

Human Rights in the wake of terrorism

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It's important to begin with the observation that terrorism, which I take to mean *causing death or injury to civilians in order to intimidate a population, or to compel a government or international organisation to act in a particular way*,¹ is itself a massive violation of human rights.

By definition terrorists target non-combatants to achieve political or ideological purposes and thus violate the rights to life and security of innocent people.

I also want to note that terrorism is a very complex phenomenon and it's crucial to understand this to be able to work effectively against it.

the word 'terrorism' can very easily be used in an omnibus way to mean any activities that we do not approve of, or the activities associated with particular cultures and religions. I heard UK PM Tony Blair yesterday on the radio say, in the wake of the Bali bombings, that the West was facing a 'monolithic' terrorist threat.

This might be politically effective rhetoric, but it's dangerously inaccurate. As the Oklahoma bombing showed us so dramatically several years ago, terrorism is a tool of many disaffected groups and terrorists fit no particular profile.

The idea of a monolithic terrorism also of course plays into problematic stereotypes of western virtue and oriental menace which themselves can exacerbate the likelihood of violence.

Failure to understand the complexity of terrorism and its causes can also lead to a judgment that the protection of human rights is a minor, marginal issue in the fight against terrorism.

Unfortunately, over the last year we have had enough experience of terrorism to be able to detect a trend in the way governments, the world over, react to this danger. The tendency is to respond to terrorist acts with a lot of tough security talk and to devise measures that require considerable undermining of basic civil liberties and human rights.

Last year, for example, Professor Allan Dershowitz of Harvard Law School argued in the wake of the 11 September terrorist attacks that torture should be allowed in certain circumstances because some of the people detained in United States gaols refused to say anything at all. He proposed that federal judges should be allowed to issue 'torture warrants' to legalise certain forcible practices in interrogation of suspects.

We know that some anti-terrorist laws and practices have targeted particular groups such as political activists, asylum seekers, refugees and religious and ethnic minorities. The presumption of innocence, the right to privacy and the right to a fair trial (or indeed any trial at all) have all been regularly breached in the name of counter-terrorism.

It was reported recently that the European Union is drafting in secret a treaty with the US on joint measures to combat terrorism which takes no account of human rights such the right to a fair trial or to privacy.²

¹ See Article 2 1 b of the 1999 UN International Convention for the Suppressing of the Financing of Terrorism.

² 'Secret EU-US terror treaty plan raises rights fears' *Guardian Weekly* 5-11 September 2002, p 2.

The idea seems that to be that human rights are some kind of fancy optional extra, and that, in times of crisis, we should forget such frills and allow our police and security agencies to be able to operate unfettered by the troublesome guarantees of human rights.

The irony is of course that terrorists themselves take a parallel approach to human rights: human rights are seen as utterly dispensable in the pursuit of a greater political goal.

I want to argue that this is a flawed judgment and that we should be much more conscious of the human rights implications of steps taken in the name of combating terrorism.

George and I have agreed that I'll deal with this issue from an international perspective and that he'll then focus on what it means in our particular Australian context.

To begin with, I think the debate about the human rights implications of the 'war against terrorism' has become far too quickly polarised into a debate about human rights *versus* protecting the security of the civilian population, as if human rights were somehow inevitably at odds with a nation's security interests.

In fact, the definition of international human rights principles already strike a balance between the enjoyment of particular freedoms and national security. The ICCPR, for example, provides that some rights *can* be limited in very specific circumstances. The Covenant refers to 'times of public emergency which threaten the life of the nation and [which] ... is officially proclaimed'.³ There are parallel provisions in all major international and regional human rights treaties.

The ICCPR makes it clear that the permitted derogations from rights cannot involve discrimination solely on the ground of race, colour, sex, language, religion or social origin: in other words, you could not simply deny a particular religious group freedom of speech, or movement, or a right to privacy in the name of protecting security.

The ICCPR also makes clear that there are particular rights from which derogation is never permitted: these include the rights to life, to be free from torture, not to be enslaved, and the right to freedom of thought, conscience and religion.

It's also clear that the elements of a right to a fair trial must be respected even during an emergency.

I should add that all of the rights contained in the Convention on the Rights of the Child apply even during times of emergency.⁴

[The Human Rights Committee has adopted a General Comment on article 4 and made clear that 'no declaration of a state of emergency ... may be invoked as justification for a state party to engage itself ... in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence'.]⁵

³ Article 4.

⁴ Article 38.

⁵ CCPR/C/21/Rev.1/Add11.

