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RSCAS PP 2011/03

ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES
Global Governance Programme

EUROPEAN AND UNITED STATES COUNTER-TERRORISM
POLICIES, THE RULE OF LAW AND HUMAN RIGHTS

Organised by Martin Scheinin

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES
GLOBAL GOVERNANCE PROGRAMME

*European and United States Counter-Terrorism Policies,
the Rule of Law and Human Rights*

ORGANISED BY MARTIN SCHEININ

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ISSN 1830-1541

© 2011 Organised by Martin Scheinin

Printed in Italy, June 2011
European University Institute
Badia Fiesolana

I – 50014 San Domenico di Fiesole (FI)
Italy

www.eui.eu/RSCAS/Publications/
www.eui.eu
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Introductory Remarks

Martin Scheinin

On 15 March 2011 the Global Governance Programme at the EUI hosted a High-Level Policy Seminar (HLPS) on "European and United States Counter-Terrorism Policies, the Rule of Law and Human Rights". The first part of the event consisted of a transatlantic dialogue on legal issues in the fight against terrorism, with addresses by the Legal Adviser of the US Department of State, Harold Hongju Koh and the EU Counter-Terrorism Coordinator, Gilles de Kerchove. The second part of the HLPS consisted of focused discussions introduced by academics and clustered around four big themes: terrorist blacklisting, definitions of terrorism, detention, trial and the role of criminal law in the fight against terrorism, and finally the positions of the EU and the US in relation to counter-terrorism and the role of Islam.

This joint policy paper is based on a selection of memoranda written mainly by academics to launch the debates in the second part of the HLPS. After the event the authors were given an opportunity to broaden and deepen their short memoranda, without necessarily remaining within the structure of four theme clusters. Even if the papers were expanded, they were to remain policy papers, rather than academic articles. As outcome, this joint policy paper consists of six papers by participants of the HLPS event. They reflect the aim of the HLPS to contribute to a dialogue on counter-terrorism issues in the United States and in Europe, the broad scope of the themes covered in the HLPS itself and, perhaps most importantly, an effort to address practical issues and dilemmas.

The pair of papers by Dr. Cian C. Murphy (King's College London) and Professor Kent Roach (University of Toronto) retains the spirit of the transatlantic dialogue between North America and the EU. Professor Kim Lane Scheppele (Princeton University) addresses a sensitive issue in the heart of the quest of addressing policy issues through the prism of the rule of law, namely the oversight and accountability of security services in counter-terrorism. The paper by Professor Olivier Roy (EUI) adds a social science perspective and seeks to inform EU and US counter-terrorism policies of the reality of recruitment within the Western world to Al-Qaida type of terrorism, by replacing myths and misconceptions with empirically grounded research. Finally, the papers by two persons involved in counter-terrorism work at the United Nations level address central policy issues against that experience. Mr. Richard Barrett, Coordinator of the United Nations Al-Qaida Taliban Monitoring Team, assesses the UN terrorist listing regime and its reform prospects. Professor Martin Scheinin (EUI), who also served as UN Special Rapporteur on human rights and counter-terrorism, presents and defends a best practice approach in counter-terrorism.

The United Nations and Terrorism – the 1267 Sanctions Regime Directed Against Al-Qaida, the Taliban and their Associates

Richard Barrett*

Summary

One of the key international instruments developed and deployed against the threat posed by Al-Qaida-related terrorism is a sanctions regime imposed by the Security Council that targets individuals, groups and entities associated with the Taliban, Usama bin Laden and Al-Qaida. This sanctions regime dates back to resolution 1267 (1999) adopted on 15 October 1999 as part of the international response to Taliban tolerance of Al-Qaida camps in Afghan territory then under its control.¹ Although the link between the Taliban and Al-Qaida predated 1999, it became of particular significance following Al-Qaida attacks on two United States Embassies in East Africa in August 1998.²

These attacks, and the general international disapproval of the Taliban regime, led initially to a traditional Security Council sanctions regime, focused on a specific geographical area, in this case Afghanistan, and designed to bring international pressure to bear in order to encourage or even force a change of policy. The sanctions measures were intended to isolate the Taliban regime, which in any case had found recognition from only three States,³ to end its support for Al-Qaida, and to encourage it to deliver Usama bin Laden to trial.

The further attacks by Al-Qaida on 11 September 2001, which provoked an immense reaction at international, regional and national levels, and the subsequent ejection of the Taliban regime from Afghanistan, did not bring the sanctions regime to an end but rather caused it to change direction. From a fairly standard regime directed against the authorities of a State, the Security Council decided to use the Afghan sanctions not only to continue to target people who had held senior office during the Taliban regime, although now stripped of power, but also to target Al-Qaida and its associates, wherever they might be found.

Although all Security Council sanctions regimes require observance by all Member States of the United Nations given that they are adopted under Chapter VII of the Charter,⁴ the '1267' sanctions regime became the first that had truly global scope. Listed individuals and entities are found in all parts of the world, and the Council therefore seeks effective implementation from all States to make it work, not just from those that share a border with Afghanistan or have some other close relationship with the country as was largely the case before 2001. The sanctions regime also continues a trend away from sanctioning a State to sanctioning the individuals in charge. Targeted sanctions, as they are known, were originally designed to keep pressure on the rulers of a State without causing undue suffering to the population at large. The 1267 sanctions, however, target individuals who have no connection with a State.

By imposing sanctions against them, the Security Council establishes a relationship with individuals. Where these individuals are associated with the policies and actions of a State, this relationship is easily understood in the context of the Security Council's responsibilities towards, and engagement with, the rest of the international community. As international structures are generally

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¹ [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1267\(1999\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1267(1999)).

² The attacks in Nairobi and Dar es Salaam of 7 August 1998.

³ Pakistan, Saudi Arabia and the United Arab Emirates.

⁴ <http://www.un.org/en/documents/charter/chapter7.shtml>.

designed to be mutually supportive, little legal conflict or controversy has arisen from Security Council action taken in this way when it is clearly in the interests of the maintenance of international peace and security and therefore within the Council's mandate.

However, the 1267 regime has attracted an increasing volume of concern, expressed by Member States, their courts and their publics. This concern arises from the inherent complexity of the Council taking action against individuals, with considerable impact on their lives and their rights to its enjoyment, despite the fact that they have no control over any traditional levers of state power. As the Security Council deals with States rather than individuals, and as Security Council decisions depend for their implementation on action by States, there has been considerable debate about the need to develop new mechanisms that allow the individuals affected by the 1267 sanctions to address the Security Council in order to seek relief, whether on a temporary or permanent basis.

The Council has been increasingly aware of this issue and the need to address it, not least because some individuals targeted by the Council's 1267 sanctions regime have challenged the imposition of the measures against them in national and regional courts.⁵ These challenges, and the problems that they may create for States if successful, have raised questions about the overall ability of the Council effectively to impose any targeted sanctions regime. This paper seeks to examine this issue and the Security Council's options and reaction to date.

The Role of the United Nations in Counter Terrorism

The international community, through the United Nations, has adopted 16 legal instruments that together provide a legal framework for national and international counter-terrorism work.⁶ These conventions, amendments and protocols include the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism and the International Convention for the Suppression of Acts of Nuclear Terrorism, all of which were negotiated through the General Assembly. The conventions typically define specific acts of terrorist violence and require States parties to criminalise them under national law.

The General Assembly aims to develop a comprehensive legal framework of conventions dealing with international terrorism through an Ad Hoc Committee which it established in December 1996.⁷ It has renewed the mandate of the Committee every year since then and in 2000 the Ad Hoc Committee began to draft a comprehensive convention on international terrorism, but this remains a work in progress and has been stuck for some time, mainly over the definition of terrorism.

The Security Council, not without opposition from some members of the General Assembly, has also adopted resolutions concerning international terrorism, many of them under Chapter VII of the Charter which gives them the force of international law. The Security Council has used its powers under Chapter VII in three areas. First it has adopted a range of resolutions that address the threat posed to international peace and security by the Taliban and Al-Qaida; second, in the immediate aftermath of the attacks in the United States on 11 September 2001, it adopted resolution 1373 which aimed to ensure an adequate response by Member States to the threat posed by international terrorism and to provide assistance to those States that needed it; in part it accelerated the ratification of the international convention on the Suppression of the Financing of Terrorism by including many of its provisions in a mandatory form.⁸ Third, the Security Council in April 2004 adopted resolution 1540 as

⁵ Cases have been brought before the courts in Canada, the European Union, Pakistan, Turkey, the United Kingdom and the United States, as well as the European Court of Human Rights.

⁶ See https://www.unodc.org/tldb/en/universal_instruments_list__NEW.html.

⁷ http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/51/210&Lang=E, adopted by the General Assembly in January 1997.

⁸ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

a way to impede the acquisition of nuclear, chemical and biological weapons, and their means of delivery, by terrorists or other non-State actors.⁹

In taking this action, the Security Council has asserted that the threat from terrorism constitutes a threat to international peace and security. In the immediate aftermath of the attacks of 2001, this seemed a reasonable assessment. Certainly those attacks had a global impact in terms of economic fall-out and global reaction; and since having elevated the threat to that level, the Security Council has decided to leave it there. Indeed it is hard to know what would prompt a reassessment that might persuade it to change its mind. Such is the nature of successful terrorism: it terrorises, and in doing so creates an emotional response which is not generally in proportion to its physical impact.

The opposition to Security Council action against terrorism by members of the General Assembly did not arise from a different assessment of the threat so much as from a concern that Security Council involvement would lead to the General Assembly ceding its competency to deal with this important subject, an issue made all the more important by the political sensitivities concerning the definition of terrorism and the question of State terrorism, as well as a perceived tendency, especially in the wake of the attacks of September 2001, to identify terrorism with the Muslim world.

In fact, if the broader membership of the United Nations had feared that the Council would hijack the negotiations over a definition of terrorism and conclude them by means of a mandatory resolution, this fear proved unfounded. Resolution 1373 (2001) has received a high level of support from all Member States and it remains a key instrument in the development of international norms and procedures in countering terrorism, as well as enshrining the principle that counter terrorism activity can only be conducted in conformity with international law and standards of human rights. The development of the Council's role in preventing non-state actors acquiring access to weapons of mass destruction following the adoption of resolution 1540 (2004), has also been largely uncontroversial among the broader membership of the United Nations.

The same cannot be said of the Al-Qaida, Taliban sanctions regime. While no State supports Al-Qaida, and the Taliban regime was almost universally reviled during its dominance in Afghanistan between 1996 and 2001, implementation of the sanctions measures has been problematic. A small number of individuals whose names appear on the 1267 Committee's list of persons subject to the sanctions have challenged the implementation of the measures against them in national and regional courts and have generally received judgements in their favour. One reason for this is the fundamental difference of perception between the Security Council, which sees the sanctions as an administrative and preventative measure, and the courts, which regard them as equivalent to a punishment. It is true that the sanctions are stated in the relevant resolutions to be preventative; it is also true that the Council has made clear that the decision to impose sanctions is not reliant upon criminal standards set out under national law,¹⁰ but the courts have looked at impact rather than intent and have found that, on several grounds, implementation by Member States conflicts with their obligations to protect the rights of the individual.

Apart from raising the individual's basic rights to freedom of movement and enjoyment of property, the courts have argued that as the impact of the sanctions is punitive, the individual concerned must have an appropriate recourse as if in a criminal proceeding, namely the right to be notified of the charges against him, the right to challenge them and the right to an effective judicial review.¹¹

⁹ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf?OpenElement>.

¹⁰ Mirroring the language of earlier resolutions, preliminary paragraph 10 of resolution 1904, adopted in December 2009, reads *Reiterating that the measures referred to in paragraph 1 of this resolution are preventative in nature and are not reliant upon criminal standards set out under national law*. See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/656/62/PDF/N0965662.pdf?OpenElement>.

¹¹ For example, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-402/05>.

The Council has no interest in imposing sanctions on people without adequate reason. Not only would this be unfair, but it would also discredit the Council's action against terrorism more broadly. The Council, nonetheless, is a political body not a judicial one and it cannot fully replicate the judicial system of trial and appeal that typically exists in Member States. However, rather than just point out that these resolutions are adopted under Chapter VII of the Charter and that the problems of implementation are for Member States to resolve, the Council has attempted to improve its procedures to allow an adequate measure of due process. Among several other features, it has improved notification;¹² it has provided a summary of reasons for listing;¹³ it has established a regular system of review of the continued appropriateness of the listings,¹⁴ and, most recently, it has introduced an Ombudsperson mechanism that listed individuals may utilise to have their cases thoroughly examined and brought to the attention of the 1267 Committee of the Security Council.¹⁵ It is still too early to say whether these improvements will satisfy the courts, and they may well fall short of what is required to do so, but it is clear that the Council has accepted a need for increased fairness and has thought constructively how to provide it.

On the question of notifying the individual of the charges against him, the Council has agreed to provide a summary of reasons for listing at the time that sanctions are imposed. Not all reasons will be given and the summary may exclude many details, as the Council believes that there has to be some provision whereby a member of the Committee can draw on confidential information in order to reach its decision. Few States would be prepared to share sensitive information with the other 14 members of the Committee, let alone with the individual subjected to sanctions or with a foreign court.

On the question of the individual's right to challenge the allegations made against him, the Office of the Ombudsperson allows him to do that. So as to provide the Committee with as full a report as possible, the Ombudsperson is mandated to collect information from the petitioner and all relevant States, meaning essentially those that have proposed the name for listing and the States of nationality and residence. The Ombudsperson can put questions from the petitioner to States and vice versa, and draw on any other appropriate sources of information. It is up to the States concerned to decide whether to show the Ombudsperson classified information.

Although not identical to a legal process, the Council has developed therefore a set of procedures that go some way towards emulating one. Without significant reform of the Charter, the Council cannot go much further. It cannot cede its authority to protect international peace and security to a higher body which may review and overturn its decisions. However, legal challenges to the 1267 sanctions regimes already pose a real threat to the authority of the Security Council. If Member States are still unable to implement the sanctions measures, despite the new procedures, the consequence may reach far beyond the individual who has appealed to the court against the application of the Al-Qaida and Taliban sanctions regime against him. If this sanctions regime fails in just one case on the basis of a lack of fair procedures, then it fails on all cases, and by extension all other sanctions regimes that similarly target individuals must be vulnerable in the same way. In an extreme case, this would rob the Council of a vital tool and raise questions about the meaning of Article 103 of the United Nations Charter which reads: *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.*¹⁶

¹² See resolution 1904 (2009) para 18 and para 15 (b) of Annex II.

¹³ <http://www.un.org/sc/committees/1267/narrative.shtml>.

¹⁴ See resolution 1822 (2008) paras 25 and 26, [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1822\(2008\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1822(2008)).

¹⁵ See resolution 1904 (2009) para 20 and Annex II.

[http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1904%20\(2009\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1904%20(2009)).

¹⁶ <http://www.un.org/en/documents/charter/chapter16.shtml>.

The meaning of these words is already in question. Clearly the Security Council cannot direct States to do things that are in contravention of the universal principles of human rights; but the question remains open as to where to draw the line, and who should draw it. The member states of the European Union appear not to question the authority of the European Court of Justice in this matter, even where its rulings might conflict with directives of the Security Council under Chapter VII; and although the European Court has been careful to explain that its examination of the 1267 sanctions regime focuses on the European Union directive that implements the measures, not on the right or the authority of the Security Council to impose them, nonetheless, by noting the lack of protections offered to the individual at the level of the Security Council, and by taking upon itself the function of providing them, the European Court has, in effect, attempted to rule on the legitimacy of Security Council action and has asserted itself as a higher, or at least as a corrective authority, within the confines of its jurisdiction. In the event that European Union member states find that their obligations to obey the rulings of the European Court of Justice conflict with their obligations as members of the United Nations to conform with the Charter, it is not clear what authority should decide which obligation takes precedence.

For its part, the Security Council, which always has three and at times four European Union members around its table, has attempted for three reasons to respond to the criticisms leveled against the sanctions regime, not just by the European Court but also by other judicial and non judicial bodies elsewhere. First it has accepted the argument that the regime insofar as it targets individuals must offer them adequate protection of their rights. Second, it has understood the difficulty that Member States may have in implementing its sanctions regimes if they contain no adequate protection of the rights of the targeted individuals and entities; and third, the Security Council has no desire to find itself in confrontation with any State over non-implementation of a Chapter VII resolution. In the case of the 1267 sanctions regime, just as with any other Security Council sanctions regime, a court ruling that prevented national or regional implementation would raise particularly difficult issues because the Security Council could do nothing in such a situation to assert its ultimate authority. Chapter VII resolutions, for all their coercive power, depend for their implementation and impact on the willing cooperation of States.

Over the years the Security Council has established 20 sanctions regimes of which nine have come to an end.¹⁷ Of the remaining eleven,¹⁸ all but the 1267 regime target States or are specific to a geographical area. The measures imposed vary and have included: an arms embargo; notification of arms sales; an aviation ban; restrictions on diamond sales; an assets freeze; restrictions on the sale of luxury goods; restrictions on the transfer of nuclear related material, a travel ban; a no-fly zone, or a combination of these measures. However, the variety of subject matter does not disguise the similarity in methodology, and in fact all but one sanctions regime include an assets freeze, a travel ban and an arms embargo, which are also the three elements of the Al-Qaida/Taliban sanctions regime.

The number of sanctions regimes imposed by the Security Council is not necessarily a tribute to their effectiveness so much as evidence of the limited range of other action available to the Council when it wishes to coerce States to change their policies, or, as in the case of the Al-Qaida/Taliban sanctions regime, to encourage individuals to change their behaviour. Leaving aside the imposition of sanctions, the Council has the option of issuing a Presidential Statement or declaring war. It is not surprising therefore that the Council not only resorts to imposing sanctions as the most appropriate way to exercise its responsibility when faced with almost any threat to international peace and security

¹⁷ The 9 terminated are (i) Sierra Leone (ii) Southern Rhodesia (iii) South Africa (iv) Libya (v) Haiti (vi) Angola (vii) former Yugoslavia (viii) Ethiopia/Eritrea and (ix) Rwanda.

¹⁸ (i) Somalia and Eritrea (ii) Al-Qaida/Taliban (iii) Iraq (iv) Liberia (v) Libya (vi) DRC (vii) Cote D'Ivoire (viii) Sudan (ix) IIC (International Independent Investigation Commission on the killing of the Lebanese former PM) (x) DPRK (xi) Non-proliferation (Iran). See <http://www.un.org/sc/committees/>

¹⁸ <http://www.un.org/en/documents/charter/chapter7.shtml>

that it believes demands its action, but also, in the absence of other tools, tends to deploy the three most common measures of assets freeze, travel ban and arms embargo.

To remove from the Security Council arsenal its ability to impose sanctions would therefore seriously limit its ability to take action, so reducing its role and authority within the international community. For all the extensive debate about the need for Security Council reform, there are very few States that have argued for a reduction in its powers. Sanctions regimes have usually garnered good support among the States that are most critical to their effective implementation, and have in almost all cases had an obvious effect. However, a successful challenge to the national or regional implementation of Security Council sanctions mounted by or on behalf of any targeted individual within any of the extant sanctions regimes would mount a threat to the mechanism as a whole. Although the courts will look at all cases separately as and when they are brought forward, once a precedent is set that a perceived lack of procedures at the level of the Security Council is enough in itself to negate implementation of the measures, then any listed individual would be able to mount a successful appeal against implementation of the measures against him within the same jurisdiction, regardless of the political imperative to take action.

The General Court in Europe in its ruling on Qadi II suggested that given the lack of procedures at the Security Council level and in the absence of any alternative mechanism, it would take upon itself to review the evidence against Qadi to decide if the measures taken against him were justified.¹⁹ But more important to the court than a review of the evidence was a lack of process. In any case, leaving aside that the Al-Qaida/Taliban sanctions regime makes clear that the measures are preventive, not punitive, and that a criminal standard of evidence is not required to propose a listing, no national or regional court could expect to gain access to all the information about an individual who is subject to international sanctions, particularly if some of the information is classified and belongs to a State which is outside its jurisdiction. In this situation, it is conceivable that the sanctions could be struck down against any person on the Al-Qaida/Taliban list, whatever his track record, purely on the basis that he has no recourse to an effective judicial review of the decision to subject him to the measures. It is easy to imagine that once one State decided it could not implement the sanctions, others would follow. The international regime would collapse.

Taken to the extreme therefore, the Security Council faces the option of abandoning its tool of sanctions or risk waiting until it is taken from it. Short of that, the Council could agree to the establishment of an independent body that could review its decisions, or it could allow an existing international body to conduct this review, or it could allow national or regional courts to review cases within their jurisdiction in a way that would have binding authority over its decisions. Clearly the last option is neither possible nor desirable. It would create a chaotic network of competing jurisdictions even if a review of sanctions could only be taken at the highest judicial level within any jurisdiction. Also, in such cases there would be no effective consideration of the evidence, nor any consideration of the preventative objectives of the regime. Furthermore, there are no circumstances under which Security Council members would agree to cede their authority to a national or regional body in this way.

Equally unlikely is a Security Council decision to abandon the use of sanctions altogether. Although the international community created the United Nations structures in very different political circumstances from today's, the Council's record has been impressive, particularly since the end of the super-power competition of the cold war. States have been cautious about changing a moderately

¹⁹ Judgement of the General Court of the European Union, case T-85/09, *Kadi v. Commission*, 30 September 2010, in particular paras 180-183. <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=en&alljur=alljur&juredj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=T-85/09&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&docppoag=docppoag&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher>.

unsatisfactory system that has nonetheless lasted since 1945 for one that might prove worse. If States are reluctant to see the Council gain additional powers, they are also not uniformly agreed that it should cast some aside. The adoption of sanctions and a No-Fly zone against Libya by resolutions 1970 (2011)²⁰ and 1973 (2011)²¹ relied on and responded to supportive statements by the Arab League, the African Union and the Secretary General of the Organization of the Islamic Conference, all of which looked to the Security Council as the only international body with the authority and legitimacy to initiate the action that they thought necessary.

The Council has already created an Ombudsperson mechanism through which individuals can challenge their listings under the 1267 regime. This mechanism followed and superseded the earlier, more cautious creation of the Focal Point by resolution 1730 (2006),²² but both address the same issue: how to allow a non-State actor to approach a body that by its constitution only deals with States. The Focal Point role was simply to check that delisting petitions were new and properly formulated, and forward them to the 1267 Committee. The Ombudsperson has a far more extensive role and mandate to investigate the cases submitted to her through interrogation of all concerned parties. Although empowered by resolution 1904 (2010) only to analyse the information collected and make 'observations' about a case, these observations will, to all intents and purposes, have the effect of recommendations, especially if they become public. The 1267 Committee will be under some pressure therefore to explain the reasons that it might not agree with the conclusions put forward by the Ombudsperson where the observations lead clearly towards a delisting. Although this system may fall short of an effective judicial review, if only because the Ombudsperson cannot overturn the decisions of the Committee, nonetheless it has opened a door that had until then remained very firmly shut.

It is understandable that some members of the Security Council have wondered whether the preservation of the increasingly troublesome Al-Qaida/Taliban sanctions regime is worth the erosion of the Council's authority that could result from the creation of the Ombudsperson mechanism or other attempts to provide an appropriate level of fairness. Given that the Security Council is a political body, not a judicial one, and therefore fundamentally unable to provide the protection of individual rights afforded by a court system, it is likely that any attempt to do so will be unsatisfactory and considered by the courts and public alike as inadequate, especially if seen as reactive and defensive. The Security Council will want to know that the impact of its sanctions regime on Al-Qaida and the Taliban is such as to justify taking steps into unknown territory that might lead to greater problems than it aims to solve.

Measuring the impact of the sanctions measures is not easy as they aim to prevent action and change behaviour. However, there is no doubt that they do have an effect on listed individuals and entities, as can be seen by the court cases brought against their implementation. In addition, the sanctions are assumed to have a deterrent effect, particularly on those contemplating the financing of Al-Qaida or the Taliban. Financiers are generally people of means with a public profile and identifiable assets, if only as the owners of businesses and other immovable property. For these people, to have their names appear on an international list of terrorist supporters has an immediate reputational and material impact. Other listings, such as of not-for-profit organisations that have been set up or operate as fronts for Al-Qaida-associated bodies, can also have an impact by alerting an unsuspecting public and raising awareness of terrorist fund-raising techniques. There is also a symbolic value in announcing that the Security Council deems an individual or a group to be such a threat to international peace and security that it names it as the target of its sanctions regime. In the lack of a definition of terrorism, it is useful to list the actors through the 1267 sanctions regime as well as define the actions through the 16 international instruments.

²⁰ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement>.

²¹ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement>.

²² [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1730\(2006\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1730(2006)).

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has argued that: '[t]hrough the work of the Security Council Committee established pursuant to resolution 1267 (1999), the Security Council has taken on a judicial or quasi-judicial role, while its procedures continue to fall short of the fundamental principles of the right to fair trial as reflected in international human rights treaties and customary international law.'²³ The Special Rapporteur considers that 'the imposition by the Council of sanctions on individuals and entities under the current system ... exceed[s] the powers conferred on the Council under Chapter VII of the Charter.'²⁴ However leaving aside this legal approach, it is also valid to question the extent to which individuals or groups can present a meaningful threat to international peace and security, particularly if they do not have behind them the resources of a State.

In the public imagination, Usama bin Laden may rival those villains of popular fiction who are set on achieving world domination, but in reality, even he is just an isolated leader of an unconnected group of cells and individuals with more intent than capability. He has achieved little since the spectacular attacks in the United States in 2001, but in the immediate aftermath of those attacks, the shock waves that reverberated throughout the world caused a reaction at all levels of policy-making, and, especially as the two most serious incidents occurred in New York, it was understandable that the Security Council also reacted swiftly, not just by adopting resolution 1373 (2001) but also by strengthening and expanding the sanctions regime that had, until then, been directed more against the Taliban than Al-Qaida.

Ten years later, a reassessment may be due. Not of whether a sanctions regime against international terrorism is necessary, but of its scope and form. As at the end of April 2011, close to 500 individuals groups and entities associated with Al-Qaida and the Taliban were subject to the sanctions regime. Of these, just over half were individuals connected with Al-Qaida and a little more than a quarter were individuals connected with the Taliban.²⁵ Among both groups are well-know names that have almost the public recognition of Usama bin Laden or Mullah Omar, the one-eyed leader of the Taliban; but many are more obscure. The 1267 Committee has made a considerable effort to winnow out from the list of names subject to sanctions those whose listings are no longer appropriate, and after an eighteen month review concluded in July 2010, it was able to exclude 45 entries, or almost ten per cent of the total. But the remainder may still be too great, both in the interests of ensuring the legitimacy of the listings, and in the interests of having an effective list which spurs Member States and other necessary bodies, such as financial institutions, to take action.

Rather than creep cautiously towards a set of procedures that might satisfy the courts of their fairness, though in all likelihood they would probably always fall short, the Security Council might be better advised to look more closely at the suitability of the sanctions regime as a way to address the threat posed by its targets. Although the Council has few tools at its disposal, there is no point in it using them inappropriately. Sanctions measures are not effective against all members of Al-Qaida and the Taliban, especially those whose listings have no symbolic value, who have no assets, who are hidden from sight and who have ample access to arms. If the 1267 Committee list contained the names of just the best known terrorists and their supporters, against whom there was clear evidence of their complicity in terrorism, it is likely that challenges against listings would be few and far between. When they did occur, even if the courts had doubts about the fairness of the procedures, they would be likely to accept that the imposition of the measures was proportionate and justified. The lack of legal challenges, or their dismissal when they occurred, would encourage States to embrace their obligations with more determination and to implement the measures more thoroughly. This would further endorse the role and engagement of the Security Council in the efforts of the international community to defeat terrorism.

²³ A/65/258, para 57. Available at

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/478/27/PDF/N1047827.pdf?OpenElement>.

²⁴ Ibid.

²⁵ The remainder were groups and entities associated with Al-Qaida.

EU Counter-Terrorism & the Rule of Law in a Post-‘War on Terror’ World

Cian C. Murphy*

It is clear that the ‘war on terror’ has had a detrimental effect on the rule of law. In the United States, the attempts by the Bush administration to step outside the legal constraints of the Constitution by declaring an ‘exception’ have been well documented.¹ The EU has no coercive power of its own but relies on its Member States to enforce EU law. While less naked in its exercise of power, EU counter-terrorism should not be underestimated. Its effects are less overt and thus more difficult to counteract. Two broad trends can be discerned in post-September 11 EU counter-terrorism: accelerated co-operation and a shift towards pre-emption. Certain proposals, such as the European Arrest Warrant, were brought to the top of the legislative agenda. However, September 11 was not merely catalytic. There has been a shift towards pre-emption in the EU that echoes the shift in US counter-terrorism. Pre-emption involves taking intrusive action against potential threats based on, at best, mere suspicion. It is evident in policy documents such as the Action Plan on Combating Terrorism, in the preambles to various legislative acts and in the operative text of those acts. EU counter-terrorism seeks to eradicate any space in which violent politics could develop. Key enactments put in place the common European crime of terrorism, systems of targeted sanctions and financial, travel and telecommunications surveillance. Though the targets of EU counter-terrorism are those who incite, finance, support and carry out acts of terrorism, the entire population is affected by the law. The EU did not adopt the rhetoric of a ‘war on terror’ – yet many of the danger posed by US counter-terrorism in that state can also be seen in the EU. In particular EU counter-terrorism has seen the centralisation of power and the adoption of legal acts to the detriment of the rule of law and fundamental rights.

Institutional Accountability and the Rule of Law

A recurring feature of counter-terrorism is the transfer of power from institutions subject to strong accountability mechanisms to those that are much less accountable. At a global level the greatest beneficiary has been the UN Security Council which has adopted global ‘legislation’ such as resolution 1373. That resolution, which has been described as ‘hegemonic international law’, requires states across the globe to pass legislation setting out certain terrorist offences.² The establishment of the UN Security Council’s 1267 Committee on Al Qaeda and Taleban sanctions, the Counter-Terrorism Committee and the 1540 Committee on Nuclear, Chemical and Biological Weapons has positioned the Security Council as the UN’s principal actor in the field of counter-terrorism.³ The UN General Assembly, the site of agreement of several counter-terrorism conventions prior to September 11 2001, has been disempowered as a result. As a body that consists of the representatives of a mere fifteen states – five of whom have a permanent seat and a veto power – the UN Security Council lacks accountability to the wider international community. The appointment of a Special Rapporteur and an Ombudsperson for the Al Qaeda and Taleban sanctions has been beneficial but the Security Council’s power still suffers from a democratic deficit. While it must, of course, perform its role in safeguarding international peace and security, the extension of that role to prescribing particular counter-terrorism law is revolutionary.

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This memorandum draws heavily on the author’s forthcoming *EU Counter-Terrorism: Pre-emption and the Rule of Law* (Hart Publishing 2011) where the arguments advanced here are developed in greater detail.

¹ See, amongst others, D Cole & J Lobel *Less Safe, Less Free: Why America Is Losing the War on Terror* (New Press 2007) and KL Scheppele ‘We Are All Post-9/11 Now’ [2006] *Fordham Law Review* 607.

² JE Alvarez ‘Hegemonic International Law Revisited’ [2003] *American Journal of International Law* 873.

³ UN Security Council resolutions 1267 (1999), 1373 (2001) and 1540 (2004).

A similar centralisation of power has been seen at European level. In the EU the executive can be said to be composed of the Council and the European Commission.⁴ The European Council has been the principal actor in EU counter-terrorism. In part this is due to the constitutional settlement in the EU before the Lisbon Treaty. Before Lisbon, most EU powers in the field of counter-terrorism set out legislative procedures that gave law-making power almost exclusively to the Council.⁵ The Framework Decision on Combating Terrorism, the Framework Decision on the European Arrest Warrant, as well as the later EU-US Passenger Name Record Agreements, were all adopted through processes which sidelined the European Parliament. This put the Council, which consists of Member State governments, at the heart of policy- and law-making. Of course, executives tend to dominate in times of emergency. Nonetheless, if Member State governments have control of EU legislative power they may be able to adopt law through the EU that would not survive national legislatures. While those legislatures may have to transpose EU law into national legal systems the legislation is often presented as a *fait accompli* to which the national legislature must assent. The European Commission has also engaged vigorously in this field. In addition to its lengthy evaluation reports on national implementation of EU counter-terrorism law it has also developed legislative proposals – for example in the field of data surveillance. The Commission also played a significant part in the negotiation of EU-US Passenger Name Record Agreements (despite the Treaties limiting its formal power). In the aftermath of the Madrid attacks in 2004, the EU established the office of the Counter-Terrorism Co-ordinator. The Co-ordinator is appointed by the Council and serves a three year term. The office functions, as its name suggests, to co-ordinate the Council's activities in counter-terrorism.

It is reasonable to conclude that EU counter-terrorism is dominated by Member State governments which are assisted by EU executive institutions and offices such as the European Commission and the Counter-Terrorism Co-ordinator. Such power, centralised at European level, is difficult to hold to account. Policy-laundering – moving policies through different institutions to increase their legitimacy – is apparent.⁶ The use of the Financial Action Task Force to agree soft law rules in anti-money laundering and counter-terrorist finance which are then incorporated into binding legislation is one example of this tendency. It is also evident in the development of the offence of incitement to terrorism which was a UK policy that was pursued at European and global level before being justified in Britain as an international obligation.

A corollary of the transfer of power to governments and executives is the diminution of legislatures and an increasing strain on judiciaries who try to uphold constitutional principles. The European Parliament has, until recently, been largely excluded from most (but not all) law-making in the field of counter-terrorism. National parliaments have also been disempowered by the EU legislative process and have largely been limited to scrutinising national legislation implementing EU law. It is not possible to make accurate claims about the nature and quality of the legislation that would have been adopted if the European and national parliaments had been afforded a greater role. Nonetheless, some of the European Parliament's recommendations on the draft Framework Decision on Combating Terrorism would have improved the protection of fundamental rights – but were ignored. Judicial resistance to counter-terrorism excesses has had limited success to date. For example, when the ECJ struck down the first EU-US Passenger Name Records Agreement on the ground that it was adopted on an incorrect legal basis two subsequent agreements were adopted that reduced judicial scrutiny over the action and worsened rather than improved protection for individuals.

Upholding the rule of law may well be impossible in the face of persistent action by political institutions. For those suspected of terrorism, the entire gamut of fundamental rights can be infringed by EU counter-terrorism. This includes freedom of expression and the right to receive information

⁴ See in general D Curtin *Executive Power of the European Union: Law, Practices and the Living Constitution* (Oxford 2009).

⁵ Article 34 EU (pre-Lisbon).

⁶ B Steinhardt 'Problem of Policy Laundering' *American Civil Liberties Union* 13 August 2004.

(incitement to terrorism offences and telecommunications surveillance), freedom of association (terrorist group offences), the right to privacy (surveillance of telecommunications, travel and financial transactions), and the right to property (targeted asset freezing sanctions). The terrorist offences, offences related to a terrorist group, and related offences in the Framework Decision on Combating Terrorism cast a wide net. In a similar vein, EU data surveillance aims to identify as many potential suspects as possible. Such action helps neither publics nor governments. Fundamental rights are infringed upon while law enforcement authorities are left with too much data and too many potential suspects to be effective. The rule of law is entirely discarded by targeted sanctions which use covert intelligence to identify individuals suspected of association with terrorists for designation by either the UN or the EU. The principle that the individual’s behaviour is judged against a clear standard set down in law is violated as there is no real effort to demonstrate that the target is guilty of terrorism.

Counter-terrorism also affects the general public. The ongoing development of surveillance has significantly restricted the right to privacy. For example, EU anti-money laundering legislation was altered after the attacks. Counter-terrorist finance was added to this policy field and there were several intrusive changes to the system of financial surveillance. The new approach requires even more extensive customer identification and the reporting of financial transactions based on suspicion. There have been similar developments in other fields. Having already agreed controversial Passenger Name Record agreements with the US the EU has now produced a draft directive on the collection of passenger name record data from those entering the EU.⁷ The most publicly controversial measure to date has been the Data Retention Directive. It has been the subject of adverse judgments from the German Federal Constitutional Court, Romanian Constitutional Court and the Supreme Administrative Court of Bulgaria.⁸ In May 2010 the Irish High Court agreed to refer a case challenging the directive on fundamental rights grounds to the European Court of Justice.⁹

It remains impossible to objectively assess the proportionality of any of this legislation as their necessity is asserted rather than proven. The months and years after September 11 were characterised by divisive debates over what is necessary, and what is just, when states and peoples are at risk of attack through political violence. At times the debate has been polarised to such an extent that reasonable discourse became impossible. If an inevitable consequence of pre-emptive counter-terrorism is to shrink the space for reasonable political debate then it is only through opening up that space that progress can be achieved. Such a move would require the use of parliamentary assemblies to debate the appropriate relationship between security action and fundamental rights, subjecting proposals for new powers to rigorous scrutiny, and accepting that not all risks can be eliminated.

The Post-‘War on Terror’ World

As we approach the ten year anniversary of the September 11 2001 attacks we may be entering a post-‘war on terror’ world wherein governments acknowledge the need for reform but remain reluctant to act. This is certainly true in relation to the US and UK. For example, it is not yet clear if the Obama administration will succeed in its goal of closing the detention facility at Guantanamo Bay that quickly came to represent the Bush administration’s attempts to act beyond the law.¹⁰ The equivalent action in

⁷ European Commission Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime COM(2011) 32 final, Brussels 2.2.2011.

⁸ CC Murphy ‘Romanian Constitutional Court, Decision No. 1258 of 8 October 2009’ (2010) 47(3) *Common Market Law Review* 933.

⁹ *Digital Rights Ireland Limited v Minister for Communications, Marine and Natural Resource and Others* Judgment of McKechnie J of 5 May 2010.

¹⁰ K Greenberg *The Least Worst Place: How Guantanamo Became the World’s Most Notorious Prison* (Oxford University Press 2009).

the United Kingdom can be said to be the internment of non-UK nationals who were suspected of terrorism but could not be deported.¹¹ Their internment was held to be unlawful by the House of Lords.¹² The Blair administration's response was to implement a system of control orders that, in some instances, amounted to house arrest.¹³ The change in government in the UK has brought with it a promise to repeal the most draconian of Britain's counter-terrorism powers. However, the proposed alternative, terrorism prevention and investigation measures, have already been derided as 'control orders lite' by civil liberties campaigners.¹⁴ Reluctant reform may simply be an exercise in refining the tools of law enforcement. This would be regrettable as there is ample evidence of the dangers of using counter-terrorism as a system of control.¹⁵ Whether Anglo-American policy has decisively shifted towards respect for fundamental rights and the rule of law remains to be seen.

In the EU, with the coming into force of the Lisbon Treaty and the adoption of the Stockholm Programme we may be at a point where appropriate reform can be carried out. Though the Stockholm Programme contains a wide range of proposals aimed at increasing security it also offers some hope for those hoping for a more balanced successor to the Hague Programme. At this time it is necessary to have a frank debate about the EU's role in counter-terrorism. Such a debate does, of course, require critics of the EU to acknowledge that some of the security action taken after September 11 may have been justified. However, it also requires the EU and its Member States to acknowledge that law enforcement must justify its powers to those subject to them in order to establish the trust necessary for effective government. It should also be acknowledged that over-reaching in the aftermath of the September 11 attacks has significantly undermined this trust and rebuilding it will take time. A full review of existing EU counter-terrorism action aimed at assessing its necessity, effectiveness and proportionality would be welcome. In terms of legislation of general application it is in the field of data surveillance that there is the greatest cause for concern. The systems of surveillance of financial, travel and telecommunications surveillance is based on the generalised suspicion of the entire population. The extent to which these systems now appear to be entrenched across Europe makes wholesale reform difficult to imagine.

In some respects it is almost impossible to ascertain just how much of the developments of the last decade can be attributed to the reaction to the September 11 attacks. The EU was already at the forefront of global efforts in anti-money laundering before the attacks and there was already a nascent system of financial surveillance. Nonetheless the decision to merge anti-money laundering with counter-terrorist finance is attributable to those attacks and the evolution of this policy field into 'threat finance'¹⁶ has certainly be aided by the post-September 11 climate of increased surveillance in the name of security. The development of travel and telecommunications surveillance is more clearly a reaction to the September 11 attacks. In relation to passenger name record data, the EU agreement with the US was a result of Europe struggling to meet the demands of the US – which had taken unilateral action to require airliners to provide advanced information on passengers. The same is true of the SWIFT Agreement negotiated between the EU and US on the transfer of data from financial institutions in Europe to law enforcement agencies in the US. These developments have raised serious questions about interference with privacy and the principles of data protection.

The efficacy of data surveillance is a further consideration. The Data Retention Directive was ostensibly adopted to prevent Member States from establishing different national standards and thus

¹¹ Anti-Terrorism, Crime and Security Act 2001.

¹² *A v Secretary of State for the Home Department* [2004] UKHL 56.

¹³ Prevention of Terrorism Act 2005.

¹⁴ *The Guardian*, 'Civil liberty campaigners fear 'control orders lite' regime' 25 January 2011.

¹⁵ See, for example, L Amooore and M deGoede (eds) *Risk and the War on Terror* (Routledge 2008).

¹⁶ M Levi 'Combating the Financing of Terrorism: A History and Assessment of the Control of 'Threat Finance'' [2010] *British Journal of Criminology* 650.

creating inconsistencies in the common telecommunications market.¹⁷ Nonetheless, to achieve agreement the directive made it possible for Member States to adopt implementing legislation with rules that differed in a number of respects (the retention period, compensation for telecommunications companies, and availability of the data to law enforcement authorities). It is therefore unsurprising that the European Commission has concluded that there have been ‘considerable differences’ in transposition of the directive into national law.¹⁸ The rush to ensure the EU was an effective actor has led to legislation that has failed to harmonise regulation across the EU. The powers granted to law enforcement authorities have, however, been used. In 2008/2009 there was over 2 million requests for telecommunications data across the EU.¹⁹ While it is only possible to speculate as to the crimes under investigation in each case it is unlikely that each of the 2 million requests concerned counter-terrorism. Thus, a power which was granted for use in certain circumstances may have become a tool of first resort for some authorities. The large volumes of data involved may render it impossible to use the information to prevent terrorism. An intelligence-led approach, which targeted individuals already under suspicion, would be more respectful of fundamental rights and arguably more effective. The status quo infringes those rights with no clear security benefits.

Turning to action specifically targeted at those suspected of involvement in terrorism the action that has attracted attention across jurisdictions is the UN system of sanctions against Al Qaeda and the Taleban. Despite critical judgments from the European Court of Justice and the UK Supreme Court the UN regime remains largely unreformed.²⁰ The much-celebrated decision of the European Court of Justice in *Kadi* appears to leave the EU in the difficult position of defying international law or violating its own constitutional principles. However, the debate on sanctions is not between the European judiciary and the UN Security Council but between those who believe that asserted necessity trumps the rights of those targeted.²¹ The transformation of that debate into a clash of legal orders neglects the fact that executive powers are strengthened the further from national legal systems the exercise of power becomes. The central problem is that the power to designate is being exercised at international level while the power to review is being exercised at national or EU level. If the sanctions system cannot be entirely abandoned then it follows that either the power to designate must be delegated to national authorities or real review should be made available at international level. Affording the Ombudsperson the power to review evidence and determine whether a particular designation is justifiable or not would be a small but important step towards rule of law compliance at a global level.

Institutional Reform and EU Counter-Terrorism

Ten years after the attacks it may now be possible to address the imbalance of powers both in a global context and within the EU. The development of more rule of law compliant counter-terrorism in the EU may well require reform of not just how power is exercised but also by whom it is exercised. The EU is not a state, but a quasi-state supranational governmental organisation, so the traditional separation of powers is unlikely to be directly applicable. Nonetheless, action taken since September 11 has demonstrated the danger of Member State governments acting through the EU to adopt

¹⁷ CC Murphy ‘Fundamental Rights and Security: The Difficult Position of the European Judiciary’ [2010] 16(2) European Public Law 289.

¹⁸ European Commission, *Report from the Commission to the Council and the European Parliament* COM(2011) 225 final, Brussels, 18.4.2011.

¹⁹ *ibid.*

²⁰ Joined Cases C-402/05 P & C-415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of the European Union*, [2008] ECR I-6351; *HM Treasury v Mohammad Jabar Ahmed & Others* [2010] UKSC 2. For an early argument in favour of review by EU courts see P Eeckhout ‘Community Terrorism Listings, Fundamental Rights and UN Security Council Resolution. In Search of the Right Fit’ (2007) *European Constitutional Law Review* 183.

²¹ M Scheinin ‘Is the ECJ Ruling in *Kadi* Incompatible with International Law?’ [2009] *Yearbook of European Law* 637.

counter-terrorism legislation. The strengthened role of the European Parliament and national parliaments since the coming into force of the Lisbon Treaty is to be welcomed. However, as one current case before the European Court of Justice demonstrates, there remains uncertainty over EU counter-terrorism powers.²² *Parliament v Council* is demonstrative of the challenges faced by the EU institutions even after the reforms of the Lisbon Treaty. The Treaty on the Functioning of the European Union now offers two potential legal bases for targeted sanctions in EU law. Article 75 TFEU allows the EU, when it is necessary to achieve an area of freedom, security and justice, to 'define a framework' for administrative measures against terrorism, such as the freezing of assets. Article 75 TFEU therefore offers a solution to the tortured debate on the EU's legal basis for the Al Qaeda and Taleban sanctions that took place before the Lisbon Treaty came into force.²³ The article has the benefit of providing that action should be taken through the ordinary legislative procedure which affords equal power to the Council and the European Parliament.

However, Article 75 TFEU is not the only potential legal basis for targeted sanctions. Article 215 TFEU provides for the adoption of 'restrictive measures'. It sets out a procedure for the adoption of restrictive measures against states but also declares that restrictive measures can also be adopted against 'natural or legal persons and groups or non-State entities'. Any such action should 'include necessary provisions on legal safeguards'. The procedure through which this action is taken requires the Council to act on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the European Commission. The European Parliament is merely to be informed. When the Member States decided to amend the legislation that implements the Al Qaeda and Taleban sanctions in EU law they chose to base the action on Article 215 TFEU rather than Article 75 TFEU.²⁴ As a result the European Parliament launched the litigation now before the European Court of Justice.

These rules about legal bases may seem arcane and unimportant. However, the choice of legal basis determines what procedure is used and therefore what role the European Parliament is given. This may have a direct impact on the democratic legitimacy of the legislation and an indirect impact on the content of the legislation (if the European Parliament were to insist on a more rule of law compliant system). There may well be good reasons to base the sanctions on Article 215 TFEU. It is, after all, the obvious successor to Articles 60 and 301 EC which, along with Article 308 EC, provided the legal basis for the sanctions before the Lisbon Treaty came into force. This memorandum is not the place for a full discussion of the pros and cons of different legal bases. Nevertheless, it might be preferable from an accountability point of view to use legal bases that afford the European Parliament the power of co-decision over EU implementation of the UN Al Qaeda and Taleban sanctions.

In addition to reform within the EU there is also potential for more progressive EU action on the world stage. Despite the abolition of the pillar structure by the Lisbon Treaty the common foreign and security policy remains somewhat removed from the EU's ordinary policy-making processes.²⁵ Nonetheless, the EU Treaty does provide the chance for the EU to speak with a single voice if the Member States are inclined to do so. For example, Member States on the UN Security Council are required to 'uphold the Union's positions' in this forum and 'defend the positions and interests of the Union'. They may request that the High Representative for Foreign Affairs and Security Policy be invited to present the EU position to the Security Council.²⁶ Thus the EU could play a greater role in the global governance of counter-terrorism if the Member States so wished.

²² Case C-130/10 *European Parliament v Council of the European Union* OJ 2010 C 134.

²³ T Tridimas, 'Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order' (2009) 34 *European Law Review* 103.

²⁴ Council Regulation 1286/2009 of 22 December 2009.

²⁵ Title V of the Treaty on European Union.

²⁶ Article 34 EU.

The Future of EU Counter-Terrorism

It is through an accident of history, or more accurately the designs of nineteen hijackers, that counter-terrorism has proven to be the focal point for the development of the EU’s role in criminal justice. It is an unfortunate accident – for counter-terrorism has proven time and again in jurisdictions the world over to have a corrosive effect on criminal justice.²⁷ Developments in this field tend to be reactive: the establishment of the Counter-Terrorism Co-ordinator was a reaction to the Madrid bombings and agreement on the Data Retention Directive came in the wake of the London bombings. The task of constructing a European criminal law and criminal justice is not one that should be pursued in haste simply so as to be seen to be acting against the threat of violence. A reactionary approach is likely to be enforcement-led and may therefore undermine fundamental rights in the name of protecting security.

If terrorism begins to wane as a subject of government action then it is conceivable that EU counter-terrorism may become subsumed in the broader, growing, policy field of EU criminal justice. The European Arrest Warrant could be a positive example of EU co-operation if there was the necessary mutual trust, minimum standards of protection, and proportionate use by law enforcement authorities. Instead it is seen as European over-reaching – a consequence perhaps of its hasty adoption in the wake of the September 11 attacks. Though serious concerns remain relating to the Warrant’s operation these pertain to the development of an EU criminal justice system and the establishment of appropriate safeguards in that context. The European Arrest Warrant should be reformed as an instrument of ordinary EU criminal justice co-operation. A review is envisaged by the Stockholm Programme and any reform will be indicative of the future of EU counter-terrorism in particular and EU criminal justice in general. It will help to determine whether EU counter-terrorism can indeed comply with ‘the rule of law, without which, in the long run, no democratic society can truly prosper’.²⁸

²⁷ For an enlightened discussion see K Roach ‘The Criminal Law and Terrorism’ in Ramraj, Hor and Roach *Global Anti-Terrorism Law and Policy* (Cambridge University Press 2005).

²⁸ Opinion of Advocate General Poiares Maduro in Joined Cases C-402/05 P & C-415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of the European Union*, [2008] ECR I-6351.

Some Challenges in European and (North) American Counter-Terrorism

Kent Roach*

Introduction

Europe and the United States face a number of common challenges in ensuring an effective response to terrorism that respects the rule of law and human rights. The first part of this short paper will offer some thoughts on the relation between counter-terrorism and human rights and the rule of law. The second part of the paper will outline some common challenges faced by Europe and the United States while the third part will examine some specific challenges faced by the United States.

I. Reconciling Security Measures with Human Rights and the Rule of Law

There are a variety of ways to reconcile security measures with human rights and the rule of law. There has been a tendency especially immediately after 9/11 to see human rights and security as competing goals. This approach was represented by the attempt to make Guantanamo Bay a law free zone, but also seen in the United Kingdom's post 9/11 derogation from the European Convention on Human Rights and its subsequent unsuccessful attempt to persuade the European Court of Human Rights to adopt a post 9/11 approach taken by the Supreme Court of Canada that contemplated that exceptional circumstances could justify deportation of a suspected terrorist to a substantial risk of torture.¹

Another way to examine the relationship is to require that limits on human rights for security ends be justified as reasonable and proportionate. This is a more disciplined approach that is consistent with the emphasis placed on proportionality in many legal instruments. It may be particularly valuable in requiring states to adopt less rights invasive means to achieve their security objectives. At the same time, however, like the first approach, it conceives of security and human rights as competing goals.

A third way to conceive the relationship between security and human rights is less legal and more political because it focuses on the strategic case for human rights and the rule of law. Recent events in North Africa suggest that there is a desire for human rights and the rule of law as an alternative to authoritarian and closed regimes that too often breed terrorism. The human rights/rule of law narrative including universal rights subject to punishment only after a fair trial is an attractive narrative to counter that offered by Al Qaeda and others. This approach also recognizes the strategic interest that the United States may have in closing Guantanamo and being seen to comply with human rights and the rule of law.

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¹ *Saadi v. Italy Application no. 37201/06* declining to follow *Suresh v. Canada* [2002] 1 S.C.R. 3. For further criticism of the *Suresh* exception that contemplated deportation to torture in undefined exceptional circumstances see Kent Roach "International, Constitutional and Remedial Dialogues About Rights" (2005) 40 *Texas International Law Journal* 537.

II. Some Common European and American Challenges

Complying with Security Council Mandates While Respecting the Rule of Law and Human Rights

One common challenge facing both Europe and the United States is how to comply with the Security Council's 1267 listing regime enacted under Chapter VII of the United Nations Charter while also ensuring respect for the rule of law. Europe has so far been more attentive to this challenge in the *Kadi* line of cases than the United States, but there has been some success in Canada in indirectly challenging the UN listing regime.

Starting with the European Court of Justice's decision in *Kadi*,² there have been increasing challenges to the secretive intergovernmental listing regimes that are required to provide financial institutions and others with lists of terrorists. The Canadian courts have also criticized the 1267 process as unfair while at the same time interpreting Resolution 1267 in a manner that has allowed a listed Canadian citizen to return to Canada while not placing Canada in breach of the Security Council's travel ban and asset freeze.³ There is also a case forthcoming in the European Court of Human Rights which raises a possible conflict between Security Council mandates for internment in Iraq and human rights guarantees.⁴ It would be easier for states to reconcile competing legal orders if the Security Council had paid more attention to human rights norms especially in its initial post 9/11 work. Hopefully the domestic and European pushback that the Security Council is experiencing will convince it in the future to pay more attention to human rights concerns.

The Security Council has responded to increasing concerns about the 1267 listing process with narrative summaries and the creation of an Ombudsperson. It may, however, be impossible for the Security Council to provide traditional due process because even the 1267 Ombudsperson may not have access to the secret intelligence said to justify the listing. It is unclear whether the system can be reformed to be consistent with due process while still respecting the ability of states to decide whether to disclose intelligence. The United States may well provide the most intelligence that lies behind the listings and narrative summaries but it may be especially unwilling to disclose sources and methods given the success of the American government in using state secret doctrine to prevent the disclosure of intelligence in American courts.

It is also unclear whether the 1267 listing system is worth reforming the system given the evolution of Al Qaeda and means of financing terrorism. Many home grown terrorists who may be influenced by Al Qaeda will simply never be candidates for 1267 listing. Assets freezes and suspicious transaction reporting requirements may also fail to catch the small amounts that can be used to finance deadly terrorism. In many countries, terrorism financing regulation is closely linked to money laundering despite the differences between the two phenomena. There is a danger that countries will continue to incur both human rights and financial costs in enforcing elaborate terrorism financing/money laundering regimes in order to comply with the Security Council and the Financial Action Task Force. Indonesia as well as Egypt and Syria all dutifully enacted terrorism financing/money laundering regimes after 9/11 but the effectiveness of these measures remain open to question. One strategy to save terrorism financing may be to decouple sanctions that flow from listing and place a greater emphasis on domestic prosecutions. At the same time, such prosecutions may also produce difficult questions revolving around the disclosure of intelligence and the appropriateness of punishing people

² See Joined Cases C-402/05 P & C-415/05 P, *Kadi v. Council*, 2008 E.C.R. I-6351. For further analysis see Craig Forcece and Kent Roach "Limping into the Future: The UN 1267 Terrorism Listing Process at the Crossroads" (2011) 42 *George Washington International Law Review* (forthcoming).

³ *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 F.C. 580.

⁴ *Al Jedda v. The United Kingdom* (case heard by Grand Chamber June, 2010).

for contributing to groups that may perform legitimate and peaceful services but also may be involved in terrorism. Even when convictions are obtained, the final sentence may not be worth the efforts. For example, Canada's first pure terrorism financing conviction resulted in a 6 month sentence for a man who gave \$3000 Canadian to the Tamil Tigers. There may be a need for a more radical rethink of the emphasis that the Security Council and FATF placed on terrorism financing in the immediate aftermath of 9/11 and building on the 1267 regime, Bin Laden's reputation as a financier and the 1999 financing convention.

The Security Council has made efforts to bring the rule of law and human rights back in after the initial response to 9/11, but the stain of the early years lingers. The General Assembly's 2006 strategy unfortunately came after many states had responded to 1373. The 2006 strategy provides a sound foundation, but needs to be better integrated into the work of all the UN. A stock taking exercise by various actors in light of the strategy and perhaps tied to re-evaluation, best practices, selective sunsets could be taken. The process should be transparent and open to civil society. It should include both human rights and security experts and also civil society actors. In general, the security and human rights sides of the UN need to work together, for example through joint country visits and reports.

The Criminal Law is Critically Important but under Strain

Criminal prosecutions are the fairest response to terrorism. They can have a unique value in denouncing and de-legitimizing terrorism. That said, criminal law and criminal trials are under strain. Many new terrorism offences enacted after 9/11 come dangerously close to creating status offences, thought crimes and guilt by association. Such an expansion of the criminal law runs the risk of distorting the criminal law. The expansion of post-9/11 terrorism offences also creates a risk of sentences that the public consider too lenient given the emotive terrorist label, or alternatively, sentences that are disproportionate to the actual severity of what the accused did and intended.

The criminal trial is also under strain. A new type of terrorism trial is emerging that features multiple accused, multiple offences and evidence about the accused's politics and religion. The new terrorism trial also features frequent applications to close courts and not to disclose secret but perhaps relevant intelligence to the accused. Witnesses in terrorism trials have given evidence anonymously and from remote locations. Judges who have presided in terrorism trials in common law systems at least have expressed frustration about how secrecy claims may adversely affect both the fairness and the efficiency of the criminal trial. The public, especially in the US, seems to have lost confidence in using criminal prosecutions perhaps because some of their leaders have.

Attention should be paid to ensuring that criminal trials remain workable, legitimate and command public confidence as a response to terrorism. They may be the best response to terrorism and especially escalation in home grown terrorism. There is also a need for better understanding of the different demands of common law and civilian terrorism trials, including concerns about the reliability of unsourced intelligence that may be more easily used as evidence by judges in continental systems. Although there are many examples of successful terrorism prosecutions in both the United Kingdom and the United States, the disclosure and confrontation problems created by such prosecutions should not be underestimated and may be greater than those experienced by at least some continental systems such as France's which rely on written dossiers and use specialized judges who work closely with the intelligence services. The United Kingdom still does not use electronic surveillance in its terrorism prosecutions because of concerns about the disclosure of sensitive material.

Review of Whole of Government Responses to Terrorism for Efficacy and Propriety

One of the most disturbing fall outs from 9/11 is the yawning accountability gap that has been created as governments have intensified and integrated counter-terrorism activities while various review agencies in the legislature and the executive have failed to keep pace. Lack of review can harm both

rights and security. Courts can and have played a review role but not the prime role. Review of national security activities should mirror the national security activities that are subject to review. Increased national security activities require increased resources and powers for the reviewers. More specifically, reviewers should share information and engage in more co-ordinated review in order to match the increased co-ordination and information-sharing that is occurring within the executive branch.

Domestically, most review mechanisms remain confined to specific agencies or silos with little ability to conduct co-ordinated reviews that will follow greater integration in government. In both Canada and the UK, special inquiries with jurisdiction to examine all officials have had to be appointed to investigate whether police, intelligence agents, and foreign affairs officials have been complicit in torture. In Canada, however, the security establishment has successfully resisted the calls of two inquiries for increased review for efficacy and propriety. Australia is a better example and in 2010, its Inspector General received government-wide jurisdiction to examine all intelligence matters within the Commonwealth government. Australia also created a new special security cleared monitor to evaluate both the propriety and the effectiveness of whole of government approaches to terrorism and a new Parliamentary committee on law enforcement. Various review bodies in Australia have combined to review security legislation. The existence of quasi-judicial watchdogs within the executive, as well as the important work of the Joint Committee on Human Rights in the UK, demonstrate how the executive and the legislature, as well as the judiciary, can be enlisted to better protect human rights while countering terrorism. Even optimal domestic accountability devices, however, will not easily extend to co-ordinated activities of national governments with other states and governments.

Although a bifurcated approach that separates review for propriety and compliance with human rights from review for efficacy can in theory maximize both forms of review, it also risks marginalizing review for propriety on the basis that the reviewer has not taken seriously the need to prevent terrorism. Modern proportionality principles blend propriety and efficacy based review and some of the most abject counter-terrorism failures since 9/11 have arguably harmed both human rights and the effort to prevent terrorism. For these reasons, there is much to be said for combining efficacy and propriety based review wherever possible.

There is, however, a danger if efficacy based review involves real time operational oversight where the reviewer is part of the decision-making process or otherwise becomes heavily implicated in questionable activities that must remain secret. In this respect, Congressional oversight of US programs such as the NSA warrantless spying and extraordinary renditions (and perhaps targeted killing) have failed to provide real accountability. They have arguably co-opted the legislators who have been “briefed in” but who cannot go public with secret information or reveal the existence of secret programs.

Review bodies including legislative committees and courts face a dilemma in dealing with secret information. Being privy to secrets comes at the price of silence about those secrets. Not having access to secrets, however, leaves one vulnerable to the oft-heard criticism “If you knew what I know”.

Sunsets and Exit Strategies

Review should be tied to sunsets and exit and ramping down options. The public has often been sold harsh counter-terrorism measures as necessary to protect their security and more thought needs to be given to exit strategies. The recent UK experience is significant in this regard including Lord Macdonald’s conclusions after reviewing secret information that control orders were not necessary and that they harm prosecution strategy. At the same time, the long-timer UK reviewer Lord Carlile concluded that the eight remaining control orders were justified perhaps leaving the public and the government in some state of confusion.

Value for money review may be attractive given governmental concern about fiscal deficits and the dramatic increase in security and related military budgets in the United States and Europe. It would be odd if security measures were totally sheltered from governmental austerity measures and if greater efficiencies could not be secured in the security sector which has extensive overlap and perhaps redundancy particularly in the intelligence sector. Economic restraints may be as potent and perhaps more so in ramping down security strategies than human rights concerns.

Having ramped up security measures, government may need to take steps to convince the population that it is safe to ramp down some of these measures. The British experience is interesting in this regard as the coalition government is prepared to lower a maximum detention period of 28 days following preventive arrest to 14 days but has also introduced new emergency legislation to allow the maximum period to increase again to 28 days in case of an emergency. This cautious approach may be a realistic one given the security fears of the public. The UK government has also taken a cautious approach to winding down control orders, extending them to the end of 2011 with plans to replace them with new albeit less drastic measures. This represents a rather cautious approach in implementing a “correction in favour of liberty.

Substitution Effects

Attention should be paid to possible substitution effects when governments ramp down counter-terrorism measures. The Obama administration has closed down CIA black site prisons and imposed new restrictions on interrogations. These are praiseworthy developments but their impact may be offset by the oft-noted increases in targeted killing by the CIA. In addition, the fate of the CIA’s extraordinary rendition program is not clear. A recent report has detailed how the CIA has allowed Pakistan to detain and interrogate a suspected terrorist even though the United States previously offered a million dollar reward for his capture with an unnamed official explaining: “The CIA is out of the detention and interrogation business.”⁵ There is a danger that substitution effects will result in less discriminate and harsher measures. This could occur if detention and interrogation is contracted out to countries with poor human rights records or if targeted killing including the collateral damage of killing innocent persons replaces detention and harsh interrogation measures.

In the United Kingdom, it is not clear what if any substitution effects will follow from the eventual repeal of control orders and the lowering of the maximum period of preventive arrest. It is possible that intrusive forms of surveillance may increase and that police and prosecutors may make greater use of broader offences such as possession of information and items that could be used for terrorism. Not all substitutions will be negative and some might be desirable from both security and human rights perspectives. Nevertheless substitution effects will occur if only because of the generous post 9/11 funding and expansion of security services. Unfortunately, the secrecy surrounding national security activities makes it difficult to judge the overall effects of substitution effects. The danger of negative substitution effects reaffirms the importance of effective review of intensified and integrated whole of government approaches to countering terrorism.

Community Relations and Rehabilitation

Community relations with Muslim minorities that may be radicalized by both the treatment of Muslims around the world and by their own treatment in Western societies are a challenge. The UK has attempted to deal with some of these issues through the Prevent strand of its Contest strategy and Canada created a Cross Cultural Roundtable as part of its 2004 National Security Plan. Approaches to multiculturalism in Europe and North America will be very different and reflect the different history and conditions of Muslim minorities in the different societies. Nevertheless, western democracies have

⁵ “CIA has slashed its interrogation role” *The Los Angeles Times* April 10, 2011.

struggled with such issues especially compared to say Singapore which in response to its home grown terrorism arrests created elaborate community relations programs and apparently successful rehabilitation programs for detainees and their families.

Another instrument that has been used in the west indirectly to deal with community relations is immigration policies. Following the warnings in Resolution 1373 about terrorists abusing asylum, many democracies dramatically decreased the number of refugees that they accepted. Like other uses of immigration law as anti-terrorism law, this blunt approach is radically overinclusive in harming many innocent people and radically underinclusive in not responding to terrorism from citizens. Denial of refugee status may like other immigration law responses simply displace terrorism. One of the lessons of 9/11 should be that the displacement of terrorism to other countries does not provide reliable protection even for western democracies.

Security Council Resolution 1624 promoted speech based prosecution as a means to prevent the incitement of terrorism. This British-led based initiative seems based on the concept of militant democracy and the idea in Article 17 of the European Convention on Human Rights that rights including freedom of expression should not be abused for non-democratic ends. This may be a particularly European response that is less acceptable in other parts of the world including North America but also in states with less democratic traditions.

Western democracies should develop more nuanced responses to Islamic extremism than immigration exclusion, speech prosecutions, rejections of multiculturalism and tough terrorism sentences. A looming problem is what will happen when terrorist offenders or suspects are released and whether counterterrorism policies are significantly adding to the pool of people who are prepared to engage in terrorism. Speech prosecutions may not be as possible in North America and even in Europe they may be difficult and smack of double standards. If governments are to foster an identity based on equal rights and individual responsibility/choice, they will have to respect such values, again underling the strategic case for human rights.

III. Some Unique American Challenges

European critiques of American counter-terrorism efforts have not always paid enough attention to the particularities of the American legal and political systems and its effects on counter-terrorism measures. This observation is not meant as a defence of some of the harsh American measures but rather to point out the need for increased transnational understanding in both Europe and North America.

The War on Terrorism

Although the Obama administration has abandoned the phrase war on terror, it is important to understand why the United States treated and in some respects continues to treat the battle against terrorism as a war. As David Cole has observed, one factor has been that most terrorist attacks on the United States have been external as opposed to internal threats.⁶ For example, the United States under President Clinton responded to the American embassy bombings with missiles in part because of the nature of the attack. Congress's Authorization of the Use of Military Force to respond to 9/11 still provides a bare bones legislative authorization for many American counter-terrorism activities including targeted killings, military detention at Guantanamo and extraordinary rendition.

The American system of divided government gives the executive branch incentives to use war and other executive powers because of the difficulties and unpredictability of achieving legislative

⁶ David Cole "English Lessons: A Comparative Analysis of UK and US Responses to Terrorism" (2008) 58 *Current Legal Problems* 136.

authorization. Despite its reputation, the Patriot Act is relatively mild from a civil liberties perspective compared to British terrorism law both before and after 9/11.⁷ After obtaining the Patriot Act, the Bush administration abandoned plans for Patriot II and did not seek Congressional authorization for some counter-terrorism activities. The Obama administration has also encountered difficulties in Congress including the legislation barring the transfer of Guantanamo detainees to the United States for criminal prosecution. European and other observers should not approach the American track record based on assumptions about the unified governance that can be produced by Parliamentary systems.

The recent decision to try KSM and other alleged 9/11 conspirators in a military commission at Guantanamo is regrettable. The accused will not enjoy all the rights they would have received in a criminal trial most notably the right to trial by civilian jury and speedy trial guarantees. In addition, military commissions will not have the same credibility as criminal trials and as suggested above, the neglect of human rights may give Al Qaeda and those who sympathize with it a propaganda victory. The Obama administration has maintained that convictions could have been obtained in criminal courts in these cases. As in the Ghailani case of the former CIA and Guantanamo detainee tried and convicted in New York in relation to the 1998 American embassy bombings, however, evidence derived from torture and other abuses would have to be excluded and various public interest immunity procedures would have to be used if the accused requested disclosure of sensitive intelligence even if that intelligence was not used as evidence and may not have been exculpatory or otherwise useful to the defence. Although the criminal law remains the best response to terrorism, the challenges of its use should not be under-estimated, especially in systems like the United States where the accused have broad rights of disclosure and restrictions are placed on the use of hearsay evidence.

After a prolonged legal battle that finally affirmed in 2008 that habeas corpus would apply to Guantanamo, there has been less success in American courts in extending the writ to military detentions in Afghanistan. In some respects, it appears as if the United States is repeating the Guantanamo mistake in another country and that the courts are not resisting. Although it does not justify the result, it is important to understand this approach in the particular context of American legalism. Legal scholars such as Alexander Bickel and Cass Sunstein have long urged American courts to take a cautious case by case approach to judicial review and to decline to answer questions about so-called political questions. The American state secrets doctrine is also broader than that used in the United Kingdom (but not in some parts of Europe) because it does not facilitate a balancing of the respective cases for and against disclosure of classified information. The result has been to produce what I have described as American extra-legalism through which the legal system is used to protect illegal conduct from review and invalidation.⁸ One example would be the American rejection of judicial review of targeted killing on a combination of standing, political questions and state secrets grounds compared to the use of judicial review of targeted killing in Israel. Another example would be how civil lawsuits stemming from extraordinary rendition and Guantanamo detention has been effectively shut down on state secrets grounds in the United States even while it has proceeded in other countries. It is important to distinguish the American approach from a crudely extra-legal approach where officials simply break the law and are prepared to risk the consequences. The legalism in American extra-legalism also helps explain why conduct such as harsh interrogation and targeted killings are backed by legal memos and legal authorizations even though they generally escape judicial review and are seen as illegal in much of the world.

⁷ Kent Roach *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011) chs. 4 and 5.

⁸ *Ibid* ch 4.

The First Amendment Tradition

It is also important for Europeans and others to understand the restraining effect of the First Amendment on domestic counter-terrorism activities. Despite its bad press, the Patriot Act enacted in the immediate aftermath of 9/11 did not attempt to criminalize membership in a terrorist group or speech that incites terrorism. The United States has subsequently explained to the Security Council's Counter-Terrorism Committee that the First Amendment restrains its ability to implement Security Council Resolution 1624 calling on states to ensure that the incitement of terrorism is a crime. Leaving aside the question of whether a militant democracy approach based on Article 17 of the European Convention on Human Rights is an effective counter-terrorism instrument (and with it the complex question of the relation between extremism, radicalism and violence), the fact is that such a militant democracy approach is simply not possible for the United States.

Conclusion

This short paper has outlined a number of approaches that can be taken towards reconciling demands for security with those for human rights and liberty. Legally, there is a need for restrictions on human rights to be prescribed by law and justified on proportionality grounds. Politically, there is a need to consider the strategic case for human rights as a means to counter sympathy and support for terrorism.

I next outlined a number of common challenges faced by Europe and the United States including the need to reconcile Security Council counter-terrorism mandates with human rights, the need to use the criminal law to respond to terrorism without distorting the criminal law, the need effectively to review whole of government responses to terrorism and when necessary ramp down counter-terrorism activities without producing either fear or even more harmful substitution effects.

Finally, I have suggested that the United States faces some unique challenges compared to Europe in responding to terrorism including the limited case by case nature of the American legal system which resists judicial review of measures that would be subject to judicial review elsewhere, the tradition of relying on executive and war powers to respond to terrorism as an external threat and various restrictions on the domestic American response to terrorism including the First Amendment and broad disclosure rules.

Defining the Target: Al Qaeda as a “Narrative” for a Rebel Youth Without a Cause

Olivier Roy*

Background

The definition of “terrorism” is both heavily loaded with political biases and understood under different disciplinary paradigms (psychology, sociology, political sciences, law etc.). The issue arose specifically after 9/11, when the US administration declared a “global war on terrorism”, implying a general paradigm that could be applied to any organization or action in the world. There have been of course a lot of debates about the definition (¹). The generally used legal definition (indiscriminate killings of innocent civilians by non-state actors in order to force a government to change its policy) is itself a post-hoc definition aiming at exempting states and regular armies from charges of terrorism. But even this definition lets unsolved one the key elements from a political point of view: is “terrorism” a tactical mean in a broader panoply of actions or is it almost an end in itself? The difference is not a nuance: terrorist organizations that use terrorism as a mean may be and have been brought into a peace agreement (IRA, Fatah), while no basis for negotiation can be found with those who identify terrorism with the struggle for a global, abstract and absolute cause (“revolution” for the Baader-Meinhof group in Germany, and “*jihad*” for Al Qaeda); it means that excluding as a principle “terrorist” organizations from the political debate might be counter-productive in terms of conflict resolution. In fact the issue is not “should one negotiate with terrorists?”, but “is there something to negotiate?”. It is clear that there is something to negotiate with Hamas and nothing with Al Qaeda. In a word, defining a policy towards organizations using terrorism depends on a primary classification between organizations acting on a territorial and political basis, for whom something could be negotiated, and global, deterritorialized movements, which just disappear as such if they stop to use terrorism. Such a classification helps also to define two different kinds of terrorists actors, depending of what kind of organizations they belong to. Both the motivations and the profiles of “suicide bombers” for instance joining a Palestinian organization or Al Qaeda are very different, which means that the way to enter a process of “deradicalization” is totally different. A Palestinian “terrorist” might be prevented to jump into action if there is a political prospect for a legitimate peace settlement, while no political concession could appease a member of Al Qaeda (for instance the motto of “the West oppressing the Muslim *ummah*” is never belied, even when the West does help the Muslims, in Bosnia for instance). The autistic narrative of Al Qaeda is never questioned through the trial of reality.

Hence a very important issue concerns the motivations of the terrorist. In an organization for which terrorism is a mean, the motivations of the actor are less an issue than the strategic decisions taken by the leadership: most Palestinians involved in terrorist actions after the second *intifida* were perfectly integrated and had often a family life; they acted through identification with a national cause, not as marginal outcasts. Islamist Palestinians fight in a national and hence territorialized context: they seldom act outside the Israel-Palestinian space (while secular Palestinian radicals of the seventies were on the contrary global radicals, and allied with other global radicals, as the Baader-Meinhoff group). Conversely as we shall see, most of the Al Qaeda terrorists were not well rooted in community life, and waged a global non-territorial struggle. This shows also that there is no psychological profile of any “suicide bomber”: psychological profiling leads to nowhere (²). Nor is there any socio-economic

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¹ For a summary see Jason Burke, *Al Qaeda*, Penguin Books, 2004, chapter 2 ; there is also a set of UN proposals, as for instance the 2004 Comprehensive Convention on International Terrorism.

² See Marc Sageman *Understanding Terrorist Networks*, University of Philadelphia Press, 2004.

explanation: Al Qaeda terrorists are over-represented among Saudi youth and underrepresented among Bangladeshis. By the same token many Western based terrorists had jobs and belonged to the middle class, not necessarily to an under-class of migrants, victims of exclusion and racism.

A general paradigm of “terrorism” is thus impossible to establish and rather useless. Terrorism has to be understood in specific political contexts. There is no “global terrorism” and putting together Hamas, Hezbollah and Al Qaeda is just misleading.

We will thus concentrate in this paper on a specific category: Al Qaeda global jihadists, and more specifically western born or western educated members of the organization. Of course there is a preliminary question: to which extent does this category coincide with AQ as a whole? Are the western “home grown” terrorists just a sub-set of the organization or do they constitute its main core? It is true that the first generation of AQ fighters came mostly from the Middle East and went to fight in Afghanistan at the end of the 1980’s. But this first generation was not terrorist: the leader of the movement, Abdullah Azzam, rejected terrorism and was promoting military jihad against communists and Soviet troops in Afghanistan. What he developed was the concept of “global jihadist”, meaning by that a body of mobile, de-territorialized Islamic fighters who reject national and ethnic identity in favour of a struggle for the global *ummah*, or community of the believers. The movement turned to global terrorism only after the assassination of Azzam in 1989: Usama bin Laden took then the leadership of Al Qaeda. In the 1990’s the movement defined a new strategy: instead of “liberating” a given territory, its aim was to directly attack the global power, namely the USA, by waging spectacular and well-targeted terrorist attacks (first attack on World Trade Center in February 1993, followed by the bombing of two US embassies in East Africa in 1998). From that period onwards a new generation of militants appeared: even if many of them were still born in the Middle East, the great majority had a complete global personal trajectory: born in a country, educated in other one, and travelling elsewhere to wage a terrorist attack. The pilots of the 9/11 2001 attack against the World Trade Center illustrate this new pattern: born in the Middle East, educated in Germany, striking in New-York. After 9/11, the role of Western born and/or Western educated militants became predominant (either second generation Muslims living in the West, or converts). Of course; Al Qaeda has always been trying to establish or re-establish territorial sanctuaries (Iraq after the US military invasion of 2003, Somalia, Pakistan, Yemen, Afghanistan). But if AQ could use some local messy situations to find hideouts for its militants (Yemen, Pakistan), it has never been able to take the lead of the local insurrections, and has even often been expelled by the local population (Northern Iraq after 2007). Far from being a Middle Eastern guerilla movement, AQ is first of all a global, non territorialized loose network of potential suicide bombers, organized on local closed cells, eager to go for action, and not indulging in the long term slow process of militancy with the objective of building a political and social constituency⁽³⁾.

The debate on the nature of AQ is central in the perspective of building a counter-insurgency policy. Any counter terrorism policy has negative side effects on public freedom and individual rights. I will not address here the issue on how to frame such a policy to fit with the existing principles and legislation concerning rights and freedom. The topic is more precisely to limit the possibility of negative side effects by concentrating on the precise field of real radicalization. Building a coherent and relevant counterterrorism policy means defining the field in the narrower possible way in order not to over-react and impose undue constraints and pressures on a too large segment of population.

The issue is then to define as strictly as possible the profile of potential terrorists.

³ Sageman, *ibidem*.

Is Al Qaeda a Religious Organization?

Al Qaeda type terrorist activities perpetrated either in Europe, or by European residents and citizens abroad, are too often seen as the extreme form, and hence as a logical consequence, of Islam-related radicalization. There is a teleological approach consisting in looking in retrospect at every form of radicalization and violence associated with the Muslim population in Europe as a harbinger of terrorism. This approach is of course based on the discourse of Bin Laden himself who tried to cast AQ as the heir of a long tradition of Islamic militancy. It is also backed by the profile of some of the first generation militants, like the Egyptian Ayman Al Zawahiri. In a word the constructed genealogy of AQ as the modern embodiment of Islamic militancy starts from the Koran and the references to *jihad*, or "holy war", then goes to the XII th century Muslim thinker, Al Taymiyya, who stated that *jihad* should target Muslim rulers who, in fact, like the Moghols of his time, do not endeavour to implement the strict tenets of *sharia* or Islamic law (this extremist view advocates *takfir* that is declaring apostate a nominal Muslim: advocating *takfir* is one of main trademarks of contemporary Islamic radicals). The genealogy then jumps to the Muslim Brothers of the XXth century, who cast Islam as a political ideology enabling militants to construct a true Islamic state. After the repression of the Muslim Brothers (who did not use the concept of *takfir*) by the regime of Nasser in the fifties, a more radical trend was embodied by Said Qotb, who rejected any compromise with the deviant society and apostate leaders. This *gotbist* trend produced in Egypt the first outburst of Islamic terrorism with the assassination of officials culminating with the murder of Anwar Al Sadat, the president of Egypt (1981). Hence radicalization under the aegis of AQ is seen as a process of religious radicalization, specific to Islam. Trying to promote "moderate" Islam, whatever the definition, and to fight radical Islam became part and parcel of any counter-terrorist policy, leading to more or less serious proposals, from the well intended "dialogue of civilizations" supported by the UN, to more fancy ideas (⁴).

This approach makes problems, not so much because it casts a shadow of suspicion and opprobrium on Islