

Protecting Human Rights while Countering Terrorism a Decade after 9/11

Christina Szurlej*

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In response to the terrorist attacks of 11 September 2001 (9/11), President George W. Bush declared a ‘war on terror’, which has since proven to have serious consequences for the protection of human rights and fundamental freedoms. Given that the tragic events of 9/11 were carried out by Al-Qaida, the ‘war on terror’ largely centres on combating Islamic fundamentalism. In other words, the ‘war on terror’ is, in some respects, a war on an ideology, which renders the criteria used to gauge victory in this war unclear.

Aside from the ‘war on terror’ combating a vague and ill-defined enemy, the definition of terrorism under international law requires clarification. With variations between existing definitions of terrorism provided for in paragraph 3 of the 1994 Declaration on Measures to Eliminate International Terrorism,¹ paragraph 2 of General Assembly Resolution 53/108 on Measures to Eliminate International Terrorism,² Article 2(1)(2) of the International

* Christina Szurlej is a Doctoral Research Fellow and PhD Candidate in International Human Right Law at the National University of Ireland, Galway and Executive Editor of Special Issues for the Essex Human Rights Review. She has an undergraduate degree in politics and conflict resolution studies and a Master of Arts degree in the theory and practice of human rights from the Human Rights Centre at the University of Essex. Special thanks are owed to the authors who contributed to the 2011 Special Issue.

¹ Measures to Eliminate International Terrorism, United Nations General Assembly Resolution 49/60, 9 December 1994, paras. 1-3. Available at <http://www.un.org/documents/ga/res/49/a49r060.htm>. Last accessed 19 August 2011. The Resolution stipulates that ‘(1) The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States; (2) Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society; (3) Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.’

² Measures to Eliminate International Terrorism, United Nations General Assembly Resolution 53/108, 26 January 1999, para. 2. Available at <http://daccessdds.un.org/doc/UNDOC/GEN/N99/762/67/PDF/N9976267.pdf?OpenElement>. Last accessed 19 August 2011. Paragraph 2 ‘*Reiterates* that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.’

Convention for the Suppression of the Financing of Terrorism,³ the 1998 International Convention for the Suppression of Terrorist Bombings,⁴ and other international legal instruments pertaining to anti-terrorism, there is no universally accepted definition of terrorism under international law. In the absence of a uniform definition, there is no consensus over what constitutes terrorism, aside from agreement that terrorism consists of the threat or use of violence against innocent people for political means. Not having a clear definition of terrorism leads to its misuse and unduly wide application, extending to those who merely dissent from the social and political norms of society. James Madison believed that, historically, ‘The means of defence against foreign danger... have become the instruments of tyranny at home.’⁵ The practice of limiting human rights in times when it is most imperative to preserve them must be revisited, as ‘the end of law is not to abolish or restrain but to preserve and enlarge freedom.’⁶

Indeed, States are faced with the challenge of protecting human rights and fundamental freedoms while suppressing small groups of interconnected non-State terrorists who operate in detached networks and have the capacity to commit massive atrocities with minimal resources. These elusive factors amplify the risk posed to the State and members of the public by masking efforts to identify networks of individuals who are involved in or associated with terrorism, detect potential terrorist threats, and prevent terrorism from occurring.

When States fail to strike a balance between human rights and security in the context of countering terrorism, they risk impeding the very rights they purport to protect.⁷ As affirmed by the International Commission of Jurists, States must:

³ Rosemary Foot, ‘The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas’, *Human Rights Quarterly*, 29(2) 2007; International Convention for the Suppression of the Financing of Terrorism, United Nations General Assembly Resolution 54/109, 9 December 1999. Available at <http://www.un.org/law/cod/finterr.htm>. Last accessed 12 September 2011. Article 2 of the Convention states that ‘Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: a. An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or b. Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.’

⁴ International Convention for the Suppression of Terrorist Bombings, entered into force 23 May 2001. Available at <http://www1.umn.edu/humanrts/instree/terroristbombing.html>. Last accessed 28 September 2011. Article 2 indicates that ‘(1) Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility: a. With the intent to cause death or serious bodily injury; or b. With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss; (2) Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article; (3) Any person also commits an offence if that person: a. Participates as an accomplice in an offence as set forth in paragraph 1 or 2 of the present article; or b. Organizes or directs others to commit an offence as set forth in paragraph 1 or 2 of the present article; or c. In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.’

⁵ Max Farrand, *Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1911), p. 465, para. 1.

⁶ John Locke, *The Second Treatise of Government*, (1960), chapter 6, para. 57.

⁷ Thomas Hoffman, ‘Human Rights and Terrorism’, *Human Rights Quarterly*, 26(4), 2004.

adhere strictly to the rule of law, including the core principles of criminal and inter-national law and the specific standards and obligations of international human rights law, refugee law and, where applicable, humanitarian law. These principles, standards and obligations define the boundaries of permissible and legitimate state action against terrorism. The odious nature of terrorist acts cannot serve as a basis or pretext for states to disregard their international obligations, in particular in the protection of fundamental human rights.⁸

The 2011 Special Issue outlines and evaluates State, regional and international responses to the threat of terrorism since 9/11 through a human rights lens. This Issue further analyses national, regional and international counter-terrorism policies; actions undertaken by United Nations bodies, and their various mechanisms, with competence in the areas of human rights and terrorism; debates that inform global and domestic counter-terrorism efforts; accountability mechanisms that address human rights violations arising from misuse of power and authority while combating terrorism; and methods for improving the promotion and protection of human rights and freedoms while countering terrorism. The following is a summary of the pieces contained in the Special Issue.

In You can't always get what you want: The Kadi II conundrum and the Security Council 1267, Lisa Ginsborg and Special Rapporteur Martin Scheinin explore the legal powers of the Security Council under Chapter VII of the UN Charter in the context of the quasi-judicial role it has assumed in listing and delisting suspected terrorists and their associates under the 1267 sanctions regime.⁹ This piece outlines the way in which the 1267 sanctions regime fails to guarantee due-process related rights for terrorist suspects, despite the establishment of the Office of the Ombudsperson of the 1267 Committee and the recent split between the Al-Qaida and Taliban sanctions regimes through Resolutions 1988¹⁰ and 1989.¹¹ The insufficient disclosure of evidence poses a particular challenge to securing effective judicial procedures of review under 1267 regime in its present form. Without access to the evidence presented against a suspected terrorist, domestic and regional courts are unable to conduct a merits based review of decisions taken by the Security Council. The authors suggest that members of the Security Council that are also EU Member States should withhold support for decisions to add or retain individuals on the 1267 Al-Qaida list without adequate disclosure of evidence necessary for judicial review. Reform should also include automatic expiration of any listing decision after a given period of time, unless unanimously renewed by the Security Council.

Martin Scheinin and Mathias Vermeulen's *Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight against Terrorism* explores the interlocutory nature of treaty law and customary norms in the context of State justifications for engaging unilateral exceptions to human rights norms when countering terrorism. Although many of the arguments advanced by States in this regard have an appropriate scope of application and are valid under international law, they are limited by State obligations. The

⁸ Mary Robinson, 'Connecting Human Rights, Human Development and Human Security', in Wilson, Ashby, *Human Rights in the War on Terror*, (Cambridge, Cambridge University Press 2001), p. 309; *Assessing Damage, Urging Action*, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights (Geneva: International Commission of Jurists, 2009).

⁹ Security Council Resolution 1267, UN Doc. S/RES/1267 (1999)

¹⁰ Security Council Resolution 1988, UN Doc. S/RES/1988 (2011)

¹¹ Security Council Resolution 1989, UN Doc. S/RES/1989 (2011)

authors argue that such unilateral exceptions must be approached through a holistic lens to ensure their proper application and prevent misuse.

On 26 January 2010, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment, the Working Group on Enforced or Involuntary Disappearances, and the Working Group on Arbitrary Detention released a joint study on global practices in relation to secret detention in the context of countering terrorism.¹² The study identifies 63 States alleged to have been engaged or involved in the practice of secret detention. During an interview on the joint study, Chair-Rapporteur of the United Nations Working Group on Enforced and Involuntary Disappearances Jeremy Sarkin discusses the purpose of the joint study; what it means to be secretly detained or extraordinarily rendered; existing prevention and enforcement mechanisms; variations between accounts from victims of secret detention and the detaining States; the lack of compensation, redress or reparation for victims; how secret detention facilitates the practice of torture, inhuman or degrading treatment; State justifications for practicing secret detention and whether it is feasible to enforce the illegality of secret detention.

Dr Miša Zgonec-Rožej's *Kafka, Sisyphus and Bin Laden: Challenging the Al-Qaida and Taliban Sanctions Regime* builds upon Ginsborg and Scheinin's discussion of the legal powers of the Security Council under Chapter VII of the United Nations Charter in the context of listing and delisting suspected terrorists and their associates under the 1267 sanctions regime. Dr Miša Zgonec-Rožej outlines the protection of due process rights under international and regional human rights instruments, which encompasses, at a minimum, the right to be informed, the right to be heard and the right to judicial review and an effective remedy. The critical evaluation of the 1267 sanctions regime,¹³ as well as its implementation by the European Union, reveals the Kafkaesque and Sisyphean nature of the present system due to its arbitrariness and the prospect of never-ending legal actions. This article assesses the opportunities available to those who wish to have their names removed from the Consolidated List to challenge their black-listing, including in respect of insufficient due process rights, under the sanctions regime at the UN level, before the Human Rights Committee, the European Court of Human Rights, the Court of Justice of the European Union and the English courts.

Julian M. Lehmann's piece on *Limits to Counter-Terrorism: Comparing Derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights* explains that one legal justification for counter-terrorism measures has traditionally been based on invoking derogation from the European Convention on Human Rights (ECHR). Although human rights obligations under the International Covenant on Civil and Political Rights (ICCPR) remain applicable and the derogation provisions within the ECHR and ICCPR are similar, the jurisprudence of the European Court for Human Rights appears to be incongruent with certain elements of the Human Rights Committee's interpretation of the derogation clause within the ICCPR. General Comment 29 of the Human

¹² Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances. A/HRC/13/42, 26 January 2010.

¹³ See fn. 9.

Rights Committee,¹⁴ which contains the Committee's interpretation, endorses a narrower margin of discretion than the European Court in assessing the legality of derogation. While much of the Court's jurisprudence mirrors the legal arguments found in General Comment 29, departure from the Human Rights Committee's interpretation are apparent in a number of issues, such as terms of notification measures, long-term derogations and the Court's hesitance towards adopting the Committee's position on international humanitarian law.

The European Court of Human Rights (ECtHR) employs the margin of appreciation as a mechanism for balancing the protection of national security against the threat of terrorism and individual rights under the Convention. In *The Margin of Appreciation and Human Rights Protection in the 'War on Terror': Have the Rules changed before the European Court of Human Rights?*, Richard Smith discusses how the landscape of counter terrorism measures has changed since 9/11 and examines the Court's application of the margin of appreciation in this regard by comparing Convention case law prior to 9/11 with the ECtHR's subsequent jurisprudence. Smith then analyses the effect of the Court's application of the margin of appreciation on the protection of human rights.

The United States declared war against the Taliban, which is known for exploiting the drug trade, following the terrorist attacks of 11 September 2001. In *Narco-Terror: Conflating the Wars on Drugs and Terror*, Patrick Gallahue examines the resultant narrowing divide between counter-terrorism measures and efforts to dismantle the international drug trade. Gallahue explains that rhetoric and tactics which fail to distinguish between the 'war on drugs' and the 'war on terror' have serious implications for the protection of human rights, particularly with regard to the right to a fair trial, the right to liberty and security of person and the right to life. Although some countries, such as Malaysia and Egypt, have incorporated drug-related offences into emergency legislation prior to 2001, counter-terrorism measures adopted since then further diminish its distinction from drug-related offences, thus presenting challenges for the protection of human rights under international law.

Nick Dent's *Section 44: Repeal or Reform? A Home Secretary's Dilemma* explains that while stop and search without suspicion under Section 44 of the Terrorism Act 2000 is a necessary tool in preventing terrorism, the UK Government must ensure such measures do not breach Article 8 of the European Convention of Human Rights, as was the case in *Gillan v UK*. When permitting the use of stop and search without suspicion, the Home Secretary must strike an appropriate balance between respect for civil liberties with the need to ensure public safety in order to effectively counter terrorist threats while meeting its obligations under the Convention. Dent proposes solutions for addressing this dichotomy based on lessons learned from the challenges that have arisen from improper application of Section 44.

In *State Secrets, Impunity and Human Rights Violations: Prosecution Restricted in The Abu Omar Case*, Carmelo Danisi explores the Italian Constitutional Court's decision and its consequences on the Milanese trial regarding Omar's abduction. He discusses the difficulties that arose during the prosecution process and identifies limitations that should be imposed on the use of State secrets in order to prevent its misuse. On 17 February 2003, Abu Omar—a political refugee—was abducted from Italy and extraordinary rendered to Egypt where he was arbitrarily detained until 2007. The Italian Government subsequently invoked the State secret privilege to withhold information regarding the illegal abduction and transfer of Abu

¹⁴ International Covenant on Civil and Political Rights, General Comment No 29: States of Emergency (Article 4), 31/08/2001, UN-Doc CCPR/C/21/Rev.1/Add.11

Omar in an effort to shield itself from accountability before domestic courts. Danisi explores the ensuing decision reached by an Italian judge in this regard and discusses the limitations that should be imposed on the use of the State secret privilege in future cases.

Patricia Tarre Moser's *Torture Papers, Never Again: Guarantees of Non-repetition for the Torture Committed by the Bush Administration during the 'War on Terror'* discusses the Bush Administration's legal justifications for subjecting suspected terrorists to 'enhanced interrogation techniques'. Tarre explores the legal basis for these justifications as found in a set of government memorandums known as the Torture Papers and analyses how ambiguities in US domestic legislation, including the Torture Act, led to the interpretations reached by those who prepared these memorandums. The author contends that these ambiguities must be amended and recommends other measures to guarantee non-repetition of the draconian practice of 'enhanced interrogation techniques' employed by the Bush Administration.

Diplomatic assurances are agreements reached between the State from which an individual is to be transferred and the receiving State that the individual to be transferred is not at risk of suffering certain human rights abuses. Such assurances are generally sought from States that are known for serious human rights violations. In *The End of the Road on Diplomatic Assurances: The Removal of Suspected Terrorists under International Law*, Evelyne Schmid explores the legal arguments that are invoked to support the use of diplomatic assurances and weighs them against empirical evidence of the consequences that arise when diplomatic assurances fail to protect the transferred individual, pointing *Chahal v. the United Kingdom*, *Saadi v. Italy*, *Ben Khemais v. Italy* and *Toumi v. Italy* as to illustrate how diplomatic assurances may not suffice in preventing mistreatment of the individual upon his or her transfer. Schmid stresses the need for a careful approach towards the use of diplomatic assurances and provides a framework for assessing their validity.

Based on the arguments presented in each of these articles, it is clear that the international community must remember the words of Thomas Paine, who stated 'He that would make his liberty secure must guard even his enemy from oppression for if he violates this duty, he establishes a precedent that will reach to himself.'¹⁵ Although terrorism is a very real and ever-present threat, it does not negate domestic, regional and international obligations to respect, protect and preserve human rights and fundamental freedoms. Counter-terrorism efforts must apply the narrowest margin possible without compromising its efficacy and respect limitations regarding the scope of exceptions to such protection.

¹⁵ Thomas Paine, 'Dissertation on First Principles of Government,' (1895) *The Writings of Thomas Paine*, ed. Moncure D. Conway, 3, p. 277.