

Reconstituting 'Human Security' in a New Security Environment: One Australian, Two Canadians and Article 3 of the Universal Declaration of Human Rights

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I. Introduction

This article explores a controversial claim by the Commonwealth Attorney-General that counter-terrorism legislation is justified by reference to the obligations of governments to ensure their citizens' human security, which, in turn, is suggested to flow from article 3 of the Universal Declaration of Human Rights (UDHR).¹ As the title suggests, the article focuses upon and analyses the views of the Attorney-General (the one Australian) and two Canadians influential in the field of human security, as the Attorney-General's particular assertions regarding human security and human rights have been articulated and advanced by citing the writings of these two Canadians, Irwin Cotler and Louise Arbour.

The article commences with a conceptual and thematic overview of a series of claims by the Commonwealth Attorney-General, positioning counter-terrorism national security measures within the framework and language of human rights. There follows an examination of the conventional understandings of the concept of human security in an international context. The article proceeds to a discussion of the relationship between human rights and human security as articulated by various United Nations (UN) bodies, including those developing counter-terrorism responses. Both of these discussions provide necessary background material to obtain a clear understanding of the Australianised reconstruction of human security and the extent of departure in that reconstruction from mainstream understandings. It is then demonstrated that the concept of human security is appropriated and re-invented to be presented as synonymous with a framework for the realisation of rights.

A detailed analysis is then made of article 3 of the UDHR as the claimed source of government obligations to enact security legislation in keeping with the Attorney-General's reconstructed concept of human security. This illustrates that the history and circumstances of article 3 make that claim problematic and contentious on several levels. It is also noted that the first invocation of human

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¹ Universal Declaration of Human Rights, GA Res 217A (1948).

security to justify counter-terrorism legislation came some time after the initial raft of counter-terrorism legislation. The writings of two prominent Canadians, Irwin Cotler and Louise Arbour, are then examined to reveal that the claim that their work supports this particular conception of human security is inaccurate and unjustifiable. Further difficulties are then exposed in the elision from article 3 to a claimed human right of safety and security, as a component of a reinvented 'human security'. It is concluded that this radical departure from conventional understandings of the term human security and its disconnection from a broad international human rights framework creates real risks for defending the structures, institutions and practices of Australian democracy against international terrorism, whilst affording no clear guarantee of security of the person. Indeed, the article will demonstrate that the term human security is being used inappropriately.

II. Examining the Australian Context in which the Term Human Security has Emerged

Following the 11 September 2001 attacks, extensive counter-terrorism legislative reform occurred throughout the world, including of most direct comparative relevance to Australia, in the common law democracies of the United States,² United Kingdom,³ Canada⁴ and New Zealand.⁵

Australia is distinctive amongst this group for the nature of its human intelligence-gathering model,⁶ the fact that counter-terrorism legislative reform

² USA Patriot Act 2001 Public Law No 107-56.

³ The Terrorism Act 2000 (UK) was enacted prior to 11 September 2001 and subsequently amended after that date by the Anti-Terrorism Crime and Security Act 2001 (UK). Significant subsequent UK counter-terrorism legislation has included the Criminal Justice Act 2003 (UK), the Prevention of Terrorism Act 2005 (UK) and the Terrorism Act 2006 (UK). The Prevention of Terrorism Act 2005 (UK) instituted a system of control orders following the House of Lords decision in *A (FC) and others v Secretary of State for the Home Department* [2005] 2 WLR 87. The Terrorism Act 2006 (UK) creates, *inter alia*, new offences of the encouragement of terrorism (s 1), dissemination of terrorist publications (s 2), preparation of terrorist acts (s 5), training for terrorism (s 6) and attendance at a place used for terrorist training (s 8), as well as extending the maximum period of detention by judicial authority to 28 days (ss 23 and 24).

⁴ Anti-Terrorism Act 2001(Canada) ch.41 and Public Safety Act 2004 (Canada), ch 15.

⁵ Terrorism Suppression Act 2002 (NZ) and the Counter-Terrorism Bill 2003 (NZ), the provisions of which were incorporated into three groups of existing legislation: the Crimes Act 1961 (NZ); the Terrorism Suppression Act 2002 (NZ) ; and the Misuse of Drugs Amendment Act 1978 (NZ), the New Zealand Security Intelligence Service Act 1969 (NZ), the Sentencing Act 2002 (NZ) and the Summary Proceedings Act 1957 (NZ): see A Conte, 'Crime and Terror: New Zealand's Criminal Law Reform Since 9/11' (2005) 21 *New Zealand Universities Law Review* 635, 636.

⁶ The legislation permits the renewable, 168-hour detention of persons not suspected of any terrorism offence for the purposes of intelligence gathering compulsory questioning: see Div 3, Pt III of the ASIO Act 1979 (Cth). For outlines of the detention and questioning powers see G Carne, 'Brigitte and the French Connection: Security Carte Blanche or A La Carte?' (2004) 9 *Deakin Law Review*

has been shaped in the absence of a bill of rights,⁷ and the resultant reliance upon parliamentary mechanisms for scrutinising human rights compliance. In particular, we are reliant on committee review processes that are stretched across numerous legislative enactments and which take place in an increasingly truncated and hastened process⁸ following the government's obtaining control of the Senate after 1 July 2005.

In the context of the many existing Australian counter-terrorism legislative enactments⁹ and the constant revision and reworking of that legislation,¹⁰ one

573, 582-86 and M Head, "Counter-Terrorism" Laws: A Threat To Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 666, 677-80. The Parliamentary Joint Committee on ASIO, ASIS and DSD reviewed this legislation in 2005: see *ASIO's Questioning and Detention Powers Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979*, Parliament of Commonwealth of Australia (November 2005). On 29 March 2006, the Attorney-General introduced the ASIO Legislation Amendment Bill 2006 (Cth), which will re-enact the questioning and detention provisions to expire in July 2016: See House of Representatives, *Debates* (29 March 2006) 4-5 and Attorney-General, 'ASIO's Questioning and Detention Regime to Continue' (Press Release 29 March 2006) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_First_Quarter_29_March_2006_-_ASIO'>.

⁷ Australia is the only one of the listed comparable common law democracies without a bill of rights.

⁸ A clear example of this being the reference by the Senate on 3 November 2005 of the Anti-Terrorism Bill (No 2) 2005 (Cth), a bill of approximately 140 pages, to the Senate Legal and Constitutional Legislation Committee, for inquiry and report by 28 November 2005. Only three days of public hearings were held and only in Sydney, contrary to the familiar sitting pattern of Sydney, Canberra and Melbourne.

⁹ See eg the numerous legislative enactments mentioned in *Australian Government National Security Measures since 11 September 2001: Statement by the Attorney-General P Ruddock* (2004) Attorney-General <<http://www.ag.gov.au/agd/www/MinisterRuddockhome.nsf/Page/RWP5BBE566F5FCF596CCA256E3F001DA008?OpenDocument>>. The legislation includes the Security Legislation Amendment (Terrorism) Act 2002 (Cth), the Suppression of the Financing of Terrorism Act 2002 (Cth), the Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002 (Cth), the Telecommunications Interception Legislation Amendment Act 2002 (Cth), the Border Security Legislation Amendment Act 2002 (Cth), the Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002 (Cth), the Criminal Code Amendment (Espionage and Related Matters) Act 2002 (Cth), the Criminal Code Amendment (Offences Against Australians) Act 2002 (Cth), the Crimes Amendment Act 2002 (Cth), the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth), the ASIO Legislation Amendment Act 2003 (Cth), the Australian Protective Service Amendment Act 2003 (Cth), the Crimes (Overseas) Amendment Act 2003 (Cth), the Criminal Code Amendment (Hizballah) Act 2003 (Cth), the Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003 (Cth), the Criminal Code Amendment (Terrorism) Act 2003 (Cth) and the Maritime Transport Security Act 2003 (Cth). Subsequent legislation includes the Anti-Terrorism Act 2004 (Cth), the Anti-Terrorism Act (No 2) 2004 (Cth), the Anti-Terrorism Act (No 3) 2004 (Cth), the Aviation Transport Security Act 2004 (Cth), the Aviation Transport Security

of the more remarkable developments can be traced to a series of comments and claims by the Commonwealth Attorney-General, the Honourable Philip Ruddock, of a new relationship between counter-terrorism national security measures and the maintenance of human rights. The claim draws upon the atmospherics of the 'new security environment', a term of broad and general reference, signalling a need to think and respond to the threat of terrorism in ways previously considered inimical to human rights. Such comments are made superficially plausible and attractive by the absence of a bill of rights and the resulting unfamiliarity in Australia with the content of human rights.

The attraction of this new relationship and its presentation in human rights terminology appears to be its potential for rationalising sweeping powers and for suspending critical judgment upon what traditionally would have been characterised as significant and serial human rights encroachments. Reforms producing noticeable accretions of executive power can then be positively presented as advancing human rights and as affirming government engagement with counter-terrorism issues. Controversy surrounding such measures is neutralised in *human* terms, which then facilitates further rapid and serial counter-terrorism law reform.

In addition to a general positioning of counter-terrorism measures within the language of human rights, more specific techniques are used in support of government claims. First, article 3 of the UDHR, which provides that 'everyone has the right to life, liberty and security of person', is cited. The second technique is to marshal some of the public commentary of international figures,¹¹ such as Canadian Justice Minister and Attorney-General, Irwin

(Consequential Amendments and Transitional Provisions) Act 2004 (Cth), the Criminal Code Amendment (Terrorist Organisations) Act 2004 (Cth), the Intelligence Services Amendment Act 2004 (Cth), the Australian Security Intelligence Organisation Amendment Act 2004 (Cth), the National Security Information (Criminal Proceedings) Act 2004 (Cth), the National Security Information (Criminal Proceedings) (Consequential Amendments) Act 2004 (Cth), the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), the Surveillance Devices Act 2004 (Cth), Telecommunications (Interception) Amendment (Stored Communications) 2004 (Cth), the Maritime Transport Security Amendment Act 2005 (Cth), the National Security Information (Criminal Proceedings) Amendment (Application) 2005 (Cth), the National Security Information Legislation Amendment 2005 (Cth), the Anti-Terrorism Act 2005 (Cth), the Anti-Terrorism Act (No 2) 2005 (Cth), the Telecommunications (Interception) Amendment Act 2006 (Cth), the Maritime Transport and Offshore Facilities Security Amendment (Security Plans and Other Measures) Bill 2006 (Cth) and the Australian Security Intelligence Organisation Legislation Amendment Bill 2006 (Cth).

¹⁰ As indicated in the various Acts above, many of which amend earlier enacted counter-terrorism legislation. Further extensive re-working of national security counter-terrorism legislation occurred in the wake of the July 2005 London bombings, principally in the form of the Anti-Terrorism Act (No 2) 2005 (Cth), instituting amongst other things, control orders, preventative detention, orders to produce and reform that arguably broadened seditious offences.

¹¹ Other international figures cited include the UN Secretary-General Kofi Annan: see P Ruddock, 'Australia's Legislative Response to the Ongoing Threat of

Cotler¹² and former Canadian Supreme Court Justice and present UN High Commissioner for Human Rights, Louise Arbour,¹³ to lend credibility to the thesis that national security counter-terrorism measures are compatible with and guarantee the protection of human rights. A third technique is an elision or inflation in language from the rights to life, liberty and the security of the person to a fully fledged human right of safety and security, indeed a right seen as pre-eminent and overriding other rights, linked to a government obligation to ensure the realisation of that right.¹⁴

Each of these developments is traceable to the Attorney-General's visit to Canada in 2004¹⁵ and has been collectively described by him as constituting a 'New Framework'.¹⁶ This framework notionally supersedes or downgrades the language of balancing¹⁷ national security and civil liberties, shifting the focus

Terrorism' (2004) 27 *University of New South Wales Law Journal* 254, 254, fn 3 and the former UK Home Secretary, David Blunkett: see 'Press Conference – Recent Developments In National Security' (Media Release, 2004) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Interview_Transcripts_2004_Transcripts_26_February_2004_-_Transcript_of_Press_Conference_-_Recent_Developments_in_National_Security>.

¹² This matter will be discussed under the heading 'Two Security Conscious Canadians: Irwin Cotler and Louise Arbour', below.

¹³ Ibid.

¹⁴ A stark example of this appears in a letter from the Attorney-General dated 2 August 2004 to a Muslim Communities representative <<http://www.amcran.org/images/stories/replyletters/Ruddockp4.jpg>>, stating that 'The Government does not assume that protecting national security is opposed to protecting our civil rights, particularly the most fundamental right of all – the right to human security. The achievement of these goals should not be seen as separate ideals. Indeed, Australia's human rights obligations under both the International Covenant of Civil and Political Rights and the Universal Declaration of Human Rights include the right to security.'

¹⁵ See 'Statement by the Attorney-General Philip Ruddock on National Security – Overseas Developments' (Media Release, 19 February 2004) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2004_Speeches_19_February_2004_-_Statement_-_National_Security_-_Overseas_Developments>.

¹⁶ See *A New Framework: Counter-Terrorism and The Rule of Law* (2004) Attorney-General <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2004_Speeches_20_April_2004_-_Speech_-_A_New_Framework:_Counter_Terrorism_and_the_Rule_of_Law> reprinted in *The Sydney Papers* (Autumn 2004), 113.

¹⁷ See eg earlier comments: *The legislation needed to strike a balance between greater national security and individual liberties: The Commonwealth Response to September 11: The Rule of Law and National Security* (2003) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2003_Speeches_10_November_2003_-_Speech_-_Gilbert_and_Tobin_Centre_of_Public_Law>; *Striking the Right Balance is a very appropriate theme for this year's Security In Government Conference: Security in Government Conference Opening and Welcome Address* (2004) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2004_Speeches_17_March_2004_-_Speech_-_Security_in_Government_Conference>. The balancing metaphor persists in other discussion about counter-terrorism law matters: see 'Counter-Terrorism and Civil Liberties – the right balance?' (Paper Presented at the Safeguarding Australia 2005

away from language expressing a need to accept costs and tradeoffs¹⁸ to gain the protective benefits of counter-terrorism legislation. The chronology of the emergence of 'human security' as an Australian concept, and the reference to its Canadian conceptualisations in order to support the Australian version, make it important to examine the Canadian materials.

