruitment (Crelinsten, 2014). During the 1990s, the UN held conferences to deal with social development, women’s rights, population, and habitat, and came up with recommendations and specific deadlines for member states to

establish and implement specific proposals (Crelinsten, 2014). Most of these proposals dealt with enhancing human rights and the need to strengthen states' rule of law to protect different generations of rights.

The human security approach provides options to disenfranchised or marginalised groups that make the option of becoming a terrorist less attractive. This may be challenging in the short-term, as permitting marginalised groups admission to political freedoms, may increase violence amongst the various social factions (Crelinsten, 2014).

Human rights must be fully entrenched and constitutionally established in all societal groups for the use of violence to become unappealing (Crelinsten, 2014). The necessity for the human security model became very clear from violent events in Tunisia, Egypt, and Syria, during the Arab Spring Uprising. The Uprising revealed a new motivation to join al-Qaeda's radical Islamism. The group's message "that terrorism and violence, not democracy, was the only way to create an Islamic state" become very attractive to those who felt their grievances would not be heard (Crelinsten, 2014). A similar challenge was whether there were acceptable limits to the right to freedom of expression, assembly, and participation in political life.

One method promoted by the human security approach, is the utility and effectiveness of education as a fundamental right. The approach highlights education as a driver for endorsing democratic, pluralistic, and anti-racist standards (Crelinsten, 2014). Education is a practical means which states can use to create a socio-political society sensitive to human rights and mutual understanding across cultures and civilisations (Crelinsten, 2014). Peace education can be used to repair communities previously bruised by violence and conflict.

If let alone, past hurt can fester. Therefore "an understanding of the interdependence of human beings and an appreciation of ethnic, linguistic, cultural, religious, and historical diversity can contribute to reducing the fear and cultivated ignorance that lie at the root of much hatred and violence" (Crelinsten, 2014). Education can also uproot injustices and inequities present all around the world. As societies' minds broaden, they become exposed to answers and solutions which stimulate critical thinking. The ability to research, think, and discuss for oneself is a solution to yield to

ideological propaganda or radical theories (Crelinsten, 2014). Therefore education would reduce support for violent extremist groups.

Through the National Counterterrorism Centre, it became evident that affected states had to explore alternatives to hard power tactics to remove the root causes of terrorism in threatened regions.

Soft power promotes the development of states to partner and cooperate, rather than to use force, or to compensate financially to change civil behaviour. One way soft power coordinates a change of behaviour, is through the promotion of international cooperation and experience sharing in the fight against terrorism.

The Global Terrorism Forum, where Turkey and the USA chaired a seminar in partnership with 29 attending state representatives in 2011, set out to strengthen the fight against terrorism (Centre for Strategic Research, n.d.: 4). The forum promoted the need for “sharing experiences and reinforcing the criminal justice approach” through educational and developmental projects (Centre for Strategic Research, n.d.: 4). This could be achieved through applying track 1, track 2 and multi-diplomacy instruments. As each nation utilises specific state laws, diplomacy was found to “ensure convergence between regulations and develop a common understanding in the fight against terrorism” (Centre for Strategic Research, n.d.: 4). However, hard power remains popular and highly effective. Therefore, which one is more beneficial to practically combat terror?

3.3.2.3. *The Smart Approach*

As mentioned above, both direct and indirect modes of counterterrorism play a crucial and an effective part in the fight against violent religious extremism. However, policy makers and practitioners are at odds on which provides greater national security.

The war model’s focus on military force and special covert operations allows for the immediate targeting and removal of terrorist groups, but at great financial and human cost.

Although the criminal justice model champions the rule of law and democratic principles of accountability and transparency; it also places restrictions on

governments, thereby reducing the effectiveness of counterterrorism measures (Rineheart, 2010: 4). Therefore, the debate on which model is more effective for the international community to combat terrorism continues.

In recent years scholars, policy makers, and practitioners have debated a new approach to counter terrorism, termed the Smart Approach (Wagner, 2014). This approach adopts a counterterrorism strategy incorporating both direct and indirect counter terrorism models and methods.

The use of smart power is a flexible response which allows practitioners and policy makers to change realities of foreign policy and protect the interests of the nation state and its citizens, while avoiding unnecessary conflict (Klachkov, 2012: 222).

It is an approach which “underscores the necessity of a strong military, but also invests heavily in alliances, partnerships, and institutions” (Wagner, 2014). It has the capacity to combine essential elements from the hard and soft approach in ways which are mutually reinforcing.

Full integration of hard and soft power calls for the combination of each approach’s tools as well as the necessary measures of financial flexibility, adaptability of various cultures and civil empowerment (“Dealing With Today’s Asymmetric Threat to US and Global Security, Symposium Three: Employing Smart Power”, 2009). In practice, it is much easier for practitioners and academics to work together than it is for their institutions and stakeholders to cooperate in their efforts (“Dealing With Today’s Asymmetric Threat to U.S. and Global Security, Symposium Three: Employing Smart Power”, 2009).

To resolve this issue, states and institutions must learn to balance their interests with their expected outputs as democracies can not only implement an asymmetrical approach to counterterrorism while their terrorist adversaries are already utilising smart power ideals (“Dealing With Today’s Asymmetric Threat to U.S. and Global Security, Symposium Three: Employing Smart Power”, 2009). This can be improved through the uses of technology for agility in dealing with the unpredictable nature of terrorism. This allows democracies to remain optimistic in their dealings with transnational terrorism; however, smart power is not a quick solution. It is a long-term process, which through endurance, sustainability, and patience, lasting prevention is a possibility.

Therefore as hard power is coercive and soft power is primarily persuasive, deriving from attractive and emulating methods, smart power combines the two to promote an out-of-the-box way of thinking. It seeks to encourage creative methods to counter terror which traditionally would not have been appropriate or effective. As the support for hard power decreases in favour of diplomacy and global cooperation, smart power provides a flexible attitude which can invest in a multilateral approach which includes the military and all national political spheres to expand state influence and establish the legitimacy of state action (Pallaver, 2011: 101).

In the end, smart power seeks to create a global good, by incorporating the most effective and positive elements from each approach, to be as concrete, flexible, and real in the battle to resolve violent extremism.

As a whole, democracies sought to establish successful counterterrorism frameworks, however, this has not been easy. As the spread of rebel extremism grows, the wave of religious terror continues to challenge the methods states use to respond to extremist threats. Moving away from the use of hijackings and blackmail popular during the Cold War era, into an organised and unified terror movement, which has become bloodier and less discriminate, has forced governments to readjust their counter tactics.

Through the employment of drones and special terrorism units, counterterrorism has grown to be more complex and multifaceted. Currently it is a procedure whereby the military at large, is endeavouring to contain militant, political, and religious extremists broadly scattered across Africa, the Middle East, and Asia, who have the intention of spreading westwards into Europe and the US.

Despite all the strategies, policies, and practices available, the irregular manner of terrorism and the lack of consensus on how democratic states should respond, is troubling. For if hard power continues to have democratic support in counterterrorism, will that mean that counterterrorism as a military strategy can only result in a zero sum game? Can there only be a winner and a loser? And if so, can democracy ever win?

The next chapter seeks to address these questions, by exploring the suitability and reality of torture as an investigative hard power approach in democratic states. This will be analysed through the case study of Israel and its experience with legally

institutionalising physical pressure as a practical attempt to strengthen national security against terrorism.

Chapter Four: Legalizing Torture in a Democracy, Case Study of Israel

4.1. Introduction

While the debate between hard versus soft power continues, certain democratic states in abiding by the War Model approach, still practice coercive investigative techniques in an attempt to prevent the spread of terror.

This sense of vulnerability, which drives states to undertake extreme measures, is a sweeping concern, as the act of torture is in direct violation of international law. In an attempt to address this sense of democratic susceptibility and illegal use of hard power, this chapter will explore whether torture could be justified if used in a controlled, non-lethal investigation to prevent harm, stabilise a terrorist threat, and secure national security in a democracy. This will be explored in the case study of Israel and its use of institutionalised moderate physical pressure.

As mentioned briefly in chapter one, Israel is governed by a unwritten constitution that has lasted for over 40 years, but has written laws in accordance with the United Nations Declaration of Human Rights, to ensure state citizens are protected by necessary human rights and freedoms (Elazar, n.d.). Israel follows a strong democratic system through parliamentary representation accountable to the electorate. The state upholds the core principles of democracy which this paper supports: separation of powers, accountability, and transparency, institutionalised judiciary, executive and legislature, as well as following the principle of majority rule and the protection of human rights (Okiror, 2011: 3).

As a democracy, Israel has vast counterterrorism experience as a state continuously threatened by terror. Therefore it is for these reasons that Israel is chosen as my case study for this research.

As affirmed before in chapter one, it is important to remind the reader that Israel's status as a democracy is highly contested. Authors, Josh Ruebner and William A Cook, have strongly challenged Israel's status as a true democracy due to "Israel's apartheid policies toward Palestinians" (2011). They argue that the current unrest

and segregation of Palestine and Israel are evidence of non-democratic tendencies. This chapter acknowledges the flawed aspects of Israel's democracy, but is holding firm to the key descriptors of democracy mentioned above, which Israel claims to be important.

Therefore this chapter will attempt to provide a detailed study of investigative counterterrorism applied in Israel as a strategic national security approach. This example will be used in the hope to take away lessons learnt towards strengthening security and good governance in democratic states.

This chapter will first address the history of Israel's security environment as a target of terror, and why Israel believes it necessary to implement physical pressure as a legal counterterrorism hard power approach. Next the chapter will discuss Israel's application and methods of institutionalised moderate physical pressure, and whether it was effective prior to the internationally acclaimed 1999 Supreme Court Judgement, which both outlawed the abuse of human rights as well as legalised the application of physical pressure under the controversial principle of necessity. Further, the chapter will discuss the outcomes and reasons for the Supreme judgement and the lessons learnt in applying legal torture as a preventive counterterrorism method. Finally, the chapter will address the current acts of hard power techniques employed by the Israeli government and the wide international response based on reported international law and human rights violations. Overall, this chapter seeks to identify whether physical pressure would be suitable and practical in a democracy as a national security measure against the threat of terror.

4.2. The History of Israel as a Target of Terror

Israel is a small nation in the Middle East, surrounded by Egypt, Syria, and Lebanon. Israel is well known for its notorious invasions, conquests and re-invasions documented throughout history. It was recorded as far back as 1250 BC when the Israelites conquered and settled in what was then termed the "land of Canaan" alongside the Mediterranean Sea (Limon, 2002). Centuries later, a conquest by Arabic Muslims in 638 AD, ended the reign of the Roman regime in the region (Limon,

2002). Despite attempts during the Crusades, the land remained in Arab hands up until the fall of the Ottoman Empire in the 20th Century.

This drastic change in governance introduced many new challenges for the region. By the end of World War I, European powers heightened their interests in the Middle East. In 1917, the Balfour Declaration was proclaimed, whereby Britain promised to “establish in Palestine a National Home for the Jewish People” (Limon, 2002). This decision was influenced by greater Britain’s strategic plan to overthrow Syria from its prepared military bases in Egypt. For this plan to be successful, Britain needed an ally in the region (Limon, 2002). However, in 1914 the land had been promised to Arab leader, Sharif Husayn, by the British commissioner to Egypt, Sir Henry McMahon. This act of political betrayal, re-established former tensions between Jewish settlers and Arabs living in what was a peaceful Palestine at the time.

In 1922, Palestine was still under British control, when the colonial power established the British Mandate for Palestine, supported by the League of Nations, to recognise a Jewish homeland (CNN, 2015). This mandate further heightened tensions between the Jewish settlers and the Arab majority in the region. Tensions were further stretched as Britain attempted to maintain stability over Palestine by heightening immigration policies. During the 1940s, immigration policies became so strict, that when a ship carrying over 4,500 Jewish immigrants left France heading for Palestine, British forces stormed the vessel and forcefully took command of the ship. The vessel was returned to France but as passengers refused to get off the ship, the vessel sailed to British occupied West Germany (CNN, 2015). This event caused an international outcry.

As warfare increased in Europe and around the world, reports of a Jewish holocaust began to spread, resulting in heightened pressure on Britain to loosen immigration laws into Palestine. But it was only after World War II and the death of over six million Jews, that Britain lowered its hand of control over the region (Limon, 2002). In February 1947, Britain went before the newly established United Nations for assistance in deciding how best to move forward with Palestine. In response, the United Nations came up with a recommendation “to separate Palestine into several Jewish and Arab areas, to establish Jerusalem as an international area and to

economically tie all three entities” (Limon, 2002). This resolution was the tipping point for the Jewish settlers and Arabs living in Palestine, resulting in violent civil unrest.

In May 1948, Britain’s reign over Palestine ended as the land was declared the independent state of Israel (CNN, 2015). In the same month, reports of Jews being attacked by neighbouring Arabs, was on the rise. This was the beginning of the War for Independence between Egypt, Syria, Jordan, Iraq, and Israel. The war ended after negotiations were held whereby Israel was given 75% of Palestine and was admitted into the United Nations (CNN, 2015). Over the years to follow, Israel was in a constant state of warfare.

However, not all of Israel’s conflicts were symmetrical. Terrorism and violent extremism were tactics used upon and within Israel long before its independence. It was in 1929 that the Hebron Massacre occurred. Reports of a pending takeover of the Al-Aksa Mosque resulted in 68 Jews being killed, while over 400 were saved by Arab families, during the riot protest in Palestine (Omer-Man, 2011). This was the first violent extremist attack upon Jewish settlers. In 1936, another massacre occurred whereby 16 Jews were killed, again by rioters. As an independent state, in 1952, there was a shooting by terrorists in a home invasion in Jerusalem (Johnston, 2015). A year later, terrorists tried for the first time to invade Israel via the sea, but were unsuccessful. Further in 1953, multiple shooting attacks occurred in Jerusalem, where 43 people were killed and three others were injured (Johnston, 2015).

The day after Israel and Jordan signed a mediated agreement with the UN, terrorists from Jordan infiltrated Israeli farming villages and reached the heart of Jerusalem, where they attempted to blow up the nearby surroundings with hand grenades (Johnston, 2015). In 1956, there were 11 attacks resulting in the death of 53 civilians, leaving 30 people injured (Johnston, 2015). Throughout the 1950s onwards, terrorist activity within Israel increased to such an extent that there was almost one attack a month for over a decade (Johnston, 2015). In 1965, Palestinian terrorist groups emerged, and attempted to bomb the Israeli National Water carrier. This was the first attack carried out by the PLO’s Fatah faction. Throughout that year, numerous attacks targeted civilian infrastructure and homes in Israel (Johnston, 2015). These attacks continued strongly into the 1970s, where PLO and other groups had moved to the deployment of long range military missiles in place of short range hand

grenades (Johnston, 2015). In 1972 the Munich Massacre occurred; and in 1974, 8 PLO terrorists had infiltrated Tel Aviv, and took control of a hotel, killing 3 civilians. This lead further, to the Ma'alot Massacre, where 22 children and several adults were killed, leaving over 66 children wounded by the Democratic Front for the Liberation of Palestine (Johnston, 2015). During the rest of the 1970s and 1980s, Israelis were a persistent target of the PLO.

These constant never ending terror threats called for a strategic and immediate response from the Israeli Government. Due to these attacks, Israel become a state on high alert, constantly seeking to maintain national security.

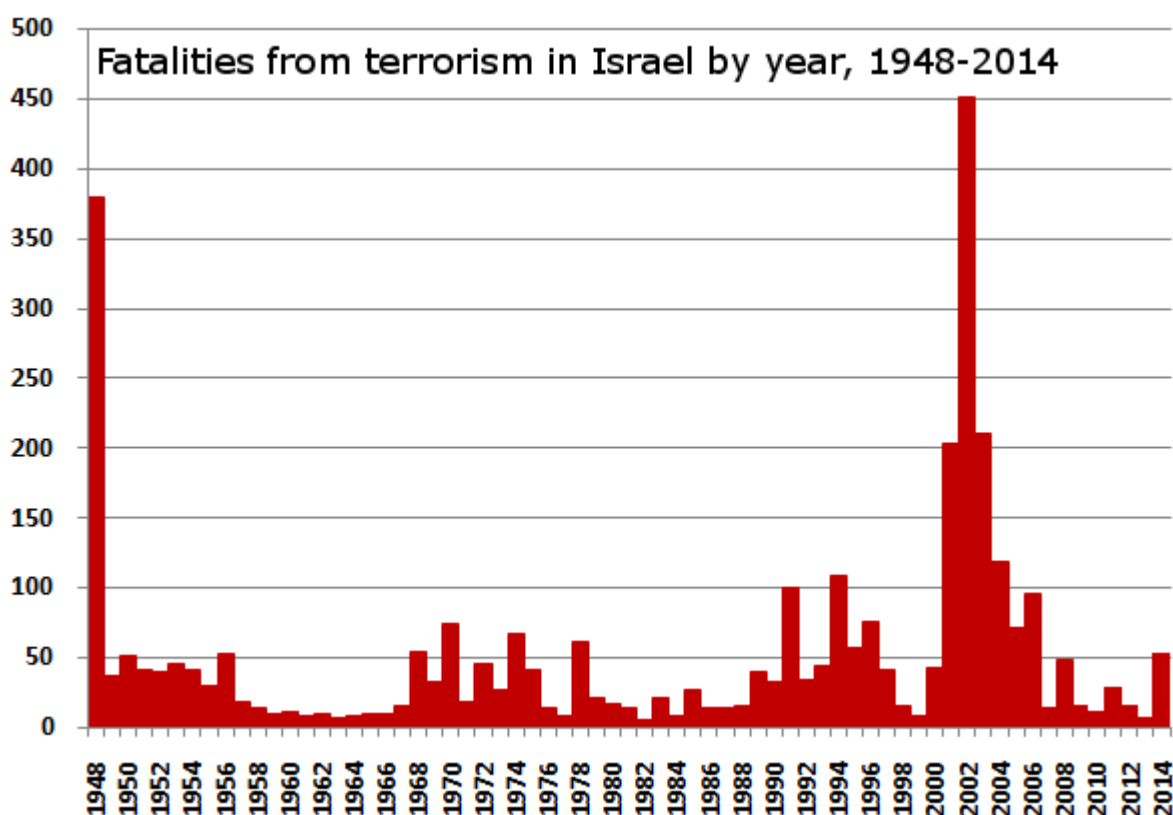


Figure 5; the graph illustrates the number of fatalities from terrorism in Israel by year from 1948-2014 (Johnston, 2015)

The graph provided above, Figure 5, provides a detailed illustration of the number of fatalities accumulated by terrorist attacks per year from Israel's independence in 1948 through to 2014. This helps to better understand the gravity and nature of terrorism present throughout Israel's history as a sovereign state, and the drastic call to strengthen counter terrorism tactics in the state.

Therefore, as an independent nation, Israel decided to respond with hard power tactics, as its primary defence against what it perceived as terror threats and violent extremism. Assassinations by violent extremists upon Jewish settlers became the traditional go-to reaction to the mounting wave of Palestinian and neighbouring terror activity (Luft, 2003). During the 1970s, waves of attacks occurred as airline planes were hijacked, attacks upon Israelis abroad heightened, and cross-border invasions by terrorists from Lebanon and Egypt were reported, each resulting in massive casualties (Luft, 2003). These incidents increased security concerns amongst Israeli communities.

During the religious wave, it is important to mention that most Palestinian terrorist groups were supported by neighbouring Arab states, as each were in a state of war against Israel. Therefore forms of negotiation and legal action, such as diplomatic protocol and official state visits were prevented, as negotiations between the host states and Israel were not viable. Resolution was further restricted as international law prohibited a state to apply force against another state hosting terrorists as “prima facie” illegal (Tams, 2009: 361). Therefore, no extraterritorial use of force was universally permitted by a state against a terrorist group operating within another state (Tams, 2009: 362). This left Israel in a highly complex situation; as a sovereign democracy, in the heart of a conflicted region with no external security, the state was vulnerable.

Israel thereby decided to retaliate against the threats of terror through the principle of self-defence provided by in Article 51 of the United Nations Charter (Tams, 2009: 364). This strategy allowed Israel to claim a right to respond to attacks even if these were not carried out by another state. However, this claim was not favourably received by the international community. Despite critical remarks, Israel began targeting the suspected perpetrators and think-tanks behind the terrorist attacks. In response to this controversial government decision, Israel established the Israel Defence Forces (IDF) in 1948, the General Security Services (GSS), and the Mossad as national security mechanisms.

These security units were highly effective. In April 1973, Israeli troops silently entered Beirut and assassinated senior Members of the Fatah branch of the PLO (Luft, 2003). Another highly successful known operation took place in 1988, when “Israeli

commando force under the command of today's IDF chief of staff Moshe Ya'alon landed in Tunis and killed the head of the Palestine Liberation Organization's (PLO) military branch, the second in seniority in the organization, Khalil al-Wazir (Abu Jihad)" (Luft, 2003).

The hard power tools of assassination and co-op operations into neighbouring states guilty of hosting anti-Israeli terrorist groups were effective. However, it was the Israeli use of coercive, moderate physical pressure which is most controversial.

4.3. Israel's Use of Moderate Physical Pressure

Despite the success of the operations mentioned above, terrorist threats continued within Israel. Terrorist acts remained constant into the 1990s, where the threat of terror grew as other groups such as Hamas, Hezbollah, Amal, and the Palestine Liberation Front (PLF), proclaimed Israel as a target of terror. In November 1990, an Egyptian terrorist shot at passing vehicles, killing 4 civilians and wounding 26 passengers (Johnston, 2015). A month later, 3 Hamas members stabbed and killed an Israeli woman. In 1992, 9 people were killed and 20 wounded in a car bombing in Samaria (Johnston, 2015). These are but a few examples of the many violent events which occurred during the 1990s.

In response to these threats, the GSS, were responsible for investigating individuals suspected of committing crimes against Israel's national security (Internationalcrimesdatabase.org, 1999). One of its tasks was to eliminate terrorist activities from within Israel (Judgments of the Israel Supreme Court: Fighting Terrorism within the Law, 2015: 23). At a governmental level, the GSS are said to conduct interrogations as an early warning mechanism to defend against and prevent future terrorist attacks.

During interrogations, Israeli law permitted strictly regulated cross-examinations, providing for hard power techniques during questioning. These methods were only appropriate in extreme cases, and only a "moderate degree of physical pressure" could be constitutionally applied (Judgments of the Israel Supreme Court: Fighting Terrorism within the Law, 2015: 23). In 1987 the government created the Landau

Commission Report, which provided guidelines following the conducted Landau Commissions enquiry into the coercive methods used during interrogations by the GSS with regard to terrorist acts.

After concluding the investigation of inquiry into the methods applied upon terrorists, the Commission provided the following recommendations;

- That the GSS should follow Article 31 of the *Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War*, which stated that “no physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties” (Landau, Maltz and Hoffi, 1987);
- This provision was recommended to be read together with Article 5 of the Convention, whereby a “protected person definitely suspected of or engaged in activities hostile to the security of the State is deprived of the rights and privileges conferred by the Convention, where the exercise of such rights would be prejudicial to State security” (Landau, Maltz and Hoffi, 1987). Despite this, the Committee recommended that these persons are nonetheless permitted to humane treatment and the right to a fair and regular trial;
- It was further recommended that “means of coercion should generally be limited to the psychological, non-violent aspect of intensive and prolonged interrogation, and to the use of stratagems including deceit; but if these means do not suffice, a moderate degree of physical coercion cannot be avoided” (Landau, Maltz and Hoffi, 1987). However, interrogators of the Service must set themselves definite limits in this regard, so as to prevent excessive physical force applied subjectively by the interrogator (Landau, Maltz and Hoffi, 1987); and
- Finally, all methods of interrogating persons suspected of terrorism acts must abide by the principle of necessity, in accordance with Article 22 of the Penal Code (Landau, Maltz and Hoffi, 1987).

Overall, the Report stated that moderate physical pressure was sanctioned in Israel in accordance with the “lesser evil” principle found in the Penal Code. This was found reasonable, based on the understanding that “the grave harm caused by hostile terrorist activities, justifies counter-measures based on the need to take action within the meaning of Article 22, not only when such an act is imminent, but also as soon

as it becomes virtual and likely to materialize at any moment” (Landau, Maltz and Hoffi, 1987). Therefore the Report recommended that the GSS employ moderate physical and psychological pressure on Palestinians suspected of security offenses (Imseis, 2001: 332)

Following the provided guidelines, it was discovered that the GSS since its establishment, conducted between 1000-1500 interrogations a year, where over 85% were subjected to coercive measures during interrogation (The Israeli Information Center for Human Rights in the Occupied Territories, 1998). That means that over 850 persons were constitutionally subjected to what is now commonly identified as torture.

While following principle techniques of moderate physical pressure, the GSS conducted over 105 variations of torture. The most common techniques involved hurling threats and insults at detainees. Other methods included; violent shaking which could last for several seconds, slapping, beatings, kicking, and shackling. Other more harmful methods of interrogation included what infamously become known as the “frog position” or the Qambaz. During the interrogation, the suspect is ordered to kneel on their toes, arms tied around their back, for hours at a time (The Israeli Information Center for Human Rights in the Occupied Territories, 1998).

Another gruelling method is called the Qas'at a-Tawleh, which involved placing the detainee into a kneeled position in front of a table, with the detainees back to the table. The detainee's arms would then be bound and stretched behind him onto the table. This was a highly painful position to be held in. Another equally painful method, was the “Shabeh Combination.” This technique was a combination of methods applied over a long period of time, comprising of “sensory isolation, sleep deprivation, and infliction of pain” (The Israeli Information Center for Human Rights in the Occupied Territories, 1998). All the while, detainees were kept in complete isolation from the outside world, residing in small, filthy conditions.

These methods become infamous, as reports of torture caught wind worldwide. The line within a democracy, between torture and coercion, began to blur. Israel's use of interrogation methods amounting to torture, as contemplated by numerous international treaties and conventions has, however, been expressly endorsed by Israel's parliament, the Knesset (Imseis, 2001: 329). Yet, despite the legislative

verdict, hundreds of individual cases from 1994-1999 were lobbied before the Israeli High Court, accusing the state of human rights violations. In 1999, these cases were finally brought before the Israeli Supreme Court.

4.4. The Supreme Court Judgement

To date, Israel is the only western-styled democracy which has acknowledged sanctioning the maltreatment of detainees during interrogations (Frankel, 2004). This was seen after numerous cases of maltreatment were presented before the Israeli High Courts throughout the 1990s, which resulted in the famous Israeli Supreme Court Judgement of 1999.

In stating the purpose of the GSS as a national security body believed to be established to investigate individuals suspected of committing crimes against Israel's security, the Israeli Supreme Court (ISC) sought to determine whether sanctioning coercive interrogation techniques was permissible and legal (Israeli Supreme Court, 1999).

Prior to the judgement, the honourable President of the Israeli Supreme Court, A Barak, reminded the court of the relentless national risk the state unceasingly struggles with in the attempt to maintain both its existence and security (Israeli Supreme Court, 1999). Barak further reminded all applicants that terrorist groups do not differentiate civilians from military targets; that violent extremist groups aim to create chaos, and attack with cruelty and without mercy (Israeli Supreme Court, 1999).

The court revealed that within the last two years leading up to the judgement, over 120 Israeli civilians were killed and 707 individuals were injured by terrorist assaults (Israeli Supreme Court, 1999). Despite these numbers, frequent car bombings, hijackings, murders, and kidnappings were prevented due to measures taken by the authorities responsible for combating terror activity. The primary body responsible for this deterrence was the GSS, whereby coercive physical pressure was applied. Yet, it was the forceful measures employed which were examined by the court.

The applications against the GSS were brought forward by the Public Committee Against Torture in Israel, the Association for Citizen's Rights in Israel (ACRI), and five individuals who were personally tortured while detained by the GSS. Each applicant argued that the acts performed by the GSS were illegal and that the GSS should be instructed to refrain from torturing suspects during interrogations (Israeli Supreme Court, 1999). Collectively, the applicants argued that the GSS was not authorised to conduct interrogations; and further, that the physical pressure applied by the GSS infringed not only upon the right to dignity, but that the act itself was criminal, as the necessity clause was not relevant to the majority of the cases placed before the GSS (Israeli Supreme Court, 1999).

The state could not deny the individual presentations made by the applicants on the details describing the physical pressure applied during GSS interrogations. But, the state did offer rationale for the various methods applied, and explained that each investigator had authority to act "by virtue of article 2(1) of the Criminal Procedure Statute (Testimony) and the relevant accessory powers" (Israeli Supreme Court, 1999). Furthermore, the state argued that the acts were equally legal under Israeli domestic law due to the necessity defence clause outlined in article 34 (11) of the Penal Law (Israeli Supreme Court, 1999).

Each description and rationale provided the ISC with a strong understanding of the measures taken during a GSS interrogation.

The court stated during its deliberations, that all administrations which conduct investigations are bound by the Basic Law, which includes the respect for human dignity and liberty. The administration, in this case the GSS, seeking to interrogate a suspected terrorist, must be legally empowered by a specific legislative provision (Imseis, 2001; 333). The court of law defines an interrogation to be "an exercise seeking to elicit truthful answers, as opposed to the mere asking of questions as in the context of an ordinary conversation (Israeli Supreme Court, 1999)." If there is no statute provided, then the act is illegal.

Therefore, does a statute stipulating that the GSS is authorised to undergo investigations actually exist?

The ISC could not source a specific instruction or clause pertaining to the GSS, stipulating that it had an investigatory capacity. In fact, the Inquiry Committee prior to

the trail could not find the GSS status, function, or powers outlined in any statute addressing this matter (Israeli Supreme Court, 1999). The court further stated that an individual's liberty was not to be the object of interrogation as outlined in the constitutional regime. Therefore, if investigations are to be permitted by law to protect human freedoms, then from where does the GSS obtain its power to interrogate?

The answer was found in article 2 (1) of the Amended Criminal Procedure Statute of 1944, which stated as follows:

A police officer, of or above the rank of inspector, or any other officer or class of officers generally or specially authorized in writing by the Chief Secretary to the Government, to hold enquiries into the commission of offences, may examine orally any person supposed to be acquainted with the facts and circumstances of any offence in respect whereof such officer or police or other authorized officer as aforesaid is enquiring, and may reduce into writing any statement by a person so examined (Israeli Supreme Court, 1999).

In accordance with the above provision, the Minister of Justice, Benjamin Netanyahu, authorised the GSS to conduct investigations regarding the instruction to deter violent extremist and terrorist threats. In light of this evidence, the court found the above mentioned statute suitable in providing the necessary authority for the GSS to conduct investigations.

Thereafter the court addressed the measures employed by the GSS during its interrogation process. Now that the court had agreed that the GSS had authority to undertake investigations, the question remained whether the GSS had authority to apply physical pressure during an interrogation (Imseis, 2001; 339).

An investigation, defined by the court, is a competition of the mind, which “places the suspect in embarrassing situations, burdens him, intrudes his conscience, penetrates the deepest crevices of his soul, while creating serious emotional pressure” (Israeli Supreme Court, 1999). In order to be legal, interrogations must be authorised by the laws of the State. There is a fine line between seeking the truth and respecting the dignity and liberty of the subject under interrogation.

In a democracy, the court reminded those present, that society desiring to uphold the principle of liberty, seeks to defend such principles against corruption and crime. Therefore, a democratic society “is prepared to accept that an interrogation may

infringe upon the human dignity and liberty of a suspect, provided it is done for a proper purpose, and that the harm does not exceed that which is necessary” (Israeli Supreme Court, 1999). This is a sensitive balance to maintain, as human dignity must be protected; so that those seeking to establish that protection, do not harm or abuse it, all the while fighting off the growing threat of terror.

For this reason, the court recognised that there was a great concern when attempting to balance conflicting values between what is deemed just, versus what is deemed right. In an attempt to preserve a balance, the “rules for a reasonable interrogation” were established (Israeli Supreme Court, 1999). These rules seek to protect both the human dignity and appearance of the subject interrogated, as well as to preserve the “purity of arms”, whereby the state must consider the means to fight wrongdoing, specifically terrorism (Israeli Supreme Court, 1999). Therefore, the Court ruled that a reasonable interrogation should be free of torture, inhumane cruelty, and all forms of degrading treatment (Imseis, 2001; 339).

The court’s findings were in complete agreement with the international laws and treaties where torture is prohibited, for which, Israel is a signatory (Imseis, 2001; 339). The ISC further ruled that reasonable interrogations will still be uncomfortable, yet there was no need to resort to violence.

In the end, the reasonableness of the interrogation is measured upon the method and purpose of the investigation. Examples such as shaking and the Shabach method would be found unreasonable.

Overall, the court ruled that GSS personnel with permission from the Prime Minister to conduct interrogations, were found to have authority to do so. However, as mentioned above, no domestic law provided the GSS with authority to employ physical pressure upon detained subjects. Therefore, the ISC declared that under the Criminal Law of Defence Statute, prescribed by the Penal Law, the GSS was authorised to apply force in very specific cases under the important principle of necessity (Israeli Supreme Court, 1999). Article 34 (1) of the Criminal Statute stated:

A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial

danger of serious harm, imminent from the particular state of things [circumstances], at the requisite timing, and absent alternative means for avoiding the harm (Israeli Supreme Court, 1999).

In following the above Statute, the court ruled that by virtue of the defence of necessity, the GSS were authorised to apply physical pressure in appropriate situations, to prevent and protect against the threat of terrorism and harm to civilian wellbeing (Imseis, 2001; 340). Therefore, no acts committed under the virtue of necessity were deemed illegal. The court identified that not only is it legitimate to fight terrorism, but it was the lesser evil appropriately applied within the ticking bomb scenario presented by the State defence during the trial. Therefore, the ISC ruled that the “use of physical means shall not constitute a criminal offence, and their use is sanctioned, to the State's contention, by virtue of the necessity defence” (Israeli Supreme Court, 1999). Within the ticking bomb situation, the court further ruled that the defence of necessity could extend up to several weeks if the situations called for it.

This was a monumental change in Western governance, as no democratic state had publically sanctioned the use of physical and physiological torture as a means of national security before this case. Once the judgement was given, Supreme Court Justice, Kedmi, while in mutual agreement with the nine Supreme Justices who presided over the case, specifically outlined the importance of the ticking bomb scenario and suggested that the court suspend the employment of physical pressure from coming into effect for a one year period, so as to provide the GSS time to employ exceptional methods in very specific ticking bomb cases. However, the employment of such pressure would only be permitted “on the condition that explicit authorization is given by the Attorney General” (Israel Ministry of Foreign Affairs, 1999).

Since the ruling of the ISC in authorising the use of physical pressure during interrogations, other democracies worldwide, such as the USA and Britain, have relied on the court's ruling to justify their own acts of interrogational force during the war against terror. Over the years, the use of physical pressure although illegal, was applied in cases deemed “necessary” by government officials in the attempt to prevent and protect against violent extremism.

4.5. The Use of Physical Pressure in the 21st Century

Since the 1999 ISC judgement, Israel continued to experience violent extremism and terrorist activity within and across its borders. Due to the constant threat, the state has had to adapt its counterterrorism measures with that of the evolving terrorisations growing around the Nation.

As one of the only two democracies in the Middle East besides Turkey, Israel decided to carry its traditional hard power approach into the 21st Century. Its ability to adapt as a nation, ensured its stability and strength as a primary contender in the region, as the state upheld its current status as a regional economic and military superpower. This is despite the constant rise of terror in the region. This national need to monitor security continued into the 21st Century, as security institutions such as the IDF and GSS remained “determined, brassy, bold, and decisive” in their national security approach (Forest, 2007: 409). According to Michael Goodspeed, the Nation’s success in combating terrorist acts has come from no place, other than the lack of choice to be able to do otherwise (Forest, 2007: 409).

The constant battle with terror over the years, has taught Israel important tools to succeed against pending terror activity. One such lesson has been the need to remain organised. Its ability to collect information on surrounding state military and intelligence, is the nation’s most effective counterterrorism tool according to Forest (2007: 410). The success of the tool has established various units, whose sole focus is intelligence gathering. The ability to acquire this information, however, brought Israel into a controversial light as evidence of human rights abuses once again, emerged (Forest, 2007: 410).

The majority of the groups established to counter terrorism in Israel today, are intelligence-based. The notorious Shin Bet unit is currently Israel’s primary security branch. It is responsible for the protection of state officials as well as civilian life. Formerly thought to be a branch of the IDF, it is actually one of the three branches of the GSS, and is highly successful in deterring and preventing the spread and damage caused by terror. Focused primarily on terror cells and violent militant insurgent groups, Shin Bet has been authorised with a military mandate which the GSS was not extended to in the past (Forest, 2007: 411). The unit has the capacity to act

offensively as well as defensively, depending on the nature and degree of the suspected attack. Unlike the GSS who were without any formal legal authority, the Shin Bet are legally bound to a 2002 statute which states that the organisation “serves the state of Israel and protects it from threats of terror, espionage, sabotage, subversion, and the exposure of state secrets” (Haaretz.com, 2015).

However, despite its dominant success, the group attracted mass negative publicity, as reports of human rights violations and detainee maltreatment continue to linger around the credibility of the unit. Reports of Shin Bet officials accused of killing two Palestinian hijackers of an Israeli bus surfaced, after the subjects were detained and taken into custody (Haaretz.com, 2015). A personal account was reported by a former Shin Bet detainee, Shireen Essawi, who described her experiences of torture. In 2010, Essawi was stopped in Jerusalem when she was arrested by Shin Bet officers. After being in custody for three hours, Essawi was transferred to a small room where she was withheld any information on why she had been arrested. She was further transferred to a detention centre, and held blindfolded in an interrogation room, where the officers had been “expecting her” (Al Jazeera, 2013).

She was confined to a small cell underground, with nothing but a bucket and sleeping mat, Essawi could barely stretch to ease the pain of supporting her back or head (Al Jazeera, 2013). The temperature was always freezing, and a bright light overhead, was constantly on. She was made to feel watched and uncomfortable when spoken to, as they would “almost stick their mouth to my ear and shout loud”; all the while, remaining chained, and shackled (Al Jazeera, 2013). All personal space was removed. When she tried to retaliate, she reported that the interrogators “hit me, tied my hands and legs, and blindfolded me, repeatedly dragging me on the floor and slamming me against the wall. They chained me with a leash and said: 'I dealt with the likes of you before. You're rubbish. You're worthless.'” (Al Jazeera, 2013). Over the next few days, she was repeatedly threatened to be sexually disgraced, all the while held without a court hearing or trial. This is one of hundreds of personal accounts accusing the Shin Bet of resorting to unreasonable methods of interrogation.

The organization was further accused of unreasonable pressure after the assassination of then Prime Minister Yitzhak Rabin in Tel Aviv (Haaretz.com, 2015).

The incident was reported to have been caused by a far-right Israeli Jew. This high profile death revealed severe flaws in the security apparatus viewed by Shin Bet officials (Haaretz.com, 2015).

These were only a few of the numerous cases which surfaced. Within the last six months of 2014, 51 cases of torture were reported (RT News, 2015). These cases reported acts such as beatings, sleep deprivation, as well as interrogations involving the notorious frog and banana positions. Since 2010, there was a constant rise in the number of cases concerning the use of torture. The year 2014 saw 59 cases, 2013 witnessed 16 cases of violent extremist activity, 2012 revealed 30 cases, and in 2011, 27 cases were further reported (RT News, 2015). Although torture is illegal in Israel, these cases were excused under the necessity window provided by the ISC 1999 judgement.

Although sanctioned, whether the methods of physical pressure applied by the Shin Bet are effective, is another issue concerned with the security group. The reports of torture further discredited the information gathered, as the detained subjects often provided false information to stop the pain of the physical pressure applied (RT News, 2015). An example of this issue was seen when Mohammed Hatib, one of the two main suspects in the killings of three Jewish teenagers in June 2014, confessed falsely to assisting in the killings once his interrogation took a torturous turn (RT News, 2015). Due to his previous involvement in terrorist activities, the Shin Bet explained their actions of torture as necessary according to the belief that a possible “ticking bomb” situation was evident (RT News, 2015).

These accusations of maltreatment received strong attention by international, Israeli and Palestinian human rights groups (Whitson, 2015); all of which, oppose the state’s employment of Shin Bet practices and lack of care for human rights during interrogations.

Another security service employed by the state is the Mossad security unit, also known as the Institute for Intelligence and Special Operations. Unlike the Shin Bet unit whose focus is primarily domestic, the Mossad is Israel’s main foreign intelligence agency (Forest, 2007: 411). The unit seeks to analyse information rather than actively strategizing, apprehending, and spoiling terror plots.

Despite the attention aimed at the abovementioned groups, in September 2015, terror attacks killed 223 civilians, as opposed to 171 deaths reported during the month before (Shabak.gov.il, 2015). Overall there were 68 attacks in Jerusalem alone (Shabak.gov.il, 2015). These figures reveal a deep threat specific to Israel, as other democracies are not threatened by terror to the same degree. However, recent developments in Paris, France, prove otherwise. Does the need to vigorously protect human rights outweigh the need to secure life? Israel may disagree.

As a democracy, Israel revealed that there is a very fine line of securing national security against a threat which in itself has no regard for human cost or principles of liberty and dignity. In fact, it is those democratic virtues through which the case study of Israel revealed that terrorists aim to target and effectively destroy. Therefore, how can a democracy effectively uphold democracy, while defending against violent extremism? Effectively, it cannot. Not by virtue alone, it would seem. Instead democracies such as Israel, who are constantly under threat, have adapted to the threat surrounding them, and have tried to establish a balance between national security and counterterrorist legitimacy.

Although physical pressure proved effective, there are still important loopholes which need to be addressed to ensure a true balance is present in a democracy. These are the twin principles of accountability and transparency. It is here, that Dr Alan Dershowitz's torture warrants may be practically appropriate. This will be addressed in the following chapter as we discuss the practicality of institutionalising torture warrants as a method of regulating physical pressure in a democracy, and as a measure to prevent and counter the threat of terror.

This chapter concludes that the practical aspects of applying a torture warrant to interrogators who torture terrorists, would not be successful, nor is it ethical. Under international law, no state can ever justify torture as all coercive interrogation methods are prohibited absolutely.

Those used by the USA in foreign prisons and Israel may and do constitute torture. Theoretically, an attempt to apply the 'lesser evil' justification under the defence of necessity, is currently only available to torturers in certain domestic legal systems, but it is firmly rejected in others. The defence of necessity is an impractical principle, in that it requires low-level officials to approach and to apprehend hard-line terrorists

in emergency ticking bomb situations. In reality, the perceived recurrence of the ticking bomb scenario and similar cases, inevitably creates a system of torture and impunity, which we currently see occurring in Israel. Realistically, democracies facing terrorism must choose between openly legalizing torture, and refusing to use torture in counterterrorism strategy.

Chapter Five: A Righteous Torturer

5.1. Introduction

Preventing terrorism often calls for a choice of evils, as both soft and hard power approaches have tactics which seek to protect civilians against mass casualties, and collect information, in an effort to identify and detain terrorists. However, whether torture can be used as a legal mechanism to capture necessary intelligence against imminent terrorist threats, is perhaps the most controversial choice of all.

This dissertation has established that democracies have practised torture, but does that mean that the government should permit officials to torture? And how should the law treat cases like this? Is it just another instance of 'dirty hands' tactics in politics? If it averts national harm, can resorting to the use of torture be seen as choosing the 'lesser evil' (Lukes, 2006: 1)?

Professor Alan Dershowitz, in an attempt to resolve the illegal use of investigatory torture already present in democracies, as presented in chapter 2, created the theory of torture warrants. As discussed, this theory seeks to establish a legal mechanism to enforce the principles of transparency and accountability upon democratic leaders, to ensure the non-lethal abuse of physical pressure applied upon detained suspects identified in a ticking bomb scenario.

In order to deter terrorism and preserve national security, Dershowitz proposes to increase national security without eroding the liberty that is central to democratic society (Sung, 2003: 195). In a brief overview, the judicially sanctioned warrant permits the non-lethal torture of a subject to disclose information that would prevent a possible imminent terrorist attack as described in the ticking bomb scenario. This scenario, although fictional, provides a practical illustration of a possible event, where an active bomb has been identified, and the only person with the information to neutralise the weapon and reduce or prevent damage by the bomb, is the subject who refuses to disclose any information (Sung, 2003: 195).

The ticking bomb scenario has been used in cases of necessity in Israel, as mentioned in chapter 4. However, whether it is a practical solution for democracies to counter terrorism, is still a matter of serious ethical and practical debate. Therefore

this chapter seeks to analyse whether a democracy can make a difficult “choice-of-evil” decision, as described by Dershowitz, in a threatening situation for which no good verdict can be made. To address this issue, the chapter will apply the theory of torture warrants in Israel, following the steps described by Dershowitz, to determine whether the application of torture warrants would be compatible with the limitations and conditions set out in democratic ideology. Following the application, the chapter evaluates the process and reports on the findings, and whether torture warrants limit the principles of democracy.

Following the evaluation, this chapter will argue that despite the strong argument and forethought provided by Dershowitz, hard power alone cannot be a viable solution. It is suggested that torture cannot be rendered democratically accountable. That is, in the sense that it would sometimes be legitimate, but when it is not, it must be punished, because its practice cannot be publicly legitimately recognized without undermining the components of a democracy. This position is supported by adopting a theoretical production called the “Dershowitz Protocol”, as directed by Robert Fothergill, to the effect that institutional investigative torture “requires liberal democracies to reject the very idea of a scale that can allow comparison of the benefits against the costs of torturing” (Lauritzen, 2010: 95).

Rather the use of smart power, as described in chapter 3, provides both physical force and peacemaking efforts to deter terrorism in democracies. This argument will be supported by the recommendations outlined by the *6th African Union High Level Retreat of Special Envoys and Mediators on the Promotion of Peace, Security and Stability*, held in Windhoek, Namibia, in October 2015, which I was able to attend.

Recommendations on good governance, dialogue, and accountability were highlighted in the Retreat which focused issues surrounding the link between terrorism, mediation, and non-state armed groups. The recommendations provided by the Retreat were selected for this chapter as credible, practical suggestions as the African Union (AU) has vast experience and standing in its dealing with terrorism as a regional multilateral institution. The AU represents all African states affected by terrorism and violent extremism, and represents the Continent which hosts a majority of democratic states affected by religious terrorist attacks.

In seeking to address whether the torture warrant system would be compatible with democratic principles and constitutional frameworks, the case study of Israel was selected. I realise that Israel exists within a different context to the Retreat held by the African Union, centred on Africa and terror, but the content discussed in the various sessions and meetings during the Retreat is comparable, in the sense that terror is universal, and all views should at least be considered in an analysis such as this. Therefore, the lessons learnt through Israel, and the recommendations provided by the African Union, are academic tools which can be applied in any democracy worldwide faced with the threat of terror. Therefore, this chapter will argue that coercive measures may be a necessity, but should be used in collaboration with the smart power approach for democracies, effectively to prevent the danger of terror threatening their nations, and thereby strengthening national security, legally, into the future.

5.2. A Ticking Bomb

Israel as one of the only two democracies in the Middle East, is the only democracy worldwide to sanction the use of investigative torture as a counterterrorism approach by the defence of necessity. As the only democracy to publically admit to the practice of investigative torture, there has been evidence of mismanagement and a lack of accountability by the government agencies responsible with implementing the controversial practice as addressed in chapter 4. The current situation is as follows; there is a certain undisclosed state tolerance for torture active without a direct measure of national accountability in the threat of religious terror which has arguably encouraged disproportionate approval for torture within Israel (Brown, 2007: 15).

However, Israel argues that the practice of physical pressure has been effective in deterring terrorist threats outlined in the ticking bomb scenario. In an attempt to analysis whether torture can be effective in strengthening national security in a vulnerable democracy, the theory of torture warrants should be applied to determine whether it would be a viable solution.

In 1987 Israel legalised torture as an interrogation method under a ticking bomb scenario where torture was considered the only way to gain important information (Devlin, 2012). The Landau Commission legislated the act, by providing recommendations for interrogational methods which combined “non-violent psychological pressure of intense and prolonged interrogation with a moderate measure of physical pressure” (Ginbar, 2008: 174). While condemning the torture of captives, the Landau Commission “decided that the use of force was unavoidable in situations where a terrorist attack could be stopped, and lives saved in the fight against terrorism” (Devlin, 2012). The Commission went further to adapt the definition of physical pressure to include the need to prevent the possibility of an event occurring (Devlin, 2012); thereby providing an example of a ticking bomb scenario in a democracy where a possible terrorist attack may occur.

The Landau Commission outlines a model which places Dershowitz’s need for torture warrants in a practical legal ticking bomb scenario present in Israel. The application for a torture warrant system was sanctioned by the Landau Model between the 1980s up to 1999. It is in this situation that Dershowitz’s application can be made as follows.

As in most democracies, state law enforcement officials would request a search warrant for an arrest to apprehend a suspected criminal. The same principle applies in the case of torture warrants. Once an imminent bomb scare is alerted and the suspect is identified, the GSS, who has the required authority to undertake investigation as set out in chapter 4, would apprehend the suspects and they would be taken in for questioning.

Applying the protocol set out in the Penal Law and the Landau Model, the GSS would interrogate the suspect. The subject would be given the option of providing the necessary information while being questioned, thereby being rewarded with immunity; but if unresponsive, the suspect would be told to testify or be threatened with imprisonment (Ginbar, 2008: 185). Only once all other alternatives have been appeased and the suspect refused to comply with what he/she was legally compelled to do, as he/she would be safe under immunity, GSS officials could apply for a torture warrant to be authorised to threaten the suspect with coercive, temporary physical pressure.

The GSS would be required to collect a formal requirement of a judicial warrant as a prerequisite to non-lethal torture. The warrant would deem judicially monitored physical pressure designed by the GSS, to cause pain without leaving lasting damage (Ginbar, 2008: 185). Torture techniques such as inserting a sterilised needle under the suspect's fingernails can produce unbearable pain but would remain non-life threatening. Another technique which would be sanctioned, would be the proposed drilling through an anaesthetized tooth to get the suspect to talk (Lauritzen, 2010: 95). These forms of physical pressure permitted by a torture warrant would be applied in the belief that pain is a lesser and "more remediable harm than death; and the lives of a thousand innocent people should be valued more than the bodily integrity of one guilty person" (Lauritzen, 2010: 95).

However, the GSS official has to prove beyond a reasonable doubt that the attack is imminent, that a known or convicted terrorist has the direct information required to save lives and prevent the attack, and only when all other measures have been tried and failed (Lauritzen, 2010: 95). Only once the judge is satisfied with the evidence at hand, will a warrant to torture be permitted. This warrant must be written, in order to preserve judicial authority and transparency for government records. Through obtaining a warrant, the act of torture can thus be accounted for and made known as there is a visible paper trail of the event, as well as installing a measure of transparency.

Once the warrant is obtained, only trained and authorised GSS personnel may perform coercive interrogations. This is to ensure that no low-ranking officials on the ground will claim that they had been secretly authorised to commit violent and unreasonable acts, since the only acceptable form of authority will be in writing. This also prevents high-ranking officials from denying accountability. This will therefore remove the plausibility of abuse as the warrant would only be permitted in very rare, imminent cases of a terror attack. However, to ensure that the methods applied do not exceed the limitations prescribed by the warrant, every act of harmful physical pressure will be monitored and reported to ensure accountability and control during the investigations. This is to ensure no lines are overstepped, and the manner of pressure used is well within the required limits.

In theory the torture warrant system provides a strong argument for security and defence in a threatening and dangerous national crisis. However, there are a few remaining loop holes which have become evident.

5.3. Assessment

In applying the practice of torture warrants in a possible ticking bomb situation in Israel, there are several problems which can be observed. One problem is that the defence of necessity, as provided by the ISC, has the potential to become a torture-enabling judicial provision. Its allowance towards a broader definition of the ticking bomb situation, which the court has extended into several weeks, reveals that there are many areas for abuse in the Dershowitz proposed theory of utilising torture warrants to provide for a stronger democracy.

5.3.1. A Judicial Enquiry

The first problem visible from the above, is the issue of judicial limitations.

When advocating for a torture warrant in very specific cases, Dershowitz does not make allowance for a full trial to take place before torture is authorised. Essentially, the judge's position in line with providing accountability for the required process, is limited only to administration. Although the judge is making the decision based on the first-hand evidence provided, the issuance of such a warrant does not seem to constitute a purely judicial act by a court (Ginbar, 2008: 190). The accused person has no part in the procedure of the trial nor does he or she have the means to freely challenge the accusation of terror before the judge issues the warrant. This thus removes the practical element of a free trial as promised by the democratic state for any person accused of a crime.

The second problem identified, is the tendency of the court to grant requests for warrants unquestionably.

The judges in Israel, according to Ginbar, simply lack the tools necessary to challenge the information brought before them (2008: 191). This result reflects poorly on the principle of accountability, for if most cases are granted a torture warrant, the requirement of necessity and rarity becomes invalid. Examples of this can be seen in Israel, when 99.5 % of the cases requesting permission to apply physical pressure in 1996 were granted (Ginbar, 2008: 191).

After the events of 11 September 2001 in the US, Seth Kruger of the Foreign Intelligence Surveillance Act (FISA) recommended that “a torture warrant court may not be the most sceptical bench, but they, like executive officials, would be subject to public pressure to do everything possible to prevent a recurrence of September 11” (Ginbar, 2008: 191). FISA recorded that only one application for a torture warrant in Israel was denied, leaving over 25 000 warrants granted in the last 25 years (Ginbar, 2008: 191). This statistic reveals that if legalised in other democracies, the regularity of the torture warrant system would not be able to provide an effective barrier against excessive abuse during coercive interrogations.

The third judicial issue identified is harm caused.

Dershowitz’s torture system argues that the degree of torture can be limited through the use of a warrant to ensure no lasting damage occurs upon the suspect. However, limiting torture methods to a non-lethal degree is a straightforward requirement, and should be a non-disputed prerequisite to begin with. It should not be an ethical consideration as argued in the human cost analysis provided in Dershowitz’s reasoning.

The use of a sterile needle under the suspect’s nails or a drilled tooth cannot be guaranteed to temporarily harm the suspect, as it may cause lasting damage. Therefore, this principle is highly controversial. The act may be temporary and non-lethal but the damage may be greater than the cause resulting in an excessive use of force. Not only is non-lethal torture possibly permanently damaging physically, but the side-effects and nature of the torture may also leave the suspect with lasting mental harm. These effects would not be identifiable to a judge nor a mental health professional for possibly many years to come. Some of the effects may even result in death if mental instability resulted in a suicide attempt. This is surely a high risk

when weighing the need, versus the harm caused by a judge, when issuing a torture warrant.

The practice of the Landau Model which authorised the issuing and practice of a torture warrant system administered by Israel's Supreme Court was in reality, a mechanism which authorised unacceptable acts preformed under a conspiracy of silence, as the principles of transparency and accountability were strongly lacking. Many cases were not reported, and those which were presented before the High Court and Supreme Court still did not reveal all the methods and personnel involved in the interrogations. The Court continuously allowed for torture to occur, justifying its decision on the defence of necessity principle and a ticking bomb concept; however, the regular permission of necessity became too regular, and Dershowitz's requirement of rarity and last resort were not properly administered. This resulted in the abuse of the warrant system, and in return, abuse of force upon suspects. Therefore, the theory when applied in practice, does not effectively facilitate the democratic principle of accountability and transparency to maintain control as intended. In short, the theory in practise, administratively will not enhance national security, nor preserve the virtue of democratic leaders in choosing the better of the two evils.

5.3.2. A Righteous Torturer?

Now that it is established that the torture warrant system is not compatible with democratic ideology, this section will address the virtue of the leaders in making the choice to torture on behalf of civil society.

From what has been evaluated by applying the torture warrant system above, a political leader will still have to make a choice between two evils in order to protect society against the danger of terror. This has been referred to as the "problem of dirty hands", a philosophical concept identified in Sartre's play (Walzer, 1973: 161). In today's perspective, this problem suggests that in politics, no leader is innocent. But this does not mean it is not possible to do the right thing while governing. Walzer provides a very appropriate example, where he illustrates the ticking bomb scenario in an effort to explain the difficulty of governance in a democracy threatened by terror.

Walzer's example is of a young politician who has just come into power, set with his first decision as President, to choose to authorise the torture of a captured suspect who knows the location of a ticking bomb hidden in civilian living areas set to detonate within 24 hours (Walzer, 1973: 167). The young president approves the torture of the suspect, as he believes he must act for the greater good of the citizenry. The leader chooses this evil even though he recognises the act as wrongful, or in governance terms, illegal. This leader is known as a righteous torturer. Yet, as repeated continuously by Dershowitz, this is a dilemma currently present within many western democracies worldwide.

Therefore as torture occurs in democracies, should torture be done secretly in violation of the laws in place; or should the legislature change the existing laws in order to allow legal torture after a torture warrant has been properly authorised, approved, and set out by the agents responsible? Dershowitz makes it clear that he is against all forms of torture and that "no democracy should allow its leaders to undertake actions that are illegal" (Lauritzen, 2010: 95). However, despite his compelling argument, I cannot agree with him.

The installation of torture as a legal mechanism, although a hard power tradition, is not coherently nor consistently reliable, accurate, and most importantly, effective. By implementing a set of policies, mechanisms and limitations, the overall goal would be to erode the practice of terror in democracies while simultaneously absolving the torturers of all responsibility for their actions (Paeth, 2008: 173). It also shows how deeply misguided Dershowitz's theory of torture warrants issued by judges is. Removing the general prohibition of torture in democracies would soon dissolve the limitation of inhibitions (Luke, 2006: 14).

If laws are propagated to allow torture only in defined circumstances of necessity, state officials and law enforcement may want to explore the alternatives to the rules and practice of torture, that once it became a familiar necessity, as seen in the application of the warrant system above, it would become a regular and therefore misused system of counterterrorism (Luke, 2006: 14). Therefore a democracy's primary hard power response would be the use of force, violence, and instilling fear in potential terror suspects, the exact same tools used by violent religious terrorist groups themselves.

This perspective is supported by Emile Durkheim's argument in his paper entitled 'Individualism and the Intellectuals' where he argues that;

Accordingly, outrages against individuals' rights cannot rest unpunished without putting national existence in jeopardy. It is indeed impossible that they should be freely allowed to occur without weakening the sentiments they violate; and as these sentiments are all that we still have in common, they cannot be weakened without disturbing the cohesion of society. A religion which tolerates acts of sacrilege abdicates any sway over men's minds. The religion of the individual can therefore allow itself to be flouted without resistance only on penalty of ruining its credit; since it is the sole link which binds us to one another, such a weakening cannot take place without the onset of social dissolution. Thus the individualist, who defends the rights of the individual, defends at the same time the vital interests of society (Lukes, 2006: 14).

