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Is the War on Terror Compatible with Human Rights?: An International Law Perspective

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Abstract:

The paper will consider the particular challenges raised for the international human rights system by the 'war on terror' declared in the wake of the events of 11 September 2001. Taking an international focus, it will argue that a human rights framework is critical for the success of such an enterprise and will examine the practical and legal implications of acting otherwise.

I am delighted to participate in this 'human rights year in review' organised by the Castan Centre. Like many lawyers of my generation, I was inspired by both the work and passion of Ron Castan. He was one of the first Australian lawyers to really understand the significance of the international human rights regime. I only saw Ron Castan in action in court once, during the argument of the *Koowarta* case in the High Court in 1982. I can still recall vividly his lucid and almost dogged arguments, persuading the bench that the prohibition on racial discrimination was truly an 'external affair'.

We are often reminded that we are in the midst of a 'war on terrorism'. The declaration of war was made by President Bush just after the devastating events of 11 September 2001 in the United States and the language of war has been adopted enthusiastically by many countries, including Australia.

One problem with the vocabulary and imagery of war when we are dealing with the phenomenon of terrorism is that they imply that it is possible to run a discrete campaign against terrorism, that it is an enemy that is identifiable and 'out there'.

Use of the idea of war also implies that it is somehow finite -- that we can expect an end to the war, if not this year, in the foreseeable future. On the other hand, given the phenomenon of terrorism, it is clear that we will never really be able to claim a victory in the war; and in this sense it is infinite.

It has been pointed out in other contexts that war terminology, such as in the case of the 'war against drugs', is not particularly helpful in responding to systemic, complex problems: it can distort expectations of the outcomes of the 'war' and it can narrow the range of strategies used in its conduct.

An example of this narrowing is the way that great focus is put on particular evil individuals as the personification of terrorism, as if their capture or killing would make the problem go away.

Thus, on the CIA website there is quote from George Tenet: he asked himself "What are the threats that keep me awake at night?"

"International terrorism, both on its own and in conjunction with narcotics traffickers, international criminals and those seeking weapons of mass destruction. You need go no further than Usama Bin Ladin...." ¹

War talk suggests that the best strategy to fight terrorism is military and other uses of force; in other words, the idea of a war on terror leads us inevitably down a particular path and distracts attention from other broader and more long term solutions. So, we are seeing in a terrible irony, that the war on Iraq, justified as a side battle in the war against terrorism, has in fact encouraged new varieties of terrorism to develop in Iraq.

Clyde Prestowitz, a former aide to President Reagan, recently wrote that:

The US occupation of Iraq has made the country a magnet for anti-American fighters across the globe, who are joining the resistance forces. It has also served as the greatest spur to recruitment that al-Qa'ida ever had. Just as in Vietnam, America has created a threat where none previously existed.²

But the particular problem with the war on terror that I want to focus on here is the way that the war is being presented as of such national and international significance and urgency that it makes talk of human rights seem irrelevant, or irresponsible or hopelessly idealistic. I will argue that this is both strategically and ethically a flawed approach. As Ronald Dworkin recently noted in the NY Review of Books,³ the move to sideline human rights in the wake of terrorism is a common self-inflicted harm of many western nations. Such policies, he writes, are 'not only wrong but shameful'.

It's important to note 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*,⁴ 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.

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.

For example, UK Prime Minister Tony Blair said, in the wake of the Bali bombings, that the West was facing a 'monolithic' terrorist threat. This might

¹ <http://www.cia.gov/terrorism/>

² 'How to create a terrorist state' The Australian 22 August 2003, p 11.

³ 6 November 2003 p 37.

⁴ See Article 2 1 b of the 1999 UN International Convention for the Suppressing of the Financing of Terrorism.

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 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 two years 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.

The war against terror has allowed the construction of what Joan Fitzpatrick has called 'rights-free zones'.⁵ A classic example is the treatment of people suspected of terrorism at Guantanamo Bay: they are treated neither as criminal suspects, with rights of due process, nor as combatants, with the rights of prisoners of war. The detainees are effectively in a type of awful legal limbo, without any rights at all, dependent solely on the diplomatic energies of their own country. They have been treated with 'impermissible contempt'.⁶ Thus, the recent agreement Australia has made with the US about the treatment of David Hicks and Md Habib presents a motley set of concessions not as rights but as a case of *noblesse oblige* on the part of the US. The joint press release by the AG and Minister for Foreign Affairs makes disturbing reading when we know that Hicks and Habib have been subjected to significant denial of their human rights including tremendous stress and duress, which may constitute forms of torture at international law.

Many countries have attempted to counter terrorist activities through legislation. Like the United States, Canada, and the United Kingdom, Australia has enacted laws that deal with a variety of aspects of terrorism. Some of these laws have been strongly criticised as being in breach of basic human rights principles. But are human rights relevant when we are dealing with terrorism?

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. The recent report by the UN Secretary-General's Special Representative on Human Rights Defenders, Hina Jilani, shows how terrorism laws have been used to target human rights groups.

⁵ 'Speaking Law to Power: The War against Terrorism and Human Rights' 14 *EJIL* 241, 242 (2003).

⁶ Dworkin p 41.

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.