Drawing together these various strands, the term 'human security'¹⁹ is used to label the phenomenon of the compatibility of national security counter-terrorism measures with human rights. The nomenclature clearly derives from the Human reference in the UDHR. The noun 'security' is softened adjectivally, with a warming, personalised and re-assuring context cultivated by the word 'human'. This usage of 'human security' by the Attorney-General however, takes on a distinctive, if contestable, meaning, most significantly in its claim that counter-terrorism measures provide the framework for the enjoyment of liberties and rights.

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- the 4th Homeland Security Summit and Exposition, National Convention Centre, Canberra, 12-14 July 2005) <<http://www.safeguardingaustraliaconference.org.au/program.html>> and 'Balancing National Security and Human Rights: Australia and the United States' (Paper Presented at the Fulbright Public Lecture, Faculty of Law, University of Melbourne and Liberty Victoria, 21 June 2005).
- 18 'We don't live in an ideal world. We live in a world of trade-offs. And we now live in a world where we must accept the costs associated with protecting ourselves from terrorism': 'The Commonwealth Response to September 11: The Rule of Law and National Security' above n 17; 'The challenge we face is to ensure that the cost of the security measures is not excessive or unjustifiable. This is a difficult balance to strike': 'Security in Government Conference Opening and Welcoming Address', above n 17.
- 19 The use of 'human security' is found in a number of examples – see the 'Statement by the Attorney-General Philip Ruddock On National Security – Overseas Developments' (Media Release, 19 February 2004) above n 15; 'A New Framework: Counter Terrorism and the Rule of Law' (Media Release, 20 April 2004) above n 16; 'Attorney-General Rejects Amnesty Criticism' (Media Release, 27 May 2004) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2004_Second_Quarter_27_May_2004_-_Attorney-General_rejects_amnesty_criticism_-_0812004> 'International and Public Law Challenges for the Attorney General' (Media Release, 8 June 2004) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2004_Speeches_08_June_2004_-_Speech_-_Centre_for_International_and_Public_Law>; 'Australia's Legislative Response To The Ongoing Threat of Terrorism' above n 11; 'Security in Government Conference 2005 Opening and Welcome Address' 10 May 2005 <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2005_Speeches_10_May_2005_-_Speech_-_Security_in_Government_Conference_2005_-_Opening_and_Welcome_Address>; 'Hardline security a UN right' *The Australian* (26 July 2005) 1, citing the Attorney-General's comments about the 'legal concept' of human security. Quotations from several of these uses of 'human security' are included in the later section 'Two Security Conscious Canadians: Irwin Cotler'. See also letter of Attorney-General Hon P Ruddock dated 2 August 2004 to Muslim Community Representatives, above n 14, making reference to the 'right to human security'.

As will be seen, this use of 'human security' is starkly at odds with its conventionally understood scope and meaning.²⁰ The right to security of the person in article 3 is simply presented as the concept of human security. This *Australian* utilisation of 'human security' as a purported *legal* justification and quasi-*legal* concept provides a rhetorical *political* anaesthesia: potent in fostering the suspension of critical assessment of the erosion of human rights, in failing to audit and analyse the costs and detriments in the nature of the security obtained, and in shading and merging the interests of the individual into the interests of the executive state. Throughout this article, the term 'human security' – with inverted commas – is used to signify this particularly Australianised conception of human security.

III. The Concept of Human Security: Conventional and Mainstream Appraisals

To obtain a full appreciation of the dimensions of this Australianised re-constitution of the meaning of 'human security', it is essential to examine understandings of human security in an international context. Such examination will demonstrate the breadth, subtlety and spectrum of conventional notions of human security, but it will also illustrate how far the new version propagated in the Australian context of counter-terrorism responses departs from common understandings and misappropriates and re-invents the term 'human security'. The extent of that departure is such as to discount any claim that what is being pursued is a dialogue or discussion about an elastic concept.

Whilst no universally accepted definition of human security exists,²¹ several examples confirm the peculiarities of the Australian version. The Secretary-General of the UN has observed:

[h]uman security, in its broadest sense, embraces far more than the absence of violent conflict. It encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities to

²⁰ As Bronitt and McSherry observe, 'A cursory review of the case law under the "right to security" in international human rights law would reveal a basic concern with confining the power of the State to coerce its citizens through powers of arrest and detention. It would seem that in this new era, fundamental human rights related to liberty and security can acquire radically new meanings': S Bronitt, and B McSherry *Principles of Criminal Law* (2nd ed, 2005) 875. See also C Michaelsen, 'Security Against Terrorism: Individual Right or State Purpose?' (2005) 16 *Public Law Review* 178, 180 and the discussion of the *travaux préparatoires* of the article 6 right to life in the ICCPR under the headings 'Towards an understanding of the claimed source of "human security": Article 3 of the Universal Declaration of Human Rights: Everyone has the right to life, liberty and security of person' and 'A Right to Safety and Security?: Article 9 ICCPR: Liberty and Security of the Person', which follow.

²¹ See 'Workshop: Measurement of Human Security Summary of Deliberations' (30 November 2001) Harvard University JFK School of Government, 2. On 24 October 2005, the UN General Assembly adopted GA Res 60/1 (2005) which, amongst other things, committed the General Assembly to discussing and defining the notion of human security: see *2005 World Summit Outcome* [143] UN Doc A/Res/60/1.

fulfil his or her potential. Every step in this direction is also a step towards reducing poverty, achieving economic growth and preventing conflict. Freedom from want, freedom from fear, and the freedom of future generations to inherit a healthy natural environment – these are the interrelated building blocks of human – and therefore national – security²² [and]

... this simple but powerful theme: the notion that every man, woman and child must have clean water, enough food to eat, adequate shelter, basic health care, a decent education, protection from violence and a popularly elected government.²³

Similarly, the President of the UN General Assembly has commented:

[h]uman security is a people-centred principle. It is a principle that recognizes that people are granted security not only by force of arms, absence of tensions or violent crime, but also by socio-economic well-being, social justice, observance of human rights, application of national and international law, access to food and health care, education, and by sustaining the environment. Its realization weeds out people's basic insecurities and vulnerabilities. It improves the quality of life, widens opportunities for inclusion and participation in decision making processes, and opens opportunities for personal fulfilment and enjoyment. It goes hand in hand with good and democratic governance.²⁴

The Commission on Human Security defined the concept as:

To protect the vital core of all human lives in ways that enhance human freedoms and human fulfilment. Human security means protecting fundamental freedoms – freedoms that are the essence of life. It means protecting people from critical (severe) and pervasive (widespread) threats and situations. It means using processes that build on people's strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, likelihood and dignity ... The vital core of life is a set of elementary rights and freedoms people enjoy. What people consider to be "vital" – what they consider to be "of the essence of life" and "crucially important" – varies across individuals and societies. That is why any concept of human security must be dynamic.²⁵

A distinctive characteristic of human security is that the referent or focus of security is upon the individual, rather than upon the security of the state.²⁶ As a consequence, the term human security is transformative of how security is conceptualised, prioritised and acted upon. These changes provide new personal dimensions and breadth to the concept of security, whilst demanding that

22 'Secretary General Salutes International Workshop on Human Security in Mongolia' (UN Press Release SG/SM/7382, 8 May 2000).

23 'Secretary General Luads Convern of Sergio Vieira De Mello for Human Security' (UN Press Release, SG/SM/9061 IHA/841, 8 December 2003).

24 'Human Security' Depends not Only on Peace of Arms but on Socio-Economic Well-Being, General Assembly President Says' (UN Press Release, GA/SM/290, 16 September 2002).

25 Commission on Human Security, *Human Security Now* (2003) 4.

26 'First, a human security approach says that security *should not* be measured in terms of the security of human people, in terms of their safety and their ability to access basic human needs without disruption': D Newman, 'A Human Security Council? Applying a "Human Security" Agenda to Security Council Reform' (1999) 31 *Ottawa Law Review* 215, 219.

state-centred conceptions of security no longer monopolise or enjoy priority in a security framework.²⁷ Addressing the extent of this change involves a great deal more than simply appropriating the concept and re-labelling the old paradigm of state security. In particular, attitudinal change and resource implications are quite exceptional:

People's interests or the interests of humanity, as a collective, become the focus. In this way, security becomes an all-encompassing condition in which individual citizens live in freedom, peace and safety and participate in the process of governance. They enjoy the protection of fundamental rights, have access to resources and the basic necessities of life, including health and education, and inhabit an environment that is not injurious to their health and well-being. Eradication of poverty is thus central to ensuring the security of all people, as well as the security of the state.²⁸

A second distinctive characteristic of human security is its very significant connection with substantive human rights law. That connection does not selectively include or exclude particular human rights from the range of human rights on the basis of their pre-conceived compatibility with some particular conception of human security. Instead, human security treats that connection holistically and symbiotically. Nor is there any particular emphasis upon the relative status, or a hierarchy, of one class of rights as against other classes of rights.

As with the definition of human security, there are a number of different conceptions of the relationship between human security and human rights:

Human rights and human security can ... fruitfully supplement each other. On the one hand, since human rights can be seen as a general box that has to be filled with specific demands with appropriate motivational substantiation, it is significant that human security helps to fill one particular part of this momentous box through reasoned substantiation ... On the other, since human security as an important descriptive concept demands ethical force and political recognition, it is useful that this can be appropriately obtained through seeing freedoms related to human security as an important class of human rights. Far from being in any kind of competition with each other, human security and human rights can be seen as complementary ideas.²⁹

It is submitted that international human rights norms define the meaning of human security ... It was a major breakthrough of the Universal Declaration of Human Rights to provide basic guarantees regarding food, health, education, housing, protection of the family, democracy, participation, the rule of law, and protection against enslavement, torture, cruel or inhuman or degrading treatment or punishment. These seminal provisions were amplified in the subsequent conventions and they have a simple rationale: these human rights and fundamental freedoms must be respected, assured, and protected, if the individual human being is to be secure, to develop to the fullness of his or her personality, and to breathe the air of liberty ... the essence of human security is to

²⁷ Ibid: these developments involve a clear shift in dominant focus to human interests.

²⁸ Above, n 25, 3.

²⁹ Ibid 9.

respect the human rights and fundamental freedoms that have been distilled and articulated by the international community.³⁰

We reaffirm the conviction that Human Rights and the attributes stemming from human dignity constitute a normative framework and a conceptual reference point which must necessarily be applied to the construction and implementation of the notion of Human Security.³¹

Although there is some variation in the above descriptions, all contemplate human rights as intricately linked to the realisation of human security and that, given the fairly broad definitions of what constitutes human security, it is illogical to identify a single human right, such as the right to life, liberty and security of the person, as synonymous with human security.³²

The interconnectedness and non-exclusivity of human rights within the concept of human security is confirmed in the language of various other UN documents dealing with the interface between human rights and counter-terrorism, such as UN Security Council Resolutions adopted after SC Resolution 1373,³³ and the resolutions of the Sub-Commission on the Promotion and Protection of Human Rights,³⁴ and the Commission on Human Rights,³⁵ and the views of the UN High Commissioner for Human Rights.³⁶

³⁰ B Ramcharan, *Human Rights and Human Security* (2002) 9-10.

³¹ Workshop on Relationship Between Human Rights and Human Security, San Jose Costa Rica, 2 December 2001.

³² 'Respecting human rights is at the core of protecting human security. The 1993 Vienna Declaration of Human Rights stresses the universality and interdependence of the human rights of all people. Those rights have to be upheld comprehensively – civil and political, as well as economic and social – as proclaimed in the legally binding conventions and protocols that derive from the 1948 Universal Declaration on Human Rights': above n 25, 10.

³³ See *High-level meeting of the Security Council: combating terrorism*, SC Res 145 UN doc, S/RES/1456 (2003) [6] and *Threats to international peace and security caused by terrorist acts*, SC Res 1566, UN Doc. S/RES/1566 (2004) preamble, which state that 'States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law'.

³⁴ Sub-Commission on Human Rights Res 2004/21, *Terrorism and Human Rights*, 2: 'all measures to counter terrorism must be in strict conformity with international law, including international human rights and humanitarian law standards and obligations'.

³⁵ Commission on Human Rights Res 2005/80 *Protection of human rights and fundamental freedoms while countering terrorism*, 2: 'that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law ... that everyone is entitled to all the rights and freedoms recognized in the Universal Declaration of Human Rights without distinction of any kind' and *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, UN Doc E/CN.4/2005/103 (2005) (submitted in accordance with Commission on Human Rights Res 2004/87) 6: 'Success in the struggle against terrorism, however will require the international community not just to respond to its violent consequences, but to uphold the rule of law in combating it'.

³⁶ *Report of the High Commissioner for Human Rights Promotion and Protection of Human Rights: Protection of human rights and fundamental freedoms while*

A quite specific and topical illustration of the scope of the departure of usages of 'human security' from common understandings is the focus in recent years on the relationship of environmental security to human security.³⁷ Environmental security was initially conceived as one of seven prerequisites to human security, under a broad umbrella of freedom from want, in the United Nations Development Program 1994 Human Development Report,³⁸ and was also advocated by the UN Secretary General.³⁹ The relationship between human security and the environment demonstrates the broad nature of the concept of human security and the impossibility of limiting it to one set of rights as contained in article 3 of the Universal Declaration.⁴⁰

IV. United Nations Institutional Responses: Human Rights and Human Security

These characteristics of the relationship between human rights and human security are further illustrated by the responses of various UN institutions to the role of human rights in the security sought to be achieved through counter-terrorism measures. A first example is found in the institutional

countering terrorism UN Doc E/CN.4/2005/100 (2005), 4: 'the High Commissioner for Human Rights, Louise Arbour, has stressed her view that counter-terrorism measures, whilst both urgent and necessary, must be taken within a context of strict respect for human rights obligations'.

