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**Reconciling Counter Terrorism Measures with the International
Human Rights Framework.**

By

Dr. Ken Nyaundi

Introduction

It is now almost 15 years since the tragic events of September 11, 2001 in New York.¹ The September 11 terrorist incident, in which 2,996 people died, marked a turning point in global responsiveness and efforts aimed at confronting terrorism. While the dangers posed by terrorism have been a constant concern of the international community,² the events of September 11 introduced a new sense of urgency in global efforts to detect and prevent terrorism. Still, while governments have intensified counter terrorism measures, terrorist acts have increased five fold.³ Experts agree that international terrorism is likely to increase and become bloodier.⁴ Four terror groups are responsible for most of the global terror attacks: Islamic State (Isis) in Iraq and Syria; Boko Haram in Nigeria; the Taliban in Afghanistan; and al-Qaida and its affiliates, such as the Al shabaab, in various parts of the world. The continuity of terror attacks raises a critical challenge for states: how to effectively combat the scourge of terrorism and still

¹ The September 11 attacks were a series of four coordinated terrorist attacks by the Islamic terrorist group al-Qaeda on the United States in New York City, New York, Arlington County, Virginia, and Shanksville, Pennsylvania on the morning of Tuesday, September 11, 2001. The attacks consisted of suicide attacks by plane hijackers. The hijackers crashed planes into the World Trade Center, The Pentagon, and a field in Shanksville, Pennsylvania.

² For a historical background, see MC Bassiouni (ed) *International terrorism and political crimes* (1975); A Cassese *Terrorism, politics and law: The Achille Lauro affair* (1989) ch 1; J Murphy 'Defining international terrorism: A way out of the quagmire' (1989) 19 *Israel Yearbook on Human Rights* 13; HH Han *Terrorism and political violence: Limits and possibilities of legal control* (1993); OY Elagab *International law documents relating to terrorism* (1999) xx-xxi; W Laqueur *A history of terrorism* (2001); A Sinclair *An anatomy of terror: A history of terrorism* (2004); H Duffy *The 'war on terror' and the framework of international law* (2005); JM Lutz & BJ Lutz *Terrorism: Origins and evolution* (2005); B Hoffman *Inside terrorism* (2006); B Saul *Defining terrorism in international law* (2006).

³ The Global Terrorism Index available at: <http://int/report/world/global-terrorism-index-report-2014>.

⁴ John Murphy, *The control of International Terrorism*," in Moore, Tipson & Turner's *National Security Law*, at pg 445.

maintain a respect for the principles of human rights, democracy and the rule of law.

In considering the place of human rights in the counter terrorism struggles the correlation between counter terrorism and human rights may be evaluated from the perspective of compliance with human rights within the anti terrorism legal regime. It requires an examination, first whether counter terrorism laws abide with human rights concerns, then considering the extent to which human rights law protects both the terrorist and the victims. In respect to both inquiries, the fundamental question is whether the human rights framework is an effective response to a growing global chorus to down-play human rights values in favor of strict anti terrorism measures.

We may observe at the outset that the post Sept 11 'War on terror' has strained and challenged the human rights framework in many aspects. Yet It is worth asking the question: Did Sept 11 'create a new concept of democracy that differs from the notion that western states defended before these events, especially with regard to the freedom of the individual' as posed by President Mubarak shortly thereafter?⁵ In the post September 11 era, are human rights marginalized, or just plain out of date?

Practical dilemma

A defining characteristic of liberal societies is the existence of legal limits on the exercise of public authority. These limits are often expressed as individual protections against the government and include the rights to life, free association, free expression, physical integrity, and due process of law.