The value of human rights is a prerequisite no democracy can undermine. What clearer example, other than torture, is there of treating a person merely as a means to an end? That is why the practise of torture is forbidden worldwide by domestic and international human rights laws. There are no reasonable legal exceptions for the abuse of human rights by a democracy.

5.3.2.1 *The Dershowitz Protocol*

Another practical way to better understand the application of torture warrants in a democracy, can be seen by the Dershowitz Protocol created by Robert Fothergill in 2007 (Lauritzen, 2010: 106). The production directly illustrates the human rights issues concerned with implementing a legal mechanism for authorising torture in a democracy. It is an engaging dramatic response according to Lauritzen (2010: 104). This play serves as a practical alternative to the case study of Israel applied above, whereby instead of addressing the issue of security alone, the play places the viewer's attention on the human rights virtue of torture, allowing for a detailed reaction from civil society to the practice of torture; and whether in fact society would approve of the security tactic if they were present while it happened. The idea is to allow

audience's to understand fully the physical pressure and pain applied during sanctioned coercive interrogational practices.

The play illustrates that there is an important and necessary link between the prohibition of torture and the rule of law, which if separated, "threatens the very rule of law itself" (Lauritzen, 2010: 105). The play is set in an interrogation room operated by the FBI, and focuses on the interactions amongst three primary characters, designed to apply and monitor the use of coercive physical pressure.

The stage is designed to reflect two adjoining rooms, one of which is a sound proof cell, where the detained suspect is attached to a device calibrated to inflict pain directly to the suspected terrorist's nervous system (Lauritzen, 2010: 107). This room is unseen to the audience. The adjacent room is the control centre, from where the officer monitoring the administration of the pressure of the device, is based. The room also hosts the interrogator, who applies the pain via the machine, and from where the detainee will be questioned via a two-way intercom. The conditions of the subject and exchanges between the suspect and interrogator are only visible through a video-feed device.

The pain is then applied electronically through the device, mandated by the administering official who has received an approved warrant to torture, which provides the necessary codes to activate the machine (Lauritzen, 2010: 107). Therefore the act of torture can only be activated in compliance with the justice department. This ensures there is an interrogation procedure monitored by a presidentially authorised protocol. The computer then records the process, including the duration and intensity of the torture, to be preserved for judicial inspection (Lauritzen, 2010: 107). The process is sterile, clinical, and impersonal, so as to minimize biased abuse and provide accountability. As long as the protocol is observed, the administrators are given full immunity to any personal liability according to Fothergill (Lauritzen, 2010: 107). This illustration addresses whether the administrators can be regulated in circumstances of fear, anger, stress, danger, panic, and terror.

As the theatrical production is structured, the torture device is calibrated to different levels of pain intensity, moving between levels 1-5. While the pain is being administered, the audience is able to hear but not see the pain felt by the suspected

terrorist. The various levels of the applied pain are longer on each level. From level one, the suspect could be heard saying “Oh my God, oh God”, heightening his reaction, until he is screaming like a young child in pain when he reaches level five (Lauritzen, 2010: 108). Throughout the production, two of the torturers were firmly committed to their responsibility, and made a strong case for the need to torture as the suspect reveals the whereabouts of the suspected device. However, the audience was struck by the horror of what was being done. This revealed that if the public knew the details of what a person underwent while tortured, it may not be so readily accepted by society as a national security mechanism.

This play wrestles with Dershowitz’s application of torture warrants in a very realistic and concrete way. The play actually invites the audience to observe and enter the reality of investigatory coercive state interrogations. The audience is able to witness the growing pressure of the device upon the suspect and the investigators.

The sound of a phone would resound in the adjacent investigation rooms, reminding the audience of the constant pressure by officials to acquire the important information. The interrogators’ expressions are visible, revealing the “obvious discomfort” in torturing a person (Lauritzen, 2010: 108). This brings home the reality that Dershowitz’s theory presupposes that a “clinical and impersonal environment can be created that will serve as a bulwark against abuse, it will in fact be flesh-and-blood people - with their passions, prejudices, and idiosyncrasies - who will carry out the protocol” (Lauritzen, 2010: 108).

The play supports Jeremy Waldron’s argument on challenging Dershowitz’s approach to national security, based on the similar fact that torture is inherently at odds with democratic legal systems (Waldron, 2011: 832). According to Waldron, the legal archetypes of democracies are founded upon positive law, as it expresses the spirit of an entire structural area of doctrine, and “does so vividly, effectively, and publically, establishing the significance of that area for the entire legal enterprise” (Waldron, 2011: 834). However, Waldron acknowledges that law is coercive, but it is not brutal or savage; it does not rule by fear or terror, or by breaking the will of those it seeks to correct (Waldron, 2011: 834). There is a strong connection between the spirit of the law and the respect for human rights, dignity in particular, which will be split if torture is legalised.

I do not believe that the democratic legal system should place its leaders in a position to compromise their ideological beliefs and that of society. It should never be justified for a democracy to reduce any human being to a quivering mass of desperation and terror, but it is worse for another human being to witness the act of reducing a person to that state. This is supported by the US Convention Against Torture, which states that “no exceptional circumstances whatsoever, whether a state of war or the threat of war, internal instability, or any other public emergency may be invoked as a justification for torture” (Ginbar, 2008: 279).

The torture warrant system is incompatible as a counterterrorism mechanism in democracies. Not only will it violate the right to human dignity and the rule of law, but it would fail to strengthen the principles of accountability and transparency in the state, thereby risking the relationship between good governance and national security. Therefore, what alternatives are available to assist vulnerable democracies from the growing danger of religious terrorisations? A possible solution is the use of smart power.

5. 4. Recommendations

Smart power is both hard and soft tactics working together to produce a stronger and broader defence for national peace and security. Terrorist organisations have already utilised the necessity of smart power strategies such as Hamas, Hezbollah, and al-Qaeda, who have recognised the complementary link between hard power and soft power (“Dealing With Today’s Asymmetric Threat to U.S. and Global Security, Symposium Three: Employing Smart Power”, 2009).

Terrorisations have adopted a strategy whereby they dominate the security and service sectors of a vulnerable state in contested regions, therefore limiting the West and neighbouring regions to effectively exploit those sectors (“Dealing With Today’s Asymmetric Threat to U.S. and Global Security, Symposium Three: Employing Smart Power”, 2009). The terror organisations fill the gaps left by the weakened government, by supplying education, healthcare and social welfare services to vulnerable areas (“Dealing With Today’s Asymmetric Threat to U.S. and Global

Security, Symposium Three: Employing Smart Power”, 2009). This is the exact strategy currently applied by ISIS within Syria.

In an effort to effectively deter terrorism in democracies, states must apply both offensive and defensive smart power as discussed in chapter 3, to strengthen national peace and security.

In identifying the dangerous threat terrorism has become, no other continent’s democratic states are more greatly affected than Africa. States such as Mali, Madagascar, Nigeria, Somalia, Chad, Kenya, Central African Republic, and Sudan are a few of the democracies affected by religious violent extremism. Because of this current reality, the African Union held its annual high-level conference in October 2015 on the Promotion of Peace, Security and Stability, where discussions centred on the rising issues of terrorism, mediation, and armed groups in democracies in Africa and worldwide. The conference welcomed practitioners, academics, and political representatives to discuss Africa’s united front against terrorism and the methods needed to counter terrorism in the region.

After much discussion, AU representatives collectively agreed that those who use terror to fight terror would be no different than the terrorisations themselves (6th Annual Retreat of Special Envoys and Mediators on the Promotion of Peace, Security and Stability, 2015). It was firmly established that respect for human rights cannot be removed, no matter the danger. Instead, states must enforce stronger prevention strategies, early warning mechanisms, and stronger definitions of who can and who to act upon, and which groups to approach for mediation (6th Annual Retreat of Special Envoys and Mediators on the Promotion of Peace, Security and Stability, 2015). In short, smart power must be employed.

The AU recommended the use of soft power models to support military force where permissible if the outcome outweighed the need as outlined in the criminal justice model. But the Council emphasised that force should only be used as a last resort, and only if dialogue and mediation were unsuccessful (6th Annual Retreat of Special Envoys and Mediators on the Promotion of Peace, Security and Stability, 2015).

Terrorism has become the prime security threat in Africa, and is strongly linked to violent extremism which has become so dangerous, that states today can no longer wait to respond. Terrorism in the 21st Century must be faced with a collective political,

military, and diplomatic strategy. This is further complicated as each terrorisation is unique. Therefore there can be no uniform approach. Former President Buyoya of Burundi recommended that states must first identify what type of terrorisation is present, the organisation's frustrations and demands, the root causes of the violent extremism, and strategize how to respond based within the political context present in the state (6th Annual Retreat of Special Envoys and Mediators on the Promotion of Peace, Security and Stability, 2015).

The United Nations and the African Union have jointly acknowledged that prevention is very difficult to enforce practically, as most intervention operations as discussed in previous chapters, only occur after the violence has erupted. To address this limitation, early warning mechanisms at a local level must be established to provide a detailed national mandate on the basis of the knowledge available. This mandate can then enhance prevention on the ground. One possible way to do this, is by questioning and negotiating with foot soldiers on the ground (6th Annual Retreat of Special Envoys and Mediators on the Promotion of Peace, Security and Stability, 2015).

The Special Representative of the UN for Central Africa and the Head of the UN Regional Office, Professor Bathily, reminded each participant that throughout history, religious movements have emerged due to socio-economic transformation within the region, desiring to overthrow the host state (6th Annual Retreat of Special Envoys and Mediators on the Promotion of Peace, Security and Stability, 2015). These organisations and movements are often reacting to a situation or circumstance to create chaos in response to a crisis. Bathily believes violent extremism is an act of desperation. From a social and political view, these groups must be deterred; yet those authorised to do so, must remember that extremists are also human beings, and that to transform the dangerous society, they must be seen as such. There can be no marginalisation or alienation of the extremists, as this will further divide the struggle and complicate the prevention, intervention, and negotiation processes needed to counter the danger.

A further complication which needs to be addressed, is the lack of a structured definition of terrorism, as this danger is not criminally defined. This creates loopholes for miscategorising suspects as terrorists. This issue can lead to the abuse of a

specific marginalised population, such as witnessed in Israel where Palestinians were the dominant population who brought cases of interrogational abuse before the ISC.

The challenges faced by violent terrorisations are deep rooted in intergovernmental failures present in many vulnerable democracies. To address these failures, Dr Jakkie Cilliers of the Institute for Security Studies recommends that democracies must bring back security reform, re-establish the independent appointment of law enforcement and security agents, minimise the use of the military, and establish a criminal justice response (6th Annual Retreat of Special Envoys and Mediators on the Promotion of Peace, Security and Stability, 2015).

At present, there is little difference between drivers of criminal terrorism and drivers of instability. The strongest defence to combat terrorism is the building of good governance. Therefore democracies need to establish a multidimensional concept by incorporating an economic, political, and social approach to counter the root causes of terror (6th Annual Retreat of Special Envoys and Mediators on the Promotion of Peace, Security and Stability, 2015). For this to take place, states need to define a new narrative for terrorism; there must be an alternative ideology present to replace fundamental Islamism to attract the youth and unemployed from being recruited by the terror groups, and prioritise state spending towards the emancipation of the minorities. The state, through the employment of civil society, can empower civilians for prevention and against the fight of terror and violent extremism.

Hard power in the form of military intervention and law enforcement units have shown that it is not conducive for effective prevention and recovery of a threatened state. It leads to a failed or unstable system of governance, often worse off than before the intervention (6th Annual Retreat of Special Envoys and Mediators on the Promotion of Peace, Security and Stability, 2015).

Force alone is not conducive for positive change, and certainly not for national security and peace. It can be effective if it was internally conducted for which state law enforcement and officials retain and contain the terror, whereby negotiation and criminal justice models take effect to find a conclusive and cooperative agenda moving forward to battle terrorism. Smart power is effective if it is conducted in a manner specific to that threatened state, as each terrorisation is different. A

necessary solution would be to apply a locally-owned, detailed specialised response monitored by state early warning mechanisms.

Violent extremists use a coercive face to produce fear in order to establish a desired reaction by the state targeted (6th Annual Retreat of Special Envoys and Mediators on the Promotion of Peace, Security and Stability, 2015). This is evident through the numerous hostage and beheading video reports currently popular on social media (Almasy, 2015). This scheme has grown in popularity over since 2011 with the rise of IS in the Middle East. It is imperative that democratic states do not give in to the desires of the terror groups. Instead, states must focus on containment. States need to control the situation and evaluate past trends, as no democracy will succeed without knowing all the relevant factors, actors, and strategies of the violent terrorisations. It is imperative that the state identifies the root causes of the issues at hand in moving forward to deter the threat.

The torture warrant system will not be an effective form of terror prevention. Prevention is the key factor for security against terror. Good governance as the leading prevention tool, requires the promotion and respect of human beings as individuals. Marginalisation is an aim of terrorism, and should not be an instrument of democracy. In conclusion, the Retreat implored democracies to promote the criminal justice model, incorporating principles of soft and hard power to provide transparency and accountability as desired by the torture warrant system. Torture in any form within a democracy is not sustainable in the long-term, and will not produce effective good governance needed to secure national peace and security.

Chapter Six: Conclusion

As mentioned in chapter one, the study aimed to identify whether torture was a possible counterterrorist strategy in a democracy. The research aimed to explore, in relation to terrorism; the limits of a state's response to a national security threat; whether torture could be a practical measure to guarantee state security; whether national security should take precedence over civil liberties and whether torture defended or attacked the principles of a democracy. To achieve these aims, the research had the following objectives; to recognise the limitations in state security when threatened by rebel terror; to discuss the efficiency and value of torture as an effective counter-terrorism tool; to recognise the value of civil liberties within a democracy, and to examine the limitations of torture as a counter-terrorist strategy in a democracy. This was discussed by examining various on-going arguments by leading legal theorists such as Michael Walzer and Alan Dershowitz, who debated the theory of legalising "torture warrants" as a counterterrorist tool for democratic states.

The 21st Century is gripped by a threat that has become so familiar, citizens are becoming desensitized to its affects. The religious wave of fundamental terrorism has become a global instigator for chaos and destruction in the wake of building a united New World. This ideological menace has formed a new threat to human rights within the very institution set up to protect it, namely democracy. This concern has leaders and organisations up in arms in the attempt to strategize a positive solution to counterterrorism.

Many democracies worldwide have heightened security measures in the wake of terror attacks in neighbouring states and regions. The recent call for a state of emergency after the ISIS inspired Paris attacks, caused great concern across Europe and its neighbours. The Middle East continues to experience waves of attacks as recently seen in Beirut, where the world witnessed the images of over 100 people killed in suicide attacks. Africa too, struggles with the dangers of terrorism, as Somalia and Nigeria continue to experience the casualties of a war against terror. These events are but a few of the examples experienced by democracies in the current evolution from domestic or local terror groups into transnational terrorisations.

However, despite the increase in terror worldwide, the global community has yet to establish a united definition of the term terrorism as a criminal entity. This lack of meaning has led to the identification of numerous groups being labelled as freedom fighters, guerrilla soldiers, and violent extremists. Therefore identifying a terrorist has become rather problematic. However, the acts of terror have been strictly administered through various international and domestic statutes, such as the United Nations Torture Convention.

This Convention strongly condemned the acts of terror by any group, organisation, or state entity. Included in the Convention, is the prohibition of torture. However, since 9/11 and the declaration of a War on Terror by the USA and UK, torture has become a documented practice by democratic states in the attempt to heighten national security and deter the harm caused by terrorism. This was evident through the release of reports and images from the notorious prisons of Abu Ghraib and Guantanamo Bay, where low-level officials had disgraced prisoners by placing them in inhumane positions and conditions. These images greatly moved legal theorist, Professor Alan Dershowitz, who sought to prevent this kind of abuse from reoccurring within democratic states, where illegal, secretive and coercive interrogations were taking place behind the euphemism of “enhanced interrogation techniques”, particularly by the US.

His solution was the development of the legal mechanism known as torture warrants, to be administered by the judicial or executive heads of state in the attempt to legally administer, control, and limit the use of force on detained terrorist suspects during interrogations. This was to ensure that the democratic principles of accountability and transparency were upheld. This legal mechanism was applied in an imagined situation idealised in the event of a real imminent terrorist attack, recognised as the “ticking bomb” scenario. This scenario provides a practical observation of how torture, if already utilised by a state, would theoretically be applied. It would occur in a clinical and controlled environment, whereby the torture authorised can only be non-lethal, and only applied if the state has no other alternative to preventing a mass catastrophe.

Despite the strong argument provided by Dershowitz, many academics, practitioners, and state representatives disagreed with these prevention methods, as they found

them to be inconsistent with international law as well as the principle of the human right to dignity. The argument of legally administering torture, and pitting certain democratic principles before others, was seen by absolutist's critics as being completely discreditable and unimaginable. Yet, the world recognised that torture was presently being criminally utilised by democracies as a security measure against terrorism. In identifying whether physical pressure would be suitable and practical in a democracy as a national security measure against the threat of terror; Israel was selected as a case study.

Israel is a nation with a strong history of terrorism. As the only democracy besides Turkey in the Middle East, Israel had to adapt to its threatening neighbours, as numerous wars and cross border insurgencies have caused the state to heighten security methods. Israel's experience of physical pressure authorised the public sanctioning of investigative, physical, and psychological pressure by the state's security units in questioning suspected terrorist detainees on pending and previous terror attacks in the nation. Through the Landau Commission, a model was adopted whereby on the application of a suspected attack, a security unit was permitted to use physical pressure through the defence of necessity precedent recognised by the Israeli Supreme Court in 1999.

In the attempt to analyse whether this method was justified, the paper evaluated the application of torture in a ticking bomb scenario relevant to Israel. The evaluation revealed that through the application of the torture warrant system, the principles of accountability and transparency could not be realistically upheld. Due to the issues identified, namely; judicial limitations, the regularity in which the necessity clause was authorised and the harm caused during coercive investigations, revealed the impractical nature of the acts to be applied by/in a democracy. Although intended by Dershowitz, due to the limitations the torture warrant system presented strong reasons for concern.

The apprehension of the violation of fundamental human rights and the severing of the rule of law required by democratic ideology, were issues which were further discovered. In the end, the evaluation revealed that the objectives of the torture warrant system did not meet the intended security and prevention outputs first believed to be ideal, and was rather found to be impractical and unreliable.

This, I established, was because the current method of hard power most favourably applied by democracies through the primary use of military might, special co-op interventions, and law enforcement units to counterterrorism, was ineffective. Instead, the paper supported recommendations provided by the African Union during a high-level conference centred on terrorism and mediation as a foundation to enhance democratic peace and security. The conference highlighted the strong need to establish early warning prevention mechanisms on the ground to recognise possible terrorist tendencies in affected areas, and to focus on nation-building through the administration of good governance as the primary prevention strategy.

This would be administered through a holistic approach stretching into the political, social, and economic spheres of governance to establish a stronger understanding of why terrorism occurs, how to manage it, and who to negotiate with. These are all principles identified in the smart power approach to counterterrorism, where elements of both hard and soft power models are present and applied simultaneously, and in consolidation with one another to institute a stronger link between national peace and security, through good governance.

In conclusion, this paper argued that in a world where terrorism is a fundamental reality, where citizens are the targets, and chaos the goal, democracies cannot allow the threat of fear to cripple the progression of humanity, as the importance of individual rights and freedoms are the key stakeholders which separate democracies from other forms of governance. Therefore, I argue that the restriction of civil liberties as an antiterrorist strategy through the application of a torture warrant system as evidence of the case study mentioned, will not be effective due to the need to uphold international laws and democratic objectives. Instead, the use of smart power through good governance tools, can strengthen prevention measures in the long term, by upholding the rule of law which in turn will build a stronger relationship between peace and security during the remaining years of the wave of religious terrorism.

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