³⁷ See eg M Redclift, 'Addressing the Causes of Conflict: Human Security and Environmental Responsibilities' (2000) 9 *Review of European Community and International Environmental Law* 44, 44: 'Security has begun to be understood at different levels of political analysis, rather than exclusively at the level of the nation state. Among those interested in human security and the environment it is increasingly accepted that 'the state [is] no longer privileged as the only meaningful *object* to be secured ... Research into human security and the environment has sought to redefine the concept of 'security' – and by implication those of 'insecurity' and 'conflict' – to include a new range of threats to social stability, such as rapid population growth, natural resource scarcity, economic vulnerabilities and environmental degradation. At the same time it has been argued that human security might be seen not only as *freedom from* specific threats (population explosion, desertification, genetic erosion etc) but also as *freedom to* participate in the wider society and environment.'

³⁸ See Human Development Report 1994, 28-30, discussing environmental issues such as water, land, salination, air pollution, deforestation and natural disasters. In commenting upon the Human Development Report 1994, Jones conveys an understanding that 'environmental threats facing countries are a combination of the degradation of both local ecosystems and the global system. In developing countries, one of the greatest environmental threats is that of water scarcity. Water scarcity is increasingly a factor in ethnic strife and political tension. Air pollution too, in industrial and developing countries alike, is a major environmental threat': J Jones, 'Human Security and social development' (2004) 33 *Denver Journal of International Law* 92, 97.

³⁹ K Annan *Letters to Future Generations* Towards a culture of peace <<http://www.unesco.org/opi2/lettres/TextAnglais/AnnanE.html>>: 'Human security can no longer be understood in purely military terms. Rather, it must encompass economic development, social justice, environmental protection, democratization, disarmament, and respect for human rights and the rule of law.'

⁴⁰ Above, n 37.

response and relationship of the Office of the High Commissioner for Human Rights to the activities of the Counter-Terrorism Committee (CTC), established under UN Security Council Resolution 1373. The primary concern of the Office of the High Commissioner for Human Rights has been that SC Resolution 1373 be implemented in a manner that is consistent with and reinforces human rights. In the 2004 Report of the High Commissioner for Human Rights,⁴¹ mention is made of SC Resolution 1566 of 2004, which reminds states that counter-terrorism measures must comply with obligations under international law, in particular international human rights, refugee and humanitarian law. The report provides details of dialogue and liaison between the two bodies⁴² on counter-terrorism-related matters and the appointment by the CTC of a staff expert on human rights, humanitarian law and refugee law.⁴³ With specific reference to the submission of states' reports to the CTC pursuant to paragraph 6 of SC Resolution 1373, the Office of the High Commissioner for Human Rights has briefed the CTC that it would 'be desirable for the Counter-Terrorism Committee to pose questions to Member States on the human rights dimensions of their reports to the Counter-Terrorism Committee',⁴⁴ and the Office has provided detailed principles, considerations, and guidance as to issue identification and questions for use by the CTC in responding to the submission of states reports.⁴⁵ This guidance is founded upon the provisions of the International Covenant on Civil and Political Rights (ICCPR)⁴⁶ and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁴⁷ and includes advice as to appropriate methodology and issues such as limitations on, and derogation from, rights.

⁴¹ Above, n 36.

⁴² See also 'Human Rights Committee Briefed on Work of Counter-Terrorism Committee' (UN Press Release, HR/CT/630 27 March 2003).

⁴³ Above, n 36.

⁴⁴ Human Rights and Counter-Terrorism Measures Security Council Counter-Terrorism Committee UN Headquarters, Briefing by Sir Nigel Rodley, Vice-Chairperson, Human Rights Committee (19 June 2003).

⁴⁵ See first, Proposals for 'Further Guidance' for the submission of reports pursuant to para 6 of SC Res 1373 (2001) (intended to supplement the Guidance of 26 October 2001) 'Compliance with International Human Rights Standards' and second, 'Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective on Counter-Terrorist Measures'. See also *Protection of human rights and fundamental freedoms while countering terrorism*, Study of the UN High Commissioner for Human Rights Report submitted to the UN General Assembly [16] UN Doc A/59/428 (2004); 'Successive CTC chairs as well as the new head of the Counter-Terrorism Committee Executive Directorate (CTED) have welcomed dialogue with the OHCHR on protecting human rights while countering terrorism. Information received from CTED in September 2004 indicated that it is the Executive Director's intention to include among his staff an expert on human rights, humanitarian law and refugee law'. UN High Commissioner for Human Rights Mary Robinson and Sergio Vieira De Mello also briefed the Counter-Terrorism Committee respectively on 19 February 2002 and 21 October 2002.

⁴⁶ International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171.

⁴⁷ UN Convention Against Torture and Other Cruel, Inhuman or Degrading

Of equal institutional interest is the 2005 resolution of the Commission on Human Rights,⁴⁸ reaffirming that 'States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law'⁴⁹ and the decision of the Commission to appoint a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.⁵⁰ The functions of the Special Rapporteur include the following:

- (a) To make concrete recommendations on the promotion and protection of human rights and fundamental freedoms while countering terrorism ... (b) To gather, request, receive and exchange information and communications ... on alleged violations of human rights and fundamental freedoms while countering terrorism ... (c) To identify, exchange and promote best practices on measures to counter terrorism that respect human rights and fundamental freedoms ... and (d) To bring to the attention of States concerned and, when appropriate, to the Commission on Human Rights or any other relevant United Nations body situations that could result in violations of human rights and fundamental freedoms while countering terrorism.⁵¹

Those functions clearly endorse conventional conceptions of human security as previously outlined.

Particular examples of the relationship between human rights and human security also emerged in two significant reports into the operation of the UN: the report by the UN Secretary-General *In Larger Freedom: towards development, security and human rights for all*⁵² and the earlier report of the High-Level panel on Threats, Challenges and Change appointed by the UN Secretary-General *A more secure world: Our shared responsibility*.⁵³ Both of these reports contain important material, which more fully informs an accurate understanding of human security: and they do so significantly in the context of national and international legal responses to terrorism.

In Larger Freedom's subtitle, 'Development, Security and Human Rights For All', reflects the interconnectedness, indivisibility and mutually reinforcing

Treatment or Punishment (10 December 1984) 1465 UNTS 85.

⁴⁸ *Commission on Human Rights Promotion and Protection of Human Rights: Protection of human rights and fundamental freedoms while countering terrorism*, UN Doc E/CN.4/2005/L.88 (2005).

⁴⁹ Ibid 3 (pt 1).

⁵⁰ Ibid 5 (pt 13) and 'Commission Establishes New Mandates for Experts on Minority Issues, Human Rights and Countering Terrorism and the Sudan' under the heading 'Action on Resolutions on Promotion and Protection of Human Rights' (UN Press Release, 21 April 2005). The appointment of the Special Rapporteur on 28 July 2005 is also referred to in para 6 of *Protecting human rights and fundamental freedoms while countering terrorism - Report of the Secretary General to the UN General Assembly*, UN Doc A/60/374 (2005).

⁵¹ Above, n 48, 5-6, pts (a)-d).

⁵² *In larger freedom: towards development, security and human rights for all - Report of the Secretary General*, UN Doc A/59/2005 (2005).

⁵³ *A more secure world: Our shared responsibility - Report of the Secretary-General's High-level Panel on Threats, Challenges and Change*, UN Doc A/59/565 (2004).

nature of the three elements of freedom.⁵⁴ The report states that the relationship between development, security and human rights has ‘only been strengthened in our era of rapid technological advances, increasing economic interdependence, globalization and dramatic geopolitical change’.⁵⁵

The nature of that freedom is articulated in three organising principles for the report: freedom from want,⁵⁶ freedom from fear⁵⁷ and freedom to live in dignity.⁵⁸ Particular aspects of the report reflect the integrative qualities of a human security approach in the context of responses to the threat of international terrorism. The need to address the threat of catastrophic terrorism, whilst recognised under ‘freedom from fear’ is qualified by the essential role human rights observance must find in that response.⁵⁹ Similarly, ‘freedom to live in dignity’ is closely identified with the pursuit of three core values:

The protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability. No security agenda and no drive for development will be successful unless they are based on the sure foundation of respect for human dignity.⁶⁰

Furthermore, the rule of law is said to be ‘the all-important framework for advancing human security and prosperity’.⁶¹ Observance of human rights is similarly seen as central to the realisation of human security and effective counter-terrorism actions,⁶² not something to be incrementally sacrificed in the pursuit of a false conception of security. Significant also is the panoptic appraisal of the UDHR as enunciating ‘the essentials of democracy’⁶³ and inspiring ‘constitution-making in every corner of the world’,⁶⁴ contributing ‘greatly to the eventual global acceptance of democracy as a universal value’,⁶⁵

⁵⁴ ‘Accordingly, we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights’: above, n 52, 6.

⁵⁵ Above n 52, 5.

⁵⁶ Ibid 7-24.

⁵⁷ Ibid 24-33.

⁵⁸ Ibid 34-39.

⁵⁹ ‘In our struggle against terrorism, we must never compromise human rights. When we do so we facilitate achievement of one of the terrorist’s objectives. By ceding the moral high ground we provoke tension, hatred and mistrust of Governments among precisely those parts of the population where terrorists find recruits’: above n 52, 27.

⁶⁰ Ibid 34.

⁶¹ Ibid 35.

⁶² ‘It would be a mistake to treat human rights as though there were a trade-off to be made between human rights and such goals as security and development. We only weaken our hand in fighting the horrors of extreme poverty or terrorism if, in our efforts to do so, we deny the very human rights that these scourges take away from citizens. Strategies based on the protection of human rights are vital for both our moral understanding and the practical effectiveness of our actions’: above n 52, 37.

⁶³ Ibid 38.

⁶⁴ Ibid.

⁶⁵ Ibid.

instead of a concentration solely upon the UDHR's article 3 aspect of the right to life.

In Larger Freedom drew on the report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility*.⁶⁶ The High-Level Panel's report also stressed the need to integrate human rights and the rule of law with counter-terrorism responses. The report discusses terrorism in the broader context of human security:

Terrorism attacks the values that lie at the heart of the Charter of the United Nations: respect for human rights; the rule of law; rules of war that protect civilians; tolerance amongst peoples and nations; and the peaceful resolution of conflict. Terrorism flourishes in environments of despair, humiliation, poverty, political oppression, extremism and human rights abuse; it also flourishes in contexts of regional conflict and foreign occupation; and it profits from weak State capacity to maintain law and order.⁶⁷

In discussing the development of a comprehensive counter-terrorism strategy, the High-Level Panel's report recognises the risks of eroding the defining characteristics of the societies for which protection is sought⁶⁸ and the counter-productive nature of some responses.⁶⁹ The method of resolving these issues draws upon a broadly comprehended human security orientation:

A thread that runs through all such concerns is the imperative to develop a global strategy of fighting terrorism that addresses root causes and strengthens responsible States and the rule of law and fundamental human rights. What is required is a comprehensive strategy that incorporates but is broader than coercive measures [including] ... development of better instruments for global counter-terrorism cooperation, all within a legal framework that is respectful of civil liberties and human rights.⁷⁰

Developments related to the September 2005 UN World Summit confirm and reinforce these preceding understandings of human security, again doing so in a context where counter-terrorism issues are a prominent theme. Of primary importance is the direct commitment given to the notion of human security:

We stress the right of people to live in freedom and dignity, free from poverty and despair. We recognize that all individuals, in particular vulnerable people,

⁶⁶ See 'Secretary-General welcomes recommendations on a more secure world and strengthened United Nations' (UN Press Release 2 December 2004) <<http://www.un.org/secureworld/>>; Executive Summary: A more secure world: Our shared responsibility, 3-4, and above n 53, 2-3.

⁶⁷ Ibid 45.

⁶⁸ 'Throughout the Panel's regional consultations, it heard concerns from Governments and civil society organizations that the current "war on terrorism" has in some instances corroded the very values that terrorists target: human rights and the rule of law': above n 53, 45.

⁶⁹ 'They did, however, express fears 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': above n 53, 45.

⁷⁰ Ibid 46.

are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential. To this end we commit ourselves to discussing and defining the notion of human security in the General Assembly.⁷¹

The human security-related aspect is developed under three distinct themes. The first, calling for a comprehensive counter-terrorism strategy, commits itself⁷² to the UN Secretary-General's identification of elements of a counter-terrorism strategy.⁷³ A further aspect of counter-terrorism strategy is the stated need to 'reach an agreement on and conclude a comprehensive convention on international terrorism'.⁷⁴ Consistent with earlier approaches, the counter-terrorism strategy must conform to human rights standards.⁷⁵

The second distinct theme related to human security is that of the responsibility to protect civilian populations.⁷⁶ That responsibility was accepted and acknowledged in the UN General Assembly Resolution on the World Summit Outcome.⁷⁷ The third distinct theme related to human security is that of human rights, democracy and the rule of law. Once again, the Outcome document mirrors earlier approaches recognising the interrelated nature of

⁷¹ *Human security*, GA Res 60/1, 2005 World Summit Conference, 2005 World Summit Outcome, [143] UN Doc A/Res/60/1 (2005).

⁷² Ibid [82].

⁷³ That strategy consists of action in a number of areas, including working to dissuade disaffected groups from choosing terrorism as a tactic, denying terrorists the means to carry out their attacks, deterring states from supporting terrorists and developing state capacity to prevent terrorism: See *Secretary-General's Statement to Security Council Summit Press Release - Terrorism Directly Attacks Values for which United Nations Stands*, UN Doc SG/SM/10092 SC/8497 (2005).