The UN High Commissioner for Human Rights has proposed criteria for the balancing of human rights protection with the combating of terrorism.⁶ The proposals include the requirement that laws restricting human rights in a time of emergency would have to:

Use precise criteria and
Not confer unfettered discretion on those charged with their execution.

The proposals also make clear that any limitations must:

Conform to a principle of proportionality
Respect the principle of non-discrimination
Be compatible with the objects and purposes of human rights treaties and not impair the essence of any right
Be necessary in a democratic society.⁷

As George I think will argue, some of the Australian security legislation does not appear to meet these standards. Certainly the US PATRIOT Act and the UK anti-terrorism legislation both do not meet these principles.

I would like to consider a particular example of the tension created by governments between human rights and responding to terrorism in the UK.

In the aftermath of 11 September, the United Kingdom enacted at great speed the Anti-terrorism, Crime and Security Act. Part IV of the Act allows the indefinite detention without any charge or trial of a non-British person suspected of involvement in international terrorism.

This law breaches many of the safeguards offered by developed legal systems, such as the right not to be arbitrarily detained. The law was challenged before the Special Immigration Appeals Commission under the UK Human Rights Act in a case decided in July this year.⁸

The UK government argued that the law was a valid derogation from the ECHR in a time of national emergency; while the SIAC accepted that derogations were possible, it noted that the law effectively discriminated against people on the basis of nationality because it could only apply to non-British nationals.

The SIAC decided that there was no valid connection between the measures adopted and the quite legitimate aim of protection against terrorism: British terrorists and foreign terrorists could both be involved in international terrorism and there was no way that the differential treatment could be objectively justified. The SIAC made a declaration of incompatibility.

Although the decision is a rather modest one at the end of the day (ie the problem could be cured by extending the possibility of indefinite detention to British nationals as well), to me, this case indicates the value of having a set of human rights standards against which rather excessive governmental action can be measured. As we have no bill of rights, no such set of standards is available in Australian law to measure counter-terrorism measures.

⁶ UN Doc. E/CN.4/2002/18, Annex, 27 February 2002.

⁷ See also the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, 15 July 2002 available at [http://press.coe.int/cp/2002/369a\(2002\).htm](http://press.coe.int/cp/2002/369a(2002).htm).

⁸ *A and others v. Secretary of State for the Home Department* appeal no SC/1-7/2002.

Apart from the issue of principle, it's worth noting that there are some quite practical pitfalls in assuming that, when the chips are down, security concerns should have priority over human rights.

We know from the United States experience that a certain insouciance about truth, justice and human rights can develop in agencies responsible for security.

Indeed the secret federal court that approves spying on suspected terrorists in the US recently stated that the Justice Department and FBI officials supplied erroneous information to the court in more than 75 applications for search warrants and wire taps.⁹

Finally I want to note that, apart from being acts of terrorism, 11 September and the recent Bali bombings both meet the international definition of a crime against humanity: they were both large scale attacks directed at civilian populations.

This gives another source of redress for these terrible acts: international criminal law requires that all states assist in the prosecution of suspects. When the ICC is up and running, it would provide an appropriate forum for the prosecution of those involved if no relevant national legal system is willing or able to conduct a proper trial.

This makes the recent opposition to the ICC here in Australia even more difficult to understand.

Conclusion

I do not want to suggest that governments should take no special measures to counter terrorism. Targeted measures proportional to the danger at hand may be of considerable value.

My point is rather that these measures require a human rights framework. As the former UN High Commissioner for Human Rights, Mary Robinson, has argued: 'An effective strategy to counter terrorism should use human rights as its unifying framework. ... The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends. International human rights and humanitarian law define the boundaries of permissible political and military conduct.'¹⁰

These principles apply with equal force to those who seek to achieve political ends through inducing terror in the civilian population *and* those who are engaged in counter-terrorism operations. Just as no political or religious or philosophical cause can justify violating the right to life of civilians, no response to terrorism can justify violating fundamental human rights.

What many quick governmental reactions to recent terrorist incidents do not seem to realise is that 'building a durable global human rights culture, by asserting the value and worth of every human being, is essential if terrorism is to be eliminated'.¹¹ Rather than rushing to appear to appear draconian in the face of terror, it's worth taking some time to consider the most effective long term strategies.

⁹ 'Secret spying court rebuffs Ashcroft' *Guardian Weekly* 29 August-4 September 2002, p 31.

¹⁰ See UN Doc. E/CN.4/2002/18, 27 February 2002.

¹¹ *Ibid.*

At the end of the day, true human security depends on broadening respect for human rights, rather than treating human rights as dispensable when the going gets tough.

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