Terrorism, which it is conceded, is a threat to international peace and security endangers these ideals as do states. But, from academic forums to international conventions, discussions on the appropriate application of executive power in counter terrorism efforts range from those who hold the view that terrorism poses

⁵ See Chichago Tribune, 5th August 2002.

a new challenge to security - which must be met with methods akin to confronting a war situation – and those who appeal for caution and restraint – appealing for counter terrorism measures which comply with the international human rights regime. This conflicting characterization fails to admit the validity in both arguments. First, that the terrorism threat is real. Secondly, terrorism is, in and of itself, a gross violation of human rights. Thirdly, that states have a legitimate duty to take measures to protect persons and property from terrorist attacks.⁶ Similarly, it is conceded that in attempts to reassure public confidence in the institution of government to protect its citizens, states have resorted to extreme legal and sometimes extra legal efforts to stem the threat of terrorism. Often, these efforts appear to disturb the delicate balance between security and human rights.

Where is the limit to executive power when the safety and security of its citizens is at stake? Is the international human rights framework so inflexible as to constrain and stymie state efforts to stem the scotch of terrorism? As we consider answers to these questions, it should be remembered that international human rights law was developed in times of a caustic and vicious global conflict and that it incorporates mechanisms intended to shield society from those who seek to destroy it. In other words, the international human rights law is not blind to the need to protect collective security, but recognizes an equal right to shield the individual against state intrusion save as may be necessary and proportionate to the gravity of the situation. On the general level, therefor, counter terrorism measures must be balanced with the aim of realizing national security. This is easier said than done. Questions still arise as to whether terrorism amounts to a threat for which a government may declare a state of emergency, or whether it may utilize the powers inherent in a state of emergency without making a formal declaration.

⁶ The United Nations Security Council Resolution 1373 required States to ensure that terrorists, their accomplices and supporters be brought to justice and that terrorist acts are established as serious criminal offences in domestic laws and the punishment duly reflects the seriousness of such terrorist acts. See Security Council Resolution 1373 (2001) adopted by the Security Council at its 4385th meeting, on 28 September 2001.

Conceptual Problems: Terrorism in the Context of International Law

In spite of frequent debates, references and writings on the subject there is as yet no universally agreed definition of terrorism. There are now 14 UN core conventions on terrorism, each with a different definition of terrorism and only agreeing that terrorism is a serious offence to be severely punished. Present heated debates and campaigns to outlaw terrorism have obscured the complexity of the problem and drawn away efforts to obtain an agreed definition. Most of the existing anti-terrorism conventions are governed by the principle to either prosecute or extradite alleged terrorists (*aut dedere aut judicare*). Emanating out of this principle is the primary subjection of terrorist suspects to domestic law. Consequently, it is apparent that within the domestic state law system, terrorism has moved the prism of state protection of persons and property from routine criminal law enforcement to state security concerns. It is now evident that, for states, striking a balance between national security and compliance with human rights norms is becoming increasingly difficult. Yet this is a necessary component of a tolerant and democratic society. There are legitimate fears that the fight against terrorism threatens the human rights regime and endangers respect for individual liberties.

There are concerns that state efforts to counter terrorism are exploiting popular fears among the populations to extend the permissible hand of arrest and interrogation into personal rights and fundamental freedoms. Human rights have become the unfortunate victims of counter-terrorism measures. Just as terrorism targets innocent civilians, so too are innocent civilians becoming casualties in the international campaign against terrorism.

The primacy of international human rights law

The primacy of international human rights law derives from the UN Charter together with the Universal Declaration of Human Rights (Universal Declaration). The Charter sets human rights as the cornerstone for the achievement of the

purposes of the UN.⁷ It provides that the UN will support 'universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.⁸ At the same time, imposes an obligation on UN member states 'to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in article 55.'⁹

The pre-eminence of human rights is placed beyond recall when the charter pronounces that:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.¹⁰

In similar vein, the Universal Declaration proclaims that it is 'a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society ... shall strive to secure their universal and effective recognition and observance.' While the Declaration may not speak with absolute authority, because its legal position is sometimes challenged, it may be said that it has acquired an acceptable place within the customary international law realm and may be binding to all nations.

The UN Working Group on Terrorism, while affirming the power of states to ensure the safety and security of all persons within their jurisdiction, has advised that all counter terrorism measures must be consistent with basic human rights.¹¹ Even in the super- heated atmosphere of the passage of Resolution 1373 the UN Security Council made it clear that all measures taken in confronting terrorism must be in 'conformity with the relevant provisions of national and international law, including international standards of human rights.'

⁷ Art 13.

⁸ Art 55(c).

⁹ Art 56.

¹⁰ Art 103

¹¹ Security Council Resolution 1456 (2003), Annex.

It is to be remembered that, International human rights law aims primarily to protect individuals and groups from abusive action by states and state agents. On a theoretical foundation, Immanuel Kant asserts that 'human rights must be kept whole, no matter what that may cost the powers that be.'¹² In the Kantian tradition, a shared respect for individual human rights underpins not just the obligation countries feel to follow international law but also international laws themselves and even the very legitimacy of nations in the eyes of the international community. An overlapping respect for human rights creates a moral common ground among the countries of the world. It is the common set of values rather than self-interest that ultimately provides legitimacy to international law. The international human rights framework, amongst others, provides an articulating axis for collective international action.

Two opposing views on the relationship between counter terrorism measures and the human rights framework have emerged: some see the two themes as mutually reinforcing and positive in improving human well-being, while others view terrorism as posing new threats not adequately governed by existing international human rights law.

Human Rights law and terrorism

The Human Rights framework is not soft on terrorism.¹³ It provides for instances in which exceptional measures may be taken to maintain the security of the public. But, even in those exceptional circumstances, there are certain rights that cannot be derogated or suspended.¹⁴ The right to life, the right to freedom from torture and all forms of cruel, inhuman or degrading treatment and the right to freedom of thought, conscience and religion are sacrosanct.¹⁵

¹² Immanuel Kant, *Zum Ewigen Frieden-Anhang II* (1795) in: *Samtliche Werke* Vol. 5 P.703.

¹³ See, *In the Name of Counter-Terrorism: Human rights Abuses Worldwide*. A Human rights watch Briefing paper for the 59th Session of the United Nations Commission on Human Rights, March 25, 2003 Accessible at: www.hrw.org.

¹⁴ Article 14 of the International Convention on Civil and Political Rights.

¹⁵ Article 4 of the ICCPR.

The OAU Convention on the Prevention and Combating of Terrorism¹⁶ affirms the serious nature of the offence of terrorism and recognizes that terrorism is a violation of human rights and in particular the right to physical integrity, life, freedom and security and impedes socio-economic development through destabilization of states. The convention obliges state parties to review their laws and criminalize acts of terror.

In the face of clear caveats, an appalling image of state abuse of human rights colors most state actions. Many Governments have enacted security laws that violate basic rights and freedoms and/or have denied terrorist suspects due process and the protection of the law. Asylum seekers and non-citizens have been punished in violation of the principle of non-refoulement. It must be remembered that the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment¹⁷ lays down a strict prohibition against torture holding that [N]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification of torture.¹⁸

The International Covenant on Civil and Political Rights establishes that restrictions to fundamental rights must be exceptional and temporary in nature; limited only to the extent strictly required by the exigencies of the situation; non-discriminatory solely on the ground of race, color, sex, language, religion or social origin and consistent with the state party's other obligations under international law, particularly of international humanitarian law.

Challenges to reconciling anti terrorism laws to human rights

¹⁶ Adopted on 14th July 1999 in Algiers, Algeria and came into force on 6th December 2002.

¹⁷ Adopted and opened for signature, ratification and accession by the General Assembly, Resolution 39/46 of December 10th 1984; entered into force 26th June 1987 in accordance with article 27(1).

¹⁸ See also article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights both of which provide that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment and the Declaration on the Protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment, adopted by the General Assembly on 9th December 1975.

There can be no argument that the seriousness of terror attacks does not justify a wholesome abandonment of the human rights regime. Yet it is apparent that in both developed and developing countries, authorities have inter-woven counter-terrorism efforts into national legislation which places considerate limits on fundamental freedoms.

Almost all counter-terrorism legislation establishes new criminal offenses, new detention and questioning powers, enhanced powers for proscription of terrorist organizations, control powers over people's movement and activities and new investigative powers for police and security agencies. In some countries, the legislation limits a free press; political dissent is equated to support for terrorism and several businessmen have had their bank accounts frozen on allegations of supporting terrorism. But it should be realized that the deprivation of liberty for citizens is not an immediate or long term solution to confronting the bane of terrorism.

There is another serious concern. Often, counter-terrorism legislation is developed without regard for in-built safety mechanisms-like Judicial Review for official conduct-thus permitting extensive negative in-roads into the human rights arena.

We may pose the question: why is it important to worry about the human rights of those who do not give a care on the rights of others? The answer lies in a discussion on the motives and objects of terrorists. Terrorism is an ideologically and politically motivated assault on democratic rights and freedoms.¹⁹ An essential strategy in countering terrorism is to 'win the contest of ideas' by rigorously defending the basic human rights and freedoms which form the

¹⁹ George Williams, 'Running the Risk of a Raft of Overreactions', The Australian, 4 Sept 2006.

'bedrock of dignity and democracy that make our societies worth protecting.²⁰ It is therefore critical that counter-terrorism measures do not violate human rights.²¹

In many instances, it has been noted that restriction of rights produces bitterness which triggers hate and radicalization in the targeted communities. This is not to deny that State concerns on the heightened risk posed by terrorism are true and legitimate. Terrorism endangers national security and development. It generates fear in the populations and attracts funding which should otherwise be directed at enhancement of social welfare.

The UN, the Commonwealth and the AU have been consistent in their advice that counter-terrorism measures be balanced against human rights standards. Counter-terrorism and human rights must be viewed as antonyms. Efforts aimed at counter-terrorism must not be enforced at the risk of violation of human rights. We should be dealing with terrorism in a manner that promotes preventive responses which flows on both security and rule of law.

Prospects

It is apparent that within the terrorism dialogue human rights law restrains state conduct more than it governs the behavior of terrorists. This results in accusations that human rights law seeks to defend the rights of those who do not care about the rights of others. This, obviously, disadvantages the strong arguments in favor of compliance with human rights. But has terrorism shifted the parameters of international human rights law? Have substantive human rights standards changed since September 11?

²⁰ Prof. David Feldman 'The Role of Parliament in Protecting Human Rights: a view from the UK' (Speech delivered at the Human Rights and Legislatures conference) Melbourne University, 20-22 July 2006.

²¹ Former United Nations Secretary General Kofi Annan observed that 'compromising human rights...facilitate the terrorist's objectives by ceding to them the moral high ground and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is likely to find recruits. Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element.' Kofi Annan, 'Address to the closing plenary of the international summit on Democracy, Terrorism and Security, Madrid, Spain, 10th March 2005.

Despite numerous negative developments there are certain advances which restore faith in the need to keep within the human rights framework. The UN comprehensive counter-terrorism strategy highlights the need for an espousal of human rights within counter-terrorism efforts. Similarly, the AU convention on terrorism compels state parties to 'adopt any legitimate measures aimed at preventing and combating terrorist acts in accordance with the provisions of the convention and their respective national legislation.'²²

On a practical level, there is an acknowledgement that violation of rights in the counter-terrorism context has shown negative effects in terrorism recruitment, legitimacy of counter-terrorism measures and state co-operation (in intelligence matters and in the criminal law context).

Conclusion

International human rights law allows a suspension of and derogation from some human rights in times of public emergency, which are clearly stated by national laws. State parties to international human rights conventions sometimes, however, use their rights to suspension of and derogation from their binding obligations in order to breach the individuals' civil liberties and fundamental rights.

Article 4 of the ICCPR envisages that states may justifiably infringe on human rights in times of public emergency. Admittedly though, in the face of constant terror threats and activities, even these rights face the risk of every day violation. Ultimately, we must consider that there is a critical litmus test for attaining the right balance between security and human rights. Much of this lies on the test of proportionality: is the limitation to rights the least restrictive means of achieving the desired purpose?

²² Art. 22 of the Convention cautions that; "Nothing in this convention shall be interpreted as derogating from the general principles of international law, in particular the principles of international humanitarian law, as well as the African charter on Human and People's Rights."