⁷⁴ Above n 71 [83]; Letter from President of General Assembly to Secretary General of UN, 3 November 2005, and Fact Sheet 2005 World Summit Outcome.

⁷⁵ Above n 71 [85] 'We recognize that international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter and relevant international conventions and protocols. States must ensure that any measures taken to combat terrorism comply with obligations under international law, in particular human rights law, refugee law and international humanitarian law'. See above n 73 : 'Fifth, we must defend human rights. This is essential if we are to prevent terrorists from unravelling the very fabric of societies they attack.'

⁷⁶ Described in summary in the Fact Sheet above n 74 as 'Clear and unambiguous acceptance by all governments of the collective international responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Willingness to take timely and decisive collective action for this purpose, through the Security Council, when peaceful means prove inadequate and national authorities are manifestly failing to do it.' The Secretary General had placed particular emphasis upon this the collective responsibility to protect civilian populations: See K Annan 'A Glass At Least Half Full' *Wall Street Journal* (19 September 2005).

⁷⁷ Above, n 71 [138] attaching responsibility to protect against genocide, war crimes, ethnic cleansing and crimes against humanity to individual states, and [139], attaching responsibility to the 'international community, through the United Nations ... to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter'.

human rights to the substance of human security issues⁷⁸ and a range of implementation activities have also been outlined.⁷⁹

Similarly, the UN Human Development Report for 2005 endorses an early and broadly-based understanding of human security,⁸⁰ reinforcing that notion by providing some pointed commentary on its relationship to counter-terrorism measures. Whilst observing that the right to life and to security are amongst the most basic human rights,⁸¹ the report compares the number of fatalities from terrorist incidents with the number of deaths from malnutrition, disease and armed conflict⁸² and highlights that fear of terrorist threats in industrialised societies has created 'a distorted perception of the distribution of human insecurity'.⁸³ This relative positioning of terrorist threats within a broad assessment of human security in the 2005 UN Human Development Report leads to more sobering assessments of the relationship of terrorism to issues of human security, endorsing holistic, integrated approaches to human security in order to address terrorism threats.⁸⁴

78 Above, n 71 [119] 'We recommit ourselves to actively protecting and promoting all human rights, the rule of law and democracy and recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations, and call upon all parts of the United Nations to promote human rights and fundamental freedoms in accordance with their mandates' and [121] 'We reaffirm that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis.'

79 See *General Implementation of decisions from the 2005 World Summit Outcome for action by the Secretary-General - Report of the Secretary*, [22]-[24] UN Doc A/60/430 (2005).

80 The report accepts the two aspects of human security of the *Human Development Report 1994*: 'safety from chronic threats, like hunger, disease and repression, and protection from sudden disruptions in the patterns of daily life. Violent conflict undermines human security in both dimensions. It reinforces poverty and devastates ordinary lives': *Human Development Report 2005*, 153. The report similarly observes 'Security, including human security in its broadest sense, is a basic foundation for sustainable development and effective government. Providing security is one of the state's most basic functions. This implies protection from systematic human rights abuses, physical threats, violence and extreme economic, social and environmental risks': *ibid* 162.

81 *Ibid* 151.

82 *Ibid*.

83 *Ibid*.

84 *Ibid* 152: 'Indeed, the "war against terror" will never be won unless human security is extended and strengthened. Today's security strategies suffer from an overdeveloped military response to collective security threats and an underdeveloped human security response'; *ibid* 169: 'the war on terrorism cannot justify brutal violation of human rights and civil liberties and militarized responses to development problems'; and *ibid* 179: 'Defining security narrowly as the threat of terrorism encourages military responses that fail to achieve collective security. What is needed is a security framework that recognizes that poverty, social breakdown and civil conflict are the core components of the global security threat – and the world must respond accordingly.'

V. 'Human Security': Appropriating and Reinventing a Concept

The above discussion of human security provides a clear and self-evident basis to appreciate that the notion of human security adopted by the Attorney-General⁸⁵ significantly departs from conventional and common understandings of the term. The local interpretation involves an appropriation and re-invention of human security to depict counter-terrorism measures as synonymous with a framework for the realisation of human rights. That is a contentious and unproven proposition. It erroneously assumes that a legislated emphasis upon security and safety has itself a neutral or minimal impact upon the individual's access to and enjoyment of civil and political rights free of state interference. It disconnects that legislative approach from a rounded consideration of the relationship between human rights and human security as discussed above.

The Attorney-General's notion of 'human security' is also counter-instinctual given situations where far-reaching, untested and novel laws often produce unexpected consequences and erosion of human rights, especially when drafted outside of the culture and discipline created by a bill of rights, or at the very least, without regard to a presumption of a deliberative culture of checks and balances. An easy, incremental and significant increase in state-centric executive power within counter-terrorism legislation is sharply at odds with the conventional understandings of the term human security and its distinctive focus upon individual needs and empowerment. Invoking 'human security' provides reassurance that distracts or neutralises critical analysis of the impact that counter-terrorism measures have on the range of human rights inherent in the conventional notion of human security. This type of 'human security' truncates debate and masks advances of executive power.

VI. Towards an Understanding of the Claimed Source of 'Human Security': Article 3 of the Universal Declaration Of Human Rights: 'Everyone has the Right to Life, Liberty and Security of Person'

To lend substance to the reinvented and appropriated term 'human security', article 3 of the UDHR has been invoked on numerous occasions.⁸⁶ Article 3 is

⁸⁵ Above n 19.

⁸⁶ See 'Security in Government Conference: Opening and Welcome Address' (Media Release, 10 May 2005) above n 19; 'Attorney-General Rejects Amnesty Criticism' (Media Release, 27 May 2004) above n 19; 'International and Public Law Challenges for the Attorney General' (Media Release, 8 June 2004) above n 19; *2004 Homeland Security Conference Opening Address* (2004) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2004_Speeches_24_August_2004_-_Speech_-_2004_Homeland_Security_Conference> and *Doorstop The Pierre Hotel New York City Subjects: Visit to USA; counter-terrorism; China; Free Trade Agreement* (2005) <<http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/>

presented as both a source of government obligations to enact security legislation and as consistent with 'human security'.

Several observations can be made about the uses of article 3 of the UDHR. First, the use of article 3 to justify counter-terrorism measures was not contemporaneous with the introduction of the raft of counter-terrorism legislation following 11 September.⁸⁷ The approach appears to have been assimilated into the national security pronouncements of the Attorney-General following a 2004 trip to Canada that involved consultations with ministers and officials responsible for national security in that jurisdiction.⁸⁸ Statements made by the Attorney-General prior to this time do not invoke the language of human security: in contrast, there is reference to the trade-offs between civil liberties and national security.⁸⁹ Likewise, the former Attorney-General⁹⁰ consistently favoured the terminology of balance and appropriateness⁹¹ rather than 'human security', in advocating and defending counter-terrorism legislation. The introduction of 'human security' into the counter-terrorism legislative discourse from 2004 strongly suggests that a range of counter-terrorism legislation passed prior to 2004 was in fact not assessed within a 'human security' framework, let alone from a conventional interpretation of human security. The sudden introduction of the term circumstantially provides a rhetorical political

Page/Interview_Transcripts_2005_Transcripts_25_July_2005_-_Transcript_-_Interview_New_York>. See also R Cornell, *A Strategic Approach to National Security* (2005) Security in Government Conference <<http://www.ag.gov.au/agd/WWW/agdHome.nsf/AllDocs/3CC883311E65455BCA256FFF00010C35?OpenDocument>>.

⁸⁷ See 'Australian Government National Security Measures since 11 September 2001', above n 9.

⁸⁸ See 'Statement by the Attorney-General Philip Ruddock On National Security – Overseas Developments' (Media Release, 19 February 2004) above n 15: 'Mr Speaker, the Howard Government has always sought to ensure that any piece of legislation, or measure taken, promotes, in Irwin Cotler's words, "human security"'.⁸⁹

⁸⁹ See eg 'The Commonwealth Response to September 11: The Rule of Law and National Security' (Media Release, 10 November 2003) above n 17: 'The Government has been extremely conscious that our counter-terrorism legislation reflects what the community considers to be necessary, reasonable and acceptable ... The legislation needed to strike a balance between greater national security and civil liberties. We don't live in an ideal world. We live in a world of trade-offs. And we now live in a world where we must accept the costs associated with protecting ourselves from terrorism.'

⁹⁰ The Hon D Williams AM QC MP was Commonwealth Attorney General from 1996 to 2003.

⁹¹ See 'Labor Refuses To Engage On Community Safety' (Media Release, 19 September 2002) <[http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Media_Release_2002_September_2002_Labor_refuses_to_engage_on_community_safety_\(19_September_2002\)](http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Media_Release_2002_September_2002_Labor_refuses_to_engage_on_community_safety_(19_September_2002))>; 'Attorney-General demands power to ban organisations' *The Age* (7 June 2002); 'A-G defends new anti-terrorism laws' ABC *Lateline* (27 November 2001); 'ASIO Bill Passes House of Representatives' (Media Release 27 March 2003) <[http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Media_Releases_2003_March_2003_ASIO_Bill_passes_House_of_Representatives_\(27_March_2003\)](http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Media_Releases_2003_March_2003_ASIO_Bill_passes_House_of_Representatives_(27_March_2003))>.

shorthand to suggest compliance with international human rights standards and norms in the drafting of counter-terrorism legislation.

Second, historical consideration of the background to the UDHR generally and of article 3 in particular, reveal both as a timely reaction by the victorious western powers to Nazi atrocities in the Second World War,⁹² re-stating the primacy of the individual as the referent of human rights protection against the then recent experience of authoritarian state rule. This focus of article 3 is conveniently summarised as follows:

Article 3 sets out three main areas of rights in the sphere of personal integrity (the physical right over one's own body). This is the classic area where the state should ensure that it and other entities do not interfere with the individual, and it is the starting point for protecting individual dignity and rights in a practical sense. The right to life is the right to be able to live, both in the sense of not being killed and being provided with the sustenance to stay alive. The right to liberty is the freedom to do whatever you want to do, from movement (Article 13) to expression (Article 19) to religious practice (Article 18) ... The right to "security of person" is the right to be safe from physical interference, and is further dealt with in Article 5 through the limitation on torture and cruel, inhuman and degrading treatment or punishment.⁹³

The emphasis on protection against state power challenges the claim that the misappropriated and reinvented notion of 'human security' is consistent with and derives from article 3. When reduced to its essentials, that new claim actually invokes article 3 to support the state enacting counter-terrorism measures in pursuit of a collective, community-articulated notion of security, supposedly under which other human rights may be enjoyed and flourish. This usage is starkly at odds with the focus of article 3 on the individual as the referent of security.⁹⁴ In this new analysis, the 'liberty' criterion in article 3 conveniently evaporates and the 'security' of the person criterion is transformed into an executive-articulated conception of 'human security'.⁹⁵

Third, the citation of article 3, without regard to other rights in the UDHR is curious. In one sense, the significance of article 3 is unremarkable and logical given the pre-eminent status of one of the rights it enshrines, the right to life:

A basic human right is the right to life, from which all other human rights stem. This right is a basic human right, because only through it can a human being enjoy other rights. The enjoyment of the right to life is a necessary condition of

⁹² See N O'Neill, S Rice and R Douglas, *Retreat from Injustice* (2nd ed, 2004) 15; J Morsink, *The Universal Declaration of Human Rights Origins, Drafting and Intent* (1999) 39, stating 'that the war experience lies just below the text of Article 3'.

⁹³ Morsink, *ibid* 78.

⁹⁴ Or, as has been alternatively expressed, 'The wording of the UDHR article 3, as it stands, is an example of those provisions in the Declaration that describe the legal position of the individual as a reflex effect of a State obligation not to interfere with the integrity of the individual': L Rehof, 'Article 3' in A Eide et al (eds), *The Universal Declaration of Human Rights – A Commentary* (1992) 75.

⁹⁵ See C Michaelsen, 'Intrusive anti-terror laws: useful or symbolic' *Canberra Times* (13 May 2005) and G Carne, 'Beware a populist approach to counter-terrorism laws' *Canberra Times* (11 August 2005).

the enjoyment of all other human rights, for a person who is deprived of his right to life is automatically also deprived of all other human rights.⁹⁶

However, while it is logical that a person has to exist to enjoy rights, article 2 of the Declaration creates no formal differentiation or hierarchy in the value of rights to be enjoyed: '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.⁹⁷ Furthermore, whilst enjoyment of the right to life is a necessary precursor to the enjoyment of the other rights in the UDHR and might well be described as setting 'the base for all following political rights and civil liberties',⁹⁸ 'the most fundamental right of all'⁹⁹ and as a 'primordial right',¹⁰⁰ it is textually and conceptually linked to liberty and security of the person in a context that articulates that right as a bulwark against state power. Moreover, the explicit and detailed nature of the other rights in the Declaration, particularly economic, cultural and social rights, as well as the content of its Preamble,¹⁰¹ are readily identifiable with the characteristics and qualities of a conventional, broadly-based conception of human security.¹⁰²

One might note that the pre-eminent status given to article 3 as the purported basis for a new form of human security is interesting given that

⁹⁶ F Przetacznik, 'The Right To Life As A Basic Human Right' (1978) 56 *Revue de Droit International* 27. See also H Kabaalioglu, 'The Obligations to "Respect" and to "Ensure" the Right to Life' in B Ramcharan (ed), *The Right To Life In International Law* (1985) 160: 'Furthermore, it is an essential right and all the rights derive from it: if a person is deprived of his right to life, all other human rights will be meaningless'; Y Dinstein, 'The Right to Life, Physical Integrity, and Liberty' in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 114: 'The right to life is incontestably the most important of all human rights. Civilised society cannot exist without the legal protection of human life ... In the final analysis, if there were no right to life, there would be no point in the other human rights.'