We can also read the revival of the idea of the death penalty as appropriate for terrorists, a debate encouraged this year by Mr Howard, as part of this tendency to brush aside human rights in the name of a stern stance on terrorism.

The irony is 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. It is true however, that the international human rights regime has not generated much of value to respond to the violence and destructiveness of transnational criminal groups such as Al Qaeda.⁷

I want to suggest that the idea of a war against terrorism in which human rights are seen as an impediment to effective responses to violence is both theoretically and practically flawed. We should be much more conscious of the human rights implications of steps taken in the name of combating terrorism.

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'.⁸ 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 is also clear that the elements of a right to a fair trial must be respected even during an emergency. All of the rights contained in the Convention on the Rights of the Child apply even during times of emergency.⁹

⁷ Fitzpatrick 243.

⁸ Article 4.

⁹ Article 38.

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'.¹⁰

Mary Robinson, as UN High Commissioner for Human Rights, proposed criteria for the balancing of human rights protection with the combating of terrorism.¹¹ Her proposals included the requirement that laws restricting human rights in a time of emergency would have to:

1. Use precise criteria and
 2. Not confer unfettered discretion on those charged with their execution.
- The proposals also make clear that any limitations must:
 1. Conform to a principle of proportionality
 2. Respect the principle of non-discrimination
 3. Be compatible with the objects and purposes of human rights treaties and not impair the essence of any right
 4. Be necessary in a democratic society.¹²

This approach has been endorsed by the UN General Assembly and the Commission on Human Rights. Kofi Annan, the UN Secretary-General, has also published a number of reports on human rights and terrorism.¹³

Some provisions of the Australian anti-terrorism legislation do not appear to meet these standards. Take, for example, the ASIO legislation that was enacted in June this year, after much debate and controversy. Although the draft legislation was held up by the scrutiny of a number of parliamentary committees, and considerably amended in the process, eventually the opposition agreed to it, saying that it was the best outcome under the circumstances.

In essence, the ASIO Act allows ASIO the power to detain people, not who are suspected of terrorism, but who are thought to have information about terrorism, for 7 days and to question them for up to 24 hours in that 7 days. This means that a university researcher could be subject to these laws if they were foolish enough to have the wrong research interests.

The legislation does not preclude indefinite detention through a series of rolling warrants. The law effectively reverses the onus of proof, removes the right to silence and restricts access to independent legal advice while a person is in detention (eg ASIO can apply for particular lawyers to be

¹⁰ CCPR/C/21/Rev.1/Add11.

¹¹ UN Doc. E/CN.4/2002/18, Annex, 27 February 2002.

¹² 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).

¹³ Eg UN Doc A/58/266 (8 August 2003).

disallowed). Questioning of a person held by ASIO can begin without a lawyer being present; and a lawyer can be removed.

It is true that some of the worst features of the legislation as originally proposed have been removed from the ASIO legislation. As George Williams has said, the earlier drafts would not have been out of place in Pinochet's Chile. In the final version, retired judges are used to oversee the process; The law will lapse after 3 years. However, from a human rights perspective, the law is still problematic.

George Williams has called the law: 'an extraordinary law for an extraordinary time. It can be justified only as a temporary response to the threat of terrorism'. My concern is that this law will in fact have a longer life and impact and set a precedent for scaling back human rights. The war on terror as depicted by our politicians can never end and thus these laws will always appear necessary.

The bi partisan support for the flawed ASIO legislation indicates to me the importance of having a set of human rights standards against which governmental action in relation to terrorism 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. The international human rights regime can thus provide a useful framework for assessing Australian law.

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 found last year that the Justice Department and FBI officials supplied erroneous information to the court in more than 75 applications for search warrants and wire taps.¹⁴

An alternative framework to consider in dealing with acts of terrorism is international criminal law. The atrocities of 11 September 2001 and the 2002 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. The International Criminal Court 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. The strategic value of the continuing US opposition to the ICC is thus very hard to understand.

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.

¹⁴ 'Secret spying court rebuffs Ashcroft' *Guardian Weekly* 29 August-4 September 2002, p 31.

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.'¹⁵

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'.¹⁶ I do not see this as 'legal idealism' but rather as politically crucial to creating an effective response to the phenomenon of terrorism.

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. 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.

For these reasons, I would like to see the rhetoric of the 'war on terror' abandoned: the idea of a war suggests that it's possible to use lethal force on the enemy regardless of their personal involvement with violence and it justifies action on the basis of feared or anticipated harm; it implies that harm to civilians is justifiable, if it assists the prosecution of the war; it also allows fair requirements of evidence and proof to be watered down.¹⁷

We need to think much more seriously about long term strategies and the causes of terrorism – talk of the 'war on terror' gives the impression of strong action while in fact exacerbating the phenomenon it seeks to eradicate. For the short term, however, the most useful approach to terrorism, I want to suggest, would be one based on the rule of law and respect for human rights.

As Kofi Annan said in August 'If we compromise on human rights in seeking to fight terrorism, we hand terrorists a victory they cannot achieve on their own.'¹⁸

¹⁵ See UN Doc. E/CN.4/2002/18, 27 February 2002.

¹⁶ Ibid.

¹⁷ David Luban, *The War on Terrorism and the End of Human Rights Philosophy and Public Policy Quarterly*

¹⁸ Press release SG/SM/8798.