⁹⁷ Above n 1, art 2. Indeed, the comprehensive inclusion, within the understanding of human rights in 1948 of civil and political, as well as economic, cultural and social rights in the Declaration, was intended to precede 'more detailed and comprehensive provisions in a single convention that would be approved by the General Assembly and submitted to states for ratification': H Steiner and P Alston, *International Human Rights In Context Law Politics Morality* (2nd ed, 2000) 139.

⁹⁸ 'A United Nations Priority': above n 1, 2.

⁹⁹ C Devine, C Hanson and R Wilde, *Human Rights The Essential Reference* (1999) 77.

¹⁰⁰ Ramcharan, above n 96, 12.

¹⁰¹ 'Whereas the people of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom': part of Preamble to the Universal Declaration of Human Rights, above n 1.

¹⁰² See also the discussion in Ramcharan highlighting activities of the General Assembly and the Commission on Human Rights that safeguarding of the right to life 'is an essential condition on the enjoyment of the entire range of economic, social and cultural, as well as civil and political rights': Ramcharan, above n 96, 4-5. Ramcharan's argument for a broader ambit to be given to the concept of a right to life assimilates a range of other considerations readily identifiable with the UN-orientated conception of human security discussed earlier.

Australia has often strongly objected to the influence of human rights treaty norms in the development of Australian domestic law¹⁰³ and indeed, to major aspects of the operation of the UN treaty committee system.¹⁰⁴ The claim for 'human security' is not articulated through cogent use of *subsequent* human rights treaties directly influenced by and emerging from the UDHR. The influence of article 3 has been most prominent in the drafting of certain articles in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)¹⁰⁵ and the ICCPR. In both treaties, the right to life, liberty and security of the person has been divided into two separate articles.¹⁰⁶

¹⁰³ These issues primarily arose from the High Court's doctrine of legitimate expectation as affecting domestic administrative decision-makers, derived from the UN Convention of The Rights of the Child, in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. See A Downer and D Williams, 'Executive Statement on the Effect of Treaties in Administrative Decision-Making' (1997) 8 *Public Law Review* 120. This Executive Statement replaced an earlier Executive Statement of 10 May 1995 by Foreign Minister G Evans and Attorney General M Lavarch. Various attempts were made in succeeding parliaments in 1995, 1997 and 1999 to pass the Administrative Decisions (Effect of International Instruments) Bill (Cth).

¹⁰⁴ See Minister for Foreign Affairs Press Releases: 'Government to Review UN Treaty Committees', (Press Release, 24-30 March 2000) <http://www.dfat.gov.au/media/releases/foreign/2000/fa024_2000.html>; 'Improving the Effectiveness of United Nations Committees' (Media Release, 29 August 2000) <http://www.dfat.gov.au/media/releases/foreign/2000/fa097_2000.html>; 'Australian Initiative to Improve the Effectiveness of the UN Treaty Committees' (Media Release, 5 April 2001) <http://www.dfat.gov.au/media/releases/foreign/2001/fa043a_01.html>; 'Australia's Criticisms of the UN Human Rights Committee System Validated by New Report' (Media Release, 21 May 2001) <http://www.dfat.gov.au/media/releases/foreign/2001/fa059_01.html>; 'UN Report Has No Credibility' (Media Release, 22 March 2002) <http://www.foreignminister.gov.au/releases/2002/fa0331_02.html>; 'Australia Elected Chair of UN Commission on Human Rights' (Media Release, 20 January 2004) <http://www.foreignminister.gov.au/releases/2004/fa006_04.html>; 'Australia Re-Elected to Three UN Bodies' (Media Release, 28 April 2005) <http://www.foreignminister.gov.au/releases/2005/fa054_05.htm>; 'Progress Made to Reform UN Treaty Bodies' (Media Release, 9 March 2006) <http://www.foreignminister.gov.au/releases/2006/joint_ruddock_un>; H Charlesworth and P Mathew, 'A response to the government's human rights treaty review' *The Age* (12 September 2000); E Evatt, 'How Australia "Supports" the United Nations Human Rights Treaty System' (2001) 12 *Public Law Review* 3; and D Otto, 'From "reluctance" to "exceptionalism": the Australian approach to domestic implementation of human rights' (2001) 26 *Alternative Law Journal* 219. This rejection of UN standards and procedures has occurred, notwithstanding the continued existence and operation of the Human Rights and Equal Opportunity Commission, with relevant anti-discrimination legislation based on international covenants, such as the Racial Discrimination Act 1975 (Cth), Sex Discrimination Act 1984 (Cth) and the Disability Discrimination Act 1992 (Cth), as well as the amendments to the Criminal Code Act 1995 (Cth) incorporating certain international crimes from the Rome Statute for the International Criminal Court.

¹⁰⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), 213 UNTS 222.

¹⁰⁶ In the ECHR, art 2 [1] states: 'Everyone's right to life shall be protected by law.'

It is particularly odd that the claim for 'human security' is underpinned by a dominant reference to article 3 of the UDHR, instead of the later, binding obligations upon Australia of the ICCPR.¹⁰⁷ (Of course, binding obligations are also imposed by any separate customary international law or *jus cogens* flowing from the UDHR.¹⁰⁸) The right to life as it appears in article 6 of the ICCPR exists alongside several other non-derogable rights,¹⁰⁹ while derogation from the right to liberty and security of the person in article 9 of the ICCPR is constrained by both its internal requirements¹¹⁰ and by the provisions of article 4.¹¹¹ By substantively focusing the 'human security' claim upon article 3 of the UDHR, consideration of other, non-derogable Covenant rights of equal status and legal constraints upon derogation of other rights under the Covenant

No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which penalty is provided by law.' Art 5 states: 'Everyone has the right to liberty and security of person.' In the ICCPR, art 6 [1] states: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' and art 9 [1] states: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.'

¹⁰⁷ Australia ratified the ICCPR on 13 August 1980 and acceded to the First Optional Protocol, allowing individual communications to the Human Rights Committee, on 25 September 1991, with effect from 25 December 1991. See H Charlesworth, 'Australia's Accession To The First Optional Protocol To The International Covenant On Civil and Political Rights' (1991) 18 *Melbourne University Law Review* 428; and S Gibb, 'Communications under the Optional Protocol' (1996) *Law Society Journal* 62.

¹⁰⁸ However, no evidence or argument that the UDHR derived right to life has attained the status of a *jus cogens* is advanced to support this manifestation of 'human security'. Even if the right to life claim is said *implicitly* to be supported by its status as a *jus cogens* (and there is no suggestion in the argument of 'human security' that this is pursued), the dualist nature of the domestic Australian legal system, especially in light of government executive policy about the domestic influence of international law, would make such an approach unusual and inconsistent.

¹⁰⁹ The other non-derogable rights are art 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment), art 8 [1] and [2] (freedom from slavery and servitude), art 11 (freedom from imprisonment merely on the ground of inability to fulfil a contractual obligation), art 15 (prohibition against retrospective criminal law and retrospective criminal offences), art 16 (recognition everywhere as a person before the law) and art 18 (freedom of thought, conscience and religion).

¹¹⁰ These requirements are of non-arbitrariness in arrest and detention and of deprivation of liberty only on such grounds and in accordance with procedures as are established by law.

¹¹¹ Art 4 permits derogation from the derogable articles (that is, articles other than arts 6, 7, 8 ([1] and [2]), 11, 15, 16 and 18) 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed ... to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'

are not factored into public debate concerning the appropriateness of counter-terrorism measures.

The jurisprudence of the UN Human Rights Committee in its General Comments on the articles of the ICCPR furnishes a clearer illustration of the meaning of the concepts of life, liberty and security of the person. These sources do not neatly align with the claims concerning ‘human security’. Therefore, it is not surprising that no mention is made of them when articulating the concept of ‘human security’.

The Human Rights Committee General Comment 6 on article 6 of the ICCPR (The right to life) is instructive. Importantly, the most relevant parts of General Comment 6 state:

[i]t is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (art 4). However, the Committee has noted that quite often the information given concerning article 6 was limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly ... the Committee has noted that the right to life has been too narrowly interpreted. The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.¹¹²

Relevant to the threat of terrorism, the broader, positive duty to protect life,¹¹³ includes ‘a duty to prevent and punish killings and disappearances by private actors’,¹¹⁴ based upon the second sentence in article 6, ‘[t]his right shall be protected by law’. Such a duty to protect life has been addressed by laws criminalising the killing of human beings.¹¹⁵ Nevertheless, the traditional, dominant focus of protection of article 6 is threats to life from the state. The illustrative examples cited by the Human Rights Committee in General Comment 6 on article 6 confirm the state-oriented focus in expounding

¹¹² See [1] and [5] of General Comment 6 on art 6 of the ICCPR.

¹¹³ The Commission on Human Rights at the 5th Session (1949), 6th Session (1950) and 8th Session (1952) observed that ‘The provision that everyone’s right to life shall be protected by law “was intended to emphasise the duty of States to protect life” ... the majority thought that States should be called upon to protect human life against unwarranted actions by public authorities as well as by private persons’: M Bossuyt, *Guide to the ‘Travaux Préparatoires’ of the International Covenant on Civil and Political Rights (Article 6 of the ICCPR)* (1987) 120. See also the comments of the members of the Third Committee, 12th Session, 1957 to the effect that society owed a duty to the individual of protecting his right to life: *ibid* 119. See also Dinstein, above n 96, 115 and J Paust, ‘The Right to Life in Human Rights Law and the Law of War’ (2002) 65 *Saskatchewan Law Review* 411, 414.

¹¹⁴ S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases Materials and Commentary* (2000) 183.

¹¹⁵ *Ibid*. Dinstein considers that such laws must satisfy the ‘higher forms in the legislative hierarchy, by statute or constitutional provision’: Dinstein, above n 96, 115. Przetacknik considers that ‘State organs [have] the duty not only to take all appropriate measures to protect this right, but also to take all necessary steps to bring the offenders guilty of violation of the right to life to justice, and punish them accordingly’: Przetacknik, above n 96, 25.

protection for the right to life: war and acts of mass violence,¹¹⁶ the threat or use of force by one state against another state,¹¹⁷ arbitrary killing by security forces,¹¹⁸ missing and disappeared persons,¹¹⁹ infant mortality, malnutrition and epidemics¹²⁰ and application of the death penalty.¹²¹ Communications to the Human Rights Committee also reflect the predominantly state-centric nature of the threat to life of individual petitioners.¹²²

The failure to engage article 6, its jurisprudence and General Comment creates an artificial and distorted conception of how the right to life should inform and interact with any revised claim of 'human security' in counter-terrorism measures. Accordingly, the citation of article 3 of the UDHR as underpinning this new 'human security' appears as more of a convenient claim than one of logical substance.

VII. Two Security-Conscious Canadians: Irwin Cotler and Louise Arbour

The contestable and tenuous nature of the relationship between article 3 of the UDHR and 'human security' is further illuminated by the Attorney-General's comments that 'there is growing support for the view that national security and human rights are not mutually exclusive' and that this is 'based on the concept of human security and it *builds upon* Article 3 of the Universal Declaration'.¹²³ Such 'building upon' article 3 hints at an adaptability and utility of the concept, instead of a clear and demonstrable sourcing of 'human security' from article 3. It is not surprising that the Attorney-General then tries to support the claims for 'human security' by citing two distinguished Canadians, Irwin Cotler and Louise Arbour. In addition, the citation of Canadians also provides further credibility by indirectly tapping into the legal and constitutional similarities between Australia and Canada. The content of this approach is overtly political in nature, rather than based on sound legal analysis and legal comparisons from the writings of the Canadians.

In each instance, the status and standing of the Canadians is introduced, followed by citation of comments attributed to them in support of the particular conception of human security. In the Cotler and Arbour examples, it will be shown that the support claimed for the misappropriated and re-constituted form of 'human security' is not present in their writings, as both convey a fuller meaning of security and human rights' issues than they are represented as

116 General Comment 6 [2].

117 Ibid.

118 Ibid [3].

119 Ibid [4].

120 Ibid [5].

121 Ibid [6].

122 Above, n 114, 155-83. This point is replicated in the selection of communications concerning art 6 in a further work: A Conte, S Davidson and R Burchill, *Defining Civil and Political Rights The Jurisprudence of the UN HR Committee* (2004) 86-93.

123 'International and Public Law Challenges for the Attorney General' (Media Release, 8 June 2004) (emphasis added) above, n 19.

doing. The citation of their comments, to support ‘human security’, fails to portray accurately and indeed, is inconsistent with, what both say about the intersection of human rights and security in counter-terrorism responses.

(a) Irwin Cotler

Irwin Cotler, former Canadian Justice Minister and Attorney-General, has been frequently cited in support of the ‘human security’ claim used to justify Australia’s counter-terrorism legislation. Initially, Cotler’s occupational status and professional standing is emphasised to furnish credibility to that claim. Cotler is described as ‘an international human rights lawyer and former counsel to Nelson Mandela’,¹²⁴ ‘former Dean of McGill University Law School in Canada [and] a prominent human rights advocate over time’,¹²⁵ ‘a distinguished international human rights lawyer and academic’¹²⁶ and ‘a leading civil rights lawyer who has acted in the past for Nelson Mandela’.¹²⁷

Having established these credentials, quotations from Cotler’s writings¹²⁸ in which he asserts the need for a new way of looking at the relationship between security and human rights, are utilised in support of the concept of ‘human security’, subsequently positioning and defending Commonwealth counter-terrorism legislation as within that ‘human security’ framework. A selection of these quotations from the Commonwealth Attorney-General’s pronouncements provides insight into how ‘human security’ is marshalled in the presentation of the government’s counter-terrorism legislation agenda, with the claimed conceptual backing of Irwin Cotler:

[A] new theory is emerging whereby national security and human rights are not considered to be mutually exclusive. In combating terrorism, we should focus on creating “human security” legislation that protects both national security and civil liberties.¹²⁹

Attorney-General Cotler talks about counter-terrorism law in terms of “human security”, arguing that the perceived dichotomy between national security and civil rights is a false one.¹³⁰

¹²⁴ ‘Statement by the Attorney-General Philip Ruddock ‘On National Security – Overseas Developments’ (Media Release, 19 February 2004), above n 15.

¹²⁵ ‘Press Conference – Recent Developments In National Security’ (Media Release, 26 February 2004), above n 11.

¹²⁶ Above, n 16.

¹²⁷ ‘A Strategic Approach to National Security’ (Media Release, 10 May 2005) Cornall, above n 86.

¹²⁸ The central article written by Cotler is I Cotler, ‘Thinking Outside the Box: Foundation Principles for a Counter-Terrorism Law and Policy’ in R Daniels, P Macklem and K Roach (eds), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (2001) 111-29. The article is cited by the Commonwealth Attorney-General in ‘Australia’s Legislative Response to the Ongoing Threat of Terrorism’ above n 11, 254, and in ‘A New Framework: Counter-Terrorism and the Rule of Law’ (*Sydney Papers*) above n 16, 113, fn 7.

¹²⁹ ‘Australia’s Legislative Response to the Ongoing Threat of Terrorism’ above n 11, 254.

¹³⁰ ‘Statement by the Attorney-General Philip Ruddock on National Security – Overseas Developments’ (Media Release, 19 February 2004), above n 15.

Cotler has been a prominent human rights advocate over time ... his starting point was to emphasise the importance of the civil and political right that citizens are entitled to expect in a civilised society and that is to be safe and secure, to be safe and secure from terrorist activities in which citizens are targeted.¹³¹

[A] new framework is being explored ... Irwin Cotler has cogently observed that counter-terrorism legislation: 'has been characterised – if not sometimes mischaracterised – in terms of national security versus civil liberties – a zero sum analysis – when what is involved here is a "human security" legislation that purports to protect both national security and civil liberties'.¹³²

This leaves Government with an important duty – to protect human rights by protecting human security. This sentiment is echoed by the Canadian Attorney-General – Irwin Cotler who recently told a Canadian parliamentary committee that: "terrorism constitutes an assault on the security of a democracy and the most fundamental rights of its inhabitants – the right to life, liberty and security of the person".¹³³

[Irwin Cotler] has said this: Indeed, as the United Nations put it, terrorism constitutes a fundamental assault on human rights – a threat to international peace and security – while counter-terrorism law involves the protection of the most fundamental of rights – the right to life, liberty and security of person – and the collective right to peace.¹³⁴

The claim by the Commonwealth Attorney-General is that 'human security' is the apposite paradigm for counter-terrorism measures. It assumes that although there might be a diminution of civil and political rights, human rights are actually enlarged through the realisation of a fundamental right to live in safety and security. This appraisal however reflects only the most basic starting point of Cotler's consideration of security.¹³⁵ By failing to proceed beyond that starting point, the concept of human security is distorted.

Cotler's writings convey a much fuller and more nuanced appraisal of the relationship between security and human rights, stating and developing a range of foundational principles¹³⁶ that are simply omitted in the Australian

¹³¹ 'Press Conference – Recent Developments in National Security', (Media Release, 26 February 2004), above n 11.

¹³² Above, n 16 (*Sydney Papers*) 116.

¹³³ 'Security in Government Conference 2005 Opening and Welcome Address', above n 19.

¹³⁴ 'A Strategic Approach to National Security' (Media Release, 10 May 2005) Cornall, above n 86.

¹³⁵ Expressed as 'the better approach from a conceptual and foundational point of view is to regard the legislation as human security legislation, which seeks to protect both national security – or the security of democracy itself – and civil liberties': above n 128, 112.

¹³⁶ The foundational principles are those principles 'Underpinning the Counter-Terrorism Law' Principle 1: Human Security Legislation; Principle 2: Jettisoning 'false moral equivalences': Towards a 'Zero Tolerance' Principle re Transnational Terrorism; Principle 3: Terrorism and Human Rights: The Contextual Principle; Principle 4: The Proportionality Principle; Principle 5: The International Criminal Justice Model; Principle 6: The Domestication of International Law: The Complementarity Principle; Principle 7: The Comparativist Principle; Principle 8: The Prevention Principle; Principle 9: Criminal Due Process Safeguards; Principle

articulation of ‘human security’. These omissions significantly impoverish what can be understood as human security-promoting legislation. The absence of Cotler’s ‘Proportionality Principle’,¹³⁷ that is ‘that the juridical response to terrorism must be proportional to the threat’¹³⁸ precludes an assessment of legislation, including the nature and features of transnational terrorism, against a Charter-type rights-based proportionality test.¹³⁹ Other Cotler foundational principles, such as the ‘Domestication of International law: The Complementarity Principle’¹⁴⁰ and ‘the Comparativist Principle’¹⁴¹ would also have provided valuable reference points to test Australian counter-terrorism legislation against human security principles respectively, not only against UN counter-terrorism resolutions and human rights concerns, but also in light of the comparative legislative experience of other free and democratic societies. However, these principles are not even mentioned, let alone engaged with, as being relevant to an understanding of ‘human security’.

The Commonwealth Attorney-General also overlooks Cotler’s ‘Rights-Based concerns: The Civil Liberties Principle’¹⁴² which attaches to relevant counter-terrorism legislation and is developed in some detail ‘within the framework of these foundational principles, and in particular this generic principle of human security’.¹⁴³ So in the Cotler schema, the *foundational*

10: The Minority Rights Principle; Principle 11: The Anti-Hate Principle; Principle 12: The Chartering of Rights; Principle 13: The Oversight Principle and are included at Cotler, above n 128, 112-20. Very similar recitation of these principles further appears in I Cotler, ‘Terrorism, Security and Rights in the Post-September 11 Universe’ (2002) *Windsor Yearbook of Access to Justice* 519; I Cotler, ‘Terrorism, Security and Rights: The Dilemma of Democracies’ (2002) *National Journal of Constitutional Law* 13; I Cotler, ‘Constitutional Democracy: Balancing Security and Civil Liberties’ (Media Release, 26 March 2002) <http://www.irwincotler.parl.gc.ca/pub_details.asp?lang=en&pubID=264> and I Cotler ‘Understanding the Anti-Terrorism Bill: Threat and Response’ (Media Release, 16 November 2002) <http://www.irwincotler.parl.gc.ca/pub_details.asp?lang=en&pubID=172>.

¹³⁷ Cotler, above n 128, 115.

¹³⁸ Ibid.

¹³⁹ Ibid. Application of that test to legislation means that the legislation must first pass a test of necessity: ie, exhibit a substantial and pressing objective, and furthermore, demonstrate that (a) there is a rational basis for the remedy tailored specifically to the objective, (b) that the remedy intrude upon *Charter* rights as little as possible, and (c) that the effect or cost of the legislation upon civil liberties not outweigh its purposive and remedial character.

¹⁴⁰ Cotler, above n 128, 116-17.

¹⁴¹ Ibid 117-18.

¹⁴² These ‘Rights-Based Concerns’ include 1. Definition of ‘Terrorist Activity’; 2. Listing of Terrorist Organizations, 3. Requirement of a *Mens Rea* Threshold, 4. Access to Information and the Right to Privacy, 5. Preventive Arrest and Investigative Hearing; Provision for a Sunset Clause, 6. Interception of Foreign Communications, 7. The Right of visible minorities to protection against differential discriminatory treatment, 8. Scrutiny of Registered Charities, 9. Civil Forfeiture Process, 10. Legal Representation, Solicitor-Client Privilege and Solicitor-Client Confidentiality, 11. Oversight Mechanisms.

¹⁴³ Cotler, above n 128, 113.

principles¹⁴⁴ – *already* broadening the circumstances in which human security must be considered and comprehended – are *further* tested against identified and articulated civil liberties principles specific to the relevant counter-terrorism legislation. Through that process, legislative amendments can be generated offering the best prospect for reconciling counter-terrorism measures with human rights.

All of these features confirm the need to read Cotler's writings in context.¹⁴⁵ In contrast, the Commonwealth Attorney-General too readily equates the enactment of counter-terrorism legislation with human security – a point demonstrated by the *ex post facto* labelling of enacted legislation as 'human security' legislation. An examination of the detail of Cotler's claims shows that his concept of human security coexists with a range of rigorous accountability mechanisms or practices to reinforce democratic institutions and human rights culture, significantly increasing the prospects of integrating security with human rights observance. Cotler's own words illustrate the depth of his approach and the distortions embedded in the Australianised 'human security':

An appropriate oversight framework is germane to the integrity and efficacy of anti-terrorist legislation, and should include the following instruments and mechanisms for monitoring, review and redress:

- Application of the *Canadian Charter of Rights and Freedoms*
- Enhanced capacity for judicial review
- Annual Report by the Attorney-General to Parliament on the operation of the Act
- A Parliamentary Officer in the ongoing monitoring and supervision of the legislation, or perhaps more preferably, a review by SIRC (the Security Intelligence Review Committee) which has developed a repository of experience and expertise in these security-related matters
- Sunset clauses for provisions respecting preventive arrest and judicial investigative hearings
- Media scrutiny and sunshine
- NGO monitoring; and
- An engaged civil society.¹⁴⁶

It is not surprising that relevant Australian legislation largely fails to meet the equivalent of many of these Cotler-mandated standards.¹⁴⁷ Yet, strikingly,

¹⁴⁴ These foundational principles are listed at above n 136.

¹⁴⁵ Indeed, the discussion of 'human security' takes place as an analysis of the Canadian Anti-Terrorism Bill, in order to '...“think outside the box” – to go beyond the conventional domestic optics, to re-think and re-configure the legislation in terms of a converging and inclusive domestic and international perspective anchored in the notion of human security – itself a people-centred rather than State-centred approach': above n 128, 112.

¹⁴⁶ Cotler, above n 128, 121.

¹⁴⁷ Eg questioning and detention powers applying to non-suspects under Division 3 Part III of the ASIO Act 1979 (Cth) would in fact fail most of the Cotler principles set out above, with the exception of an Annual Report and Parliamentary Review:

the Attorney General has, under the heading ‘Maintaining Human Security and Questioning powers,’¹⁴⁸ outlined those powers and asserted ‘[l]aws dealing with questioning powers put the human security framework to the test. Last year the Government increased the powers of ASIO to obtain intelligence about possible terrorist activity in Australia.’¹⁴⁹ The claim that such legislation is human security legislation¹⁵⁰ does not withstand closer scrutiny, either conceptually or in a strict chronological sense, but instead seems to distract and disengage from serious debate. A great irony of this is that the central theme of Cotler’s writing, namely the need to ‘think outside the box’,¹⁵¹ is ignored, as this reductive approach to Cotler’s understanding of human security actually prevents and deters creative counter-terrorism approaches that simultaneously reinforce fundamental human rights values and address demonstrable terrorism threats.

(b) Louise Arbour

The status and standing of Louise Arbour as a former justice of the Supreme Court of Canada and as the current UN High Commissioner for Human Rights is similarly invoked to lend credibility to the claims regarding ‘human security’.¹⁵² In both pieces,¹⁵³ a particular passage is cited, referring to a then

See Joint Parliamentary Committee on ASIO, ASIS and DSD, Parliament of Australia *Review of ASIO’s questioning and detention powers Committee Proceedings* (2005), 50-51 and Submissions 67 and 67A to the Joint Parliamentary Committee Inquiry. In hearings and submissions before the Joint Parliamentary Committee Inquiry, the Attorney-General’s Department advocated the permanency of the powers through the removal of a sunset clause: see Attorney-General’s Department Submission (Submission 102), 10-11, 27-28, a position supported by the Director General of ASIO at the Committee Inquiry: Joint Parliamentary Committee on ASIO, ASIS and DSD, Parliament of Australia, *Review of ASIO’s questioning and detention powers Committee Proceedings* (2005) 4, 8-9. The prohibitions on the disclosure of the existence of questioning and detention warrants and operational information preclude effective operation of the final three categories of Cotler’s ‘instruments and mechanisms’: see ASIO Act 1979 (Cth) s.34VAA and ASIO Legislation Amendment Bill 2006 (Cth) s.34ZS. It is significant also that the Canadian provision for investigative hearings and preventative arrest are more circumscribed in scope than the comparable Australian provisions, largely because they had to be ‘Charter-proofed’: see Criminal Code (Canada) ss.83.28 and 83.29 (Investigative Hearing) and 83.3 (Recognizance with Conditions).

¹⁴⁸ Above, n 16, 119 (*Sydney Papers*).

¹⁴⁹ Above, n 16, 119 (*Sydney Papers*).

¹⁵⁰ As reflected in the comment, ‘Mr Speaker, the Howard Government has always sought to ensure that any piece of legislation, or measure taken, promotes, in Irwin Cotler’s words, “human security”’: Above n 15.

¹⁵¹ ‘[T]o ‘think outside the box’ – to go beyond the conventional domestic optics, to re-think and re-configure the legislation in terms of a converging and inclusive domestic and international perspective anchored in the notion of human security – itself a people-centred rather than a State-centred approach’: Cotler, above n 128, 112.

¹⁵² See P Ruddock, ‘National Security and Human Rights’ (2004) 9 *Deakin Law Review* 295, 300 and ‘2004 Homeland Security Conference Opening Address’ (Media Release 24 August 2004) <<http://www.ag.gov.au/agd/WWW/>

recent judgment of the Canadian Supreme Court in which Arbour had participated:

We concluded that the successful protection of citizens and the successful protection of their rights are not only compatible with each other but are, indeed, interdependent. There can be no genuine personal security if rights are in peril, any more than legal guarantees can exist in an environment of fear and anarchy.¹⁵⁴

Again, context is all important in this example, both in relation to the High Commissioner's address to the Human Rights Committee and in the content of her judgments in the Canadian Supreme Court cases that tested the constitutionality of Canada's counter-terrorism investigative hearings mechanism (*Application under s.83.28 of the Criminal Code*¹⁵⁵ and *Re Vancouver Sun*).¹⁵⁶ Close examination of these materials reveals that the concept of human security contemplated is different and broader than its appropriated and re-configured version in the Australian debate.

In joint judgments with Iacobucci J in *Re Vancouver Sun* and *Re Application under s.83.28 of the Criminal Code*, Arbour J articulated the restraint necessary on counter-terrorism responses commensurate with societies remaining free and democratic: clearly setting boundaries both legislatively and judicially for what is consistent with human security. In *Re Application under s.83.28 of the Criminal Code*, some important 'background considerations' are advanced:

[A] democracy cannot exist without the rule of law ... Although terrorism changes the context in which the rule of law must operate, it does not call for the abdication of law ... Consequently, the challenge for a democratic state's answer to terrorism calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law. In a democracy, not every response is available to meet the challenge of terrorism. At first blush, this may appear to be a disadvantage, but in reality, it is not.¹⁵⁷

Similarly, her Honour observed:

As we cautioned above, courts must not fall prey to the rhetorical urgency of a perceived emergency or an altered security paradigm. While the threat posed by terrorism is certainly more tangible in the aftermath of global events such as those perpetrated in the United States, and since then elsewhere ... we must not lose sight of the particular aims of the legislation. Notably, the Canadian government opted to enact specific criminal law and procedure legislation and

MinisterRuddockHome.nsf/Page/Speeches_2004_Speeches_24_August_2004_-_Speech_-_2004_Homeland_Security_Conference>.

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Ibid.

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Address of the High Commissioner for Human Rights, Louise Arbour, to 81st Session of the Human Rights Committee 12 July 2004 cited in P Ruddock, 'National Security and Human Rights', above n 152, 300. Arbour is also quoted from the same address as stating 'Respect for human rights and human security are inextricably linked': '2004 Homeland Security Conference Opening Address' above, n 152.

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[2004] 2 SCR 248.

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[2004] 2 SCR 332.

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[2004] 2 SCR 248, [5]-[7].

did not make use of exceptional powers, for example under the *Emergencies Act* or invoke the notwithstanding clause at s.33 of the *Charter*.¹⁵⁸

Similarly, in *Re Vancouver Sun*, real emphasis was given to the integrity of the judicial role and judicial discretion as instruments for the maintenance of democratic values, including open court processes and freedom of expression, in assessing the constitutionality of the investigative hearings mechanism.¹⁵⁹ The interpretation and application of the legislative provisions was not merely to be guided by ‘the imperatives of an effective response to terrorism’, but also as a ‘continued commitment to the values and constraints of the Canadian Charter of Rights and Freedoms’ and in ‘a manner consistent with fundamental characteristics of a judicial process insofar as the section contemplates a judicial proceeding’.¹⁶⁰

The comments of Arbour as UN High Commissioner for Human Rights to the UN Human Rights Committee, shortly after her departure from the Canadian Supreme Court, also reveal a much broader awareness of the erosion of human rights brought about through counter-terrorism legislation, than would appear from the citation used to support an Australian conception of ‘human security’:

I am happy that your Committee has already addressed this issue,¹⁶¹ in different language but in substantially identical terms. I am also pleased that you regularly engage States parties to the Covenant on whether their counter-terrorism legislation or the measures they take to combat terrorism are compatible with the Covenant. Several of your concluding observations adopted since the end of 2001 have noted how anti-terrorism regulations may operate to undermine Covenant guarantees. Your work in this area, and that of the other treaty bodies, provides a crucial supplement to the work of the Security Council’s Counter-Terrorism Committee. Your own Committee’s cooperation with the CTC deserves particular mention in this context.¹⁶²

This broader perspective is even more tellingly conveyed in an address by Louise Arbour to the International Commission of Jurists¹⁶³ only weeks after her address to the UN Human Rights Committee. Reference is made once again to the Canadian Supreme Court cases¹⁶⁴ as illustrative of the interaction of human rights and security, but subsequent statements in the address are starkly at odds with the Australian ‘human security’. Indeed, Arbour argues that the

¹⁵⁸ [2004] 2 SCR 248, [39].

¹⁵⁹ See [2004] 2 SCR 332, esp [22] and [38].

¹⁶⁰ See [2004] 2 SCR 332, [3].

¹⁶¹ Referring to the issue raised in the text of the quote, above n 154.

¹⁶² Arbour, above n 154.

¹⁶³ L Arbour - UN High Commissioner for Human Rights, ‘Security Under the Rule of Law’ (Address to the Biennial Conference of the International Commission of Jurists, Berlin, 27 August 2004).

¹⁶⁴ Ibid. Arbour states that ‘In reaching our decision, we underscored that the challenge for democracies in the battle against terrorism is to balance an effective response with the fundamental democratic values that respect the importance of human life, liberty and the rule of law. We said that “Although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of law”’.

appropriateness of counter-terrorism responses should be assessed squarely within a conventional human rights framework:

I firmly believe that terrorism must be confronted in a manner that respects human rights law. Insisting on a human rights-based approach and a rule of law approach to countering terrorism is imperative. It is particularly critical, in time of crisis, when clarity of vision may be lacking and when institutions may appear to be failing ... support for human rights and the rule of law actually works to improve human security. Societies that respect the rule of law do not provide the executive a blanket authority even in dealing with exceptional situations. They embrace the vital roles of the judiciary and the legislature in ensuring that governments take a balanced and lawful approach to complex issues of national interest. A well-honed system of checks and balances provides the orderly expression of conflicting views within a country and increases confidence that the government is responsive to the interest of the public rather than to the whim of the executive ... In fact, human rights law makes ample provision for effective counter-terrorism action even in the most dire of circumstances.¹⁶⁵

The above material shows conclusively that the opinions of the present UN High Commissioner for Human Rights on the issue of security and human rights cannot be taken to resemble or support the meaning of 'human security' as presently being advanced in Australia.

VIII. A Right to Safety and Security? Article 9 ICCPR: Liberty and Security of the Person

Earlier in this article, it was demonstrated that the re-configured concept of 'human security' seeks to derive support from article 3 of the UDHR, and that it ignores the jurisprudence of the Human Rights Committee concerning the right to life encapsulated in article 6 of the ICCPR and the right to liberty aspect of article 3 of the UDHR. Another distinctive variation of this 'human security' has also been advanced. Deriving from the 'security of the person' aspect of article 3 of the UDHR and building from that commentary regarding the right to life in article 3, there is then an elision to a claimed *human right to safety and security*. This claimed right has been variously expressed: 'a fundamental right to live in safety and security',¹⁶⁶ 'the right to be safe and the right to live without fear',¹⁶⁷ 'the right to live freely and safely in our community',¹⁶⁸

¹⁶⁵ Ibid.

¹⁶⁶ See 'British Counter-Terrorism Options Examined' (Media Release, 26 February 2004) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2004_First_Quarter_26_February_2004_-_British_counter-terrorism_options_examined_-_0152004> and 'Press Conference – Recent Developments In National Security' ((Media Release, 26 February 2004) above n 11.

¹⁶⁷ '2004 National Security Australia Forum Opening Address' ((Media Release, 23 March) 2004 <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2004_Speeches_23_March_2004_-_Speech_-_2004_National_Security_Australia_Forum>.

¹⁶⁸ P Ruddock, 'Securing Civil Liberty' (2004). *Lawyer's Weekly*. See also Bronitt and McSherry above n 20, 875 who remark of the 'emerging idea that the "right to security" is a fundamental human right ... A cursory review of the case law under

‘people’s right to life and personal safety and security’,¹⁶⁹ and ‘the most fundamental right of all – the right of citizens to live safely and securely in their communities’.¹⁷⁰

This development is a clever and contentious adaptation of article 3 where ‘security of the person’ has traditionally been associated with freedom from arbitrary arrest and detention by the state,¹⁷¹ described variously as ‘the right to be safe from physical interference’,¹⁷² ‘personal security’,¹⁷³ and as freedom from coercion through powers of arrest and detention.¹⁷⁴ What is now being claimed under article 3’s authority is that the referent of security of the person is not the state, but non-state actors. The continuing potential for the state to interfere with the security of the person, the original concern of article 3, is merely glossed over and subsumed by a shift in response to the threat posed to that security by non-state actors, through the right to a physically secure environment.

This new analysis is problematic. It merely assumes or ignores, without argument, that the original values protected by article 3 will not be imperilled. The terms of the argument are framed so that state-sponsored counter-terrorism measures are excluded as a potential source of threat to the safety and security of the person, regardless of the nature and extremity of those measures. However, Arbour notes the limits to creating a physically secure environment:

Let us be clear: there is no doubt that States are obliged to protect their citizens from terrorist acts. The most important human right is the right to life. States not only have the right, but also the duty to secure this right by putting in place effective measures to prevent and deter the commission of acts of terrorism. This has been the consistent view of regional human rights courts and international quasi-judicial bodies. But counter-terrorism measures cannot be taken at any cost.¹⁷⁵

Again, it is curious that the claimed right to live in safety and security, as part of a conception of ‘human security’, is underpinned by reference to article 3 of the UDHR, instead of the later and binding obligations of article 9 of the

the “right to security” in international human rights law would reveal a basic concern with confining the power of the State to coerce its citizens through powers of arrest and detention.’

¹⁶⁹ ABC Television ‘Counter-terrorism laws a balancing exercise: Ruddock’ *Insiders* 11 September 2005 <<http://www.abc.net.au/insiders/content/2005/s1457695.htm>>.

¹⁷⁰ ‘Attorney responds: what about the right to security?’ *Bar News* (Winter 2005) 8, 9.

¹⁷¹ See O’Neill, Rice and Douglas, above n 92, 214 for a discussion of how similar issues have been articulated in several jurisdictions without specific reference to art 3.

¹⁷² Devine, Hansen and Wilde, above n 99, 78, stating ‘it is further dealt with in Article 5 through the limitation on torture and cruel, inhuman and degrading treatment or punishment’.

¹⁷³ Morsink, above n 92, 39 (in the context of information inspiring art 3 including surgical experiments by the Nazis in the Second World War and other indignities).

¹⁷⁴ Bronitt and McSherry, above n 20, 875.

¹⁷⁵ Arbour, above n 163.

ICCPR.¹⁷⁶ Reference to both the General Comment on article 9¹⁷⁷ and relevant communications to the Human Rights Committee would provide fuller material and insights into whether this claimed right of safety and security is tenable or plausible.

General Comment 8 on article 9 focuses upon deprivations of liberty, observing that the right has been narrowly understood in states parties' reports, resulting in incomplete information being provided by states in their reports to the Committee, whereas in fact the paragraph applies to all deprivations of liberty.¹⁷⁸ Emphasis is also given to court control of the legality of the detention.¹⁷⁹ Clearly such content reflects a traditional conception of the article as a human rights guarantee against state threats.

It has been observed of jurisprudence concerning article 9 that 'the right to personal security is independent of the guarantee of liberty'¹⁸⁰ and that 'the State is under an obligation to protect a person's right to personal security against attacks by private persons'.¹⁸¹ The most significant exposition of the latter of these principles is set out in *Paez v Columbia*:¹⁸²

Although in the Covenant the only reference to the right of security of person is to be found in article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty. At the same time, States parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. States parties are under

¹⁷⁶ Art 9 [1] of the ICCPR states: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law'. The *travaux préparatoires* of art 9 of the ICCPR focus largely upon the terms upon which accepted restrictions to the right to liberty and security of the person might be expressed: see the extracts of the Commission on Human Rights, 5th Session (1949), 6th Session (1950) and 8th Session (1952) in Bossuyt, above n 113, 193-98. See also M Nowak, *The UN Covenant on Civil and Political Rights CCPR Commentary* (1993) 162, noting that in relation to determining the significance of the right to security of the person, 'the travaux préparatoires to Art. 9 are of little assistance on this issue, as are those of comparable provisions in other instruments: whereas the original drafts in the HR Comm related only to the prohibition of arbitrary arrest or detention, a 1952 British proposal provided for the first time that the provision be headed by a general right to liberty and security of person. The sentence was adopted without discussion [in 1952] in an amendment submitted by Poland ...'

¹⁷⁷ General Comment 8 on art 9 Right to liberty and security of persons.

¹⁷⁸ Ibid [1]. The other examples of deprivation of liberty cited are apart from criminal cases, mental illness, vagrancy, drug addiction, educational purposes and immigration control.

¹⁷⁹ Ibid [1] and [4].

¹⁸⁰ Joseph, Schultz and Castan, above n 114, 305.

¹⁸¹ Ibid 307 and described by Nowak as clearly defining 'it as a right with horizontal effects' (ie against private persons): Nowak, above n 75, 163.

¹⁸² Comm No 195/1985. This communication involved death threats to the complainant following his own complaints to educational and ecclesiastical authorities arising from his employment as a teacher.

an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.¹⁸³

However, the scope of that obligation to protect has *not been generalised* to a right to a physically secure personal environment. Other communications¹⁸⁴ give some indication of the situations so far contemplated as falling within the ambit of article 9: death threats and the failure to investigate such threats;¹⁸⁵ subjection to continued harassment and intimidation following release from detention;¹⁸⁶ subjection to harassment, intimidation and threats;¹⁸⁷ abduction and circumstances subsequent to abduction where family, relatives and colleagues remained without news;¹⁸⁸ shooting by police of victim without warning and failure to provide evidence in respect of investigation of shooting;¹⁸⁹ harassment and threats by state authorities following a private investigation into the murder of a companion;¹⁹⁰ shooting and wounding by the police while attending a major political rally to launch a civil disobedience campaign;¹⁹¹ and death threats, phone and written harassment and shots fired at the victim.¹⁹²

None of these situations confer a generalised right to a physically secure environment. Instead, they relate to a concrete, identifiable and personalised threat to the security of the individual, including threats from both state and non-state actors. These threats are more concrete, unlike the characteristics of terrorist threats, where a threat is more anticipatory or predictive in nature. Furthermore, consistent with the nature of the individual communication procedure under the ICCPR, the threats are not being directed at a class of persons or a community, such as a civilian population, but represent a risk for a specific individual.

Whilst not precluding a *developmental basis* for safety and security to be encompassed within a conventional conception of human security, what is not acknowledged in the Australian 'human security' notion is the quantitative and qualitative leaps logically needed to reach that position. No principled steps within a human rights framework by which effective counter-terrorism measures can be developed¹⁹³ are articulated. Simplistic appropriation, inversion and articulation of the concept of 'human security' actually divert

¹⁸³ *Paez v Colombia* Comm, No 195/1985 [5.5]. See also Joseph, Schultz and Castan, above n 114, 304-06.

¹⁸⁴ See generally Joseph, Schultz and Castan, *ibid* 305-06.

¹⁸⁵ *Jayawardene v Sri Lanka* Comm No 916/2000.

¹⁸⁶ *Bwalya v Zambia* Comm No 314/1988.

¹⁸⁷ *Bahamonde v Equatorial Guinea* Comm No 468/1991.

¹⁸⁸ *Tshishimbi v Zaire* Comm No 542/1993.

¹⁸⁹ *Leechong v Jamaica* Comm No 613/1995.

¹⁹⁰ *Dias v Angola* Comm No 711/1996.

¹⁹¹ *Chongwe v Zambia* Comm No 821/1998.

¹⁹² *Vaca v Columbia* Comm No 859/1999.

¹⁹³ See eg the Study of the United Nations High Commissioner for Human Rights, above n 45, and Report of the Secretary General, above n 50.

attention from the possibilities of human rights-compliant counter-terrorism methodology and responses, implicitly suggesting that human rights impede effective counter-terrorism measures. Plainly, that is not the case, but the methodology and processes demanded of government counter-terrorism action through alternative approaches¹⁹⁴ and constraints on executive power may be marginalised or discounted through a 'human security' reform model.

There are distinct limits as to the utility of article 9 of the ICCPR, its General Comment and individual communications, above and beyond article 3 of the UDHR, in underpinning or articulating this claimed right to safety and security, as part of a reinvented form of 'human security'. At best it can be suggested that there are some principles and analogies derived from the phrase 'security of the person' from which the claimed right might be argued to exist, such as the fact that the obligation to protect extends to threats from non-state actors¹⁹⁵ and accrues also to persons not detained or in different forms of detention other than arrest.¹⁹⁶

As can be appreciated, General Comment 8 and the jurisprudence are largely, but not exclusively, extrapolating from known experience and the historical focus of protection against anticipated threats to that security of the person. The mere recitation of article 3 of the UDHR as ultimately underpinning this notion of safety and security, fails to argue from the principles emerging from article 9 of the ICCPR. This failure means that a more convincing legal argument is not advanced¹⁹⁷ to provide a principled framework for articulating a claim of safety and security within a human rights framework, in place of political assertion. Instead, what is achieved is an inflation from the article 3 principle to claim a fully fledged right to safety and security: really another method of promoting a 'community rights' agenda,¹⁹⁸

¹⁹⁴ Aside from the UN examples mentioned above, a further example is found in the Council of Europe Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002 at 804th meeting of Ministers Deputies. The Council of Europe Guidelines, in stating an obligation on states to protect persons within their jurisdictions against terrorist acts, does so in the context of a series of human rights protections, including a prohibition on arbitrariness and torture, inhuman and degrading treatment, a requirement of lawfulness, necessity and proportionality of counter-terrorism measures and measures and standards for arrest, custody, pre-trial detention, legal proceedings, detention, return and extradition.

¹⁹⁵ Above n 114, 307, and Conte, Davidson and Burchill, above n 122, 103.

¹⁹⁶ Above n 114, 304, and Conte, Davidson and Burchill, above n 122, 103.

¹⁹⁷ That is, in articulating a case for protection by the state against non-state actors in the type of situations alluded to by Joseph, Schultz and Castan: 'to people who are being stalked, or under genuine risk of attack, such as habitually battered spouses': above n 114, 307.

¹⁹⁸ See eg Cornall, above n 86: 'The second area requiring attention over the next couple of years is an examination of our understanding of individual and community rights in the 21st century ... There was not much need to think about community rights in the 20th century because they were not under any obvious challenge. This allowed individual rights to flourish without regard to the broader setting of community rights ... But things are a bit different now. Australia and Australians have been nominated as terrorist targets. We have to ensure that we

completely contrary to the individually focused meaning and origins of article 3 with its concerns relating to state power.

IX. Conclusion: Possible Consequences of ‘Human Security’ in the New Security Environment

There are various possible consequences of the Australian use of ‘human security’ in the present debate. The first has just been alluded to: the distortion of legal principles underpinning democratic governance, institutions and practices, the very targets of terrorism. This has the potential to erode confidence in the integrity and propriety of democratic institutions and weaken the credibility of those institutions in responding to the threat of terrorism. Glib political invocation of ‘human security’ as a catch-all justification for executive and legislative measures carries some distinct risks. The creation of a false sense of security is amongst them; repeated statements that executive and legislative measures are of a ‘human security’ orientation may contribute to the suspension of critical evaluation of the priorities and efficacy of such measures. A further risk is that, contrary to the claimed protective umbrella of counter-terrorism legislative measures under which civil and political rights can prosper, the defining, freedom-orientated attitudinal characteristics of liberal democracy are unconsciously and serially eroded. The focus of attention is shifted away from the role that legislation and other state action should play in protecting the rights of individuals, to protecting the interests of the state. Such action may emerge to a point where the active democratic characteristics of the society supposedly protected are fundamentally transformed to merely formal structures and practices.

A defining characteristic of the Australian concept of ‘human security’ is its radical departure from conventional, mainstream understandings of the term and in particular, its disconnection from the full panoply of human rights, particularly economic, cultural and social rights. Such disconnections from international reference points are unlikely to produce optimal outcomes for defending the structures, institutions and practices of Australian democracy against international terrorism. A first and predominantly international dimension of that disconnection is the lack of reference to the work of the UN Human Rights bodies seeking the integration of human rights principles with counter-terrorism responses.¹⁹⁹ This occurs as a result of the focus upon one provision of the UDHR, and a failure to consider important and well-established international human rights concepts as proportionality, reasonableness and necessity. The irony of this is that a well-developed international framework is being eschewed²⁰⁰ as the critical set of operating principles for articulating and

take all the steps necessary to protect the safety of our community as a whole and, in the process, to protect the rights of individuals within our society. This aim is totally consistent of the Universal Declaration of Human Rights.’

¹⁹⁹ See the discussion under the heading ‘IV. United Nations Institutional Responses: Human Rights and Human Security’.

²⁰⁰ Similarly, with the distinctive focus in arguing for ‘human security’ upon art 3 of the UDHR, engagement with the other civil and political rights of the Universal

assessing domestic legislative and executive responses to international terrorism.

A second problematic dimension of 'human security' is that instead of shifting the referent of security away from the state and towards the individual, the opposite occurs, with the imprimatur of 'human security' being used to assert and justify an executive-conceived and concentrated conception of state security. In other words, the interests of individual protection through state legislative and other action increasingly fails to coincide with the interests of the state being protected. That executive perspective is mirrored in the impatience with delays in the passing of counter-terrorism legislation²⁰¹ through democratic processes and is implicit in an array of other legislative

Declaration is not achieved, in much the same vein as the failure to engage seriously the ICCPR. Art 29(2) of the UDHR provides a limitation principle, namely 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society', logically placing boundaries upon the methods of the 'human security' claim and in all probability lending to that claim dimensions of other, individualised rights. Likewise, art 29(3) of the UDHR states that 'These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations'. Again, a limitation principle upon 'human security' might well be derived from art 1 (3) (Purposes) of the Charter of the United Nations, namely 'To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.'

201 See 'Free rein for A-G on anti-terror powers' *Lawyers' Weekly* (23 March 2004); 'More Labor Indecision On National Security Laws' (Media Release, 15 March 2005) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2005_First_Quarter_15_March_2005_-_More_Labor_indecision_on_national_security_laws_-_0392005>; 'Government Delivers On National Security Priorities' (Media Release, 8 December 2004) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2004_Fourth_Quarter_8_December_2004_-_Government_delivers_on_national_security_priorities_-_2052004>; 'Labor Settles For 'Lowest Common Denominator' on National Security' (Media Release 5 August 2004) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2004_Third_Quarter_05_August_2004_Labor_settles_for_'lowest_common_denominator'_on_national_security_-_1392004>; 'Australia's Anti-Terrorism Laws "World Best" Practice' (Media Release, 13 August 2004) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2004_Third_Quarter_13_August_2004_-_Australia's_anti-terrorism_laws_'world_best'_practice_-_1502004>; 'Labor Delays Important Anti-Terrorism Legislation' (Media Release, 8 July 2004) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2004_Third_Quarter_8_July_2004_-_Labour_delays_important_Anti-Terrorism_Legislation_-_1172004>; 'News Conference At Parliament House' (News Release) 27 November 2003 <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Interview_Transcripts_2003_Transcripts_27_November_2003_-_Transcript_-_News_Conference_at_Parliament_House>.

reforms that will have the effect of diminishing the role of the citizen as a participant in civil society-orientated democratic processes.²⁰² The consolidation of this executive concept of security is likely to accelerate with government control of the Senate and the removal of the critical deliberative function, accounting for a wider range of interests, which the referrals of counter-terrorism legislation²⁰³ to Senate Committees provided.

A further problematic dimension of 'human security' is that the particular narrowing of the concept to an executive orientation means in fact that counter-terrorism legislative responses will not be coherent with the government's preferred human rights model, *Australia's National Framework for Human Rights National Action Plan*.²⁰⁴ That document gives considerable emphasis to the role of Parliamentary institutions as the most effective mechanism for protecting human rights, citing 'Australia's robust system of human rights protection',²⁰⁵ 'promot[ion of] a strong free democracy'²⁰⁶ and

²⁰² See eg the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006 (Cth); the Higher Education Support Amendment (Abolition of Compulsory Upfront Union Fees) Act 2005 (Cth); the Workplace Relations Amendment (Work Choices) Act 2005 (Cth); and proposed changes to media cross ownership laws to permit a media proprietor to own multiple media forms in the one capital city, diminishing the chances of an informed citizenry by facilitating the reduction of media diversity. Other examples, particularly concerning taxing and funding measures to influence and control NGO participation in political advocacy and criticism, are cited in P Manning, 'Keeping Democracy in Its Place' in M Kingston, *Not Happy John* (2004) 265-87.

²⁰³ Examples of such legislation referred to either or both of the Senate Legal and Constitutional References Committee and the Senate Legal and Constitutional Legislation Committee include the National Security Information Legislation Amendment Bill 2005 (Cth), the Anti-Terrorism Bill (No 2) 2005 (Cth), the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth), the National Security Information (Criminal Proceedings) Bill 2004 (Cth), the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004 (Cth), the Anti-Terrorism Bill 2004 (Cth), the Anti-Terrorism Bill (No 2) 2004 (Cth) and the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) (Cth).

²⁰⁴ *Australia's National Framework for Human Rights National Action Plan* (2005) Attorney-General's Department <[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~18+NAP+17+FEB.pdf/\\$file/18+NAP+17+FEB.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~18+NAP+17+FEB.pdf/$file/18+NAP+17+FEB.pdf)>; See also Joint Media Release of Minister for Foreign Affairs and Attorney-General 'New Australian Framework for Human Rights' (Media Release, 22 December 2004) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/MediaReleases_2004_Fourth_Quarter_23_December_2004_-_New_Australian_framework_for_human_rights_-_2112004>.

²⁰⁵ *Australia's National Framework for Human Rights* above n 204, 5-6 'The central features of our constitutional system are the doctrines of "responsible government" under which the Executive is accountable to the Parliament and the Parliament to the people ... In addition, a network of parliamentary committees exists, with specific responsibilities to review various spheres of government activity and legislation.'

²⁰⁶ *Ibid* 8: 'Australia has one of the most effective representative democracies in the world. The Government considers that Australia's federal structure, independent judiciary and robust representative parliamentary institutions play an integral role in protecting human rights and provide a bulwark against abuses of power and

'representative government'.²⁰⁷ Indeed, 'human security' is quite at odds with the focus in the *National Action Plan of Enhancing the effectiveness of national security*:

Efforts to achieve national security must not jeopardise basic human rights ... Australia's democratic traditions and processes are its greatest ally and greatest strength in the war on terror. These traditions and processes are the tools that will help combat terrorism and protect and preserve our human rights.²⁰⁸

The appropriation and re-invention of the term 'human security' as a mechanism for advocating and advancing a counter-terrorism legislative program, under the guise of creating a safe and secure environment for the enjoyment of those rights, offers the prospect of fundamentally altering the characteristics of Australian democracy and the enjoyment of civil and political rights, whilst providing no clear guarantee of effective counter-terrorism security. The extent to which a re-constructed 'human security' will produce those consequences will in part depend on how successfully the term can acquire and maintain a meaning and connotations totally at odds with its history and practice.

denials of fundamental freedoms.'

²⁰⁷ Ibid 71: 'Members of the Australian community can also play an active role in representative democracy by making submissions to Australian, State and Territory parliamentary committees, which examine issues of public concern or proposed legislation.'

²⁰⁸ Ibid 21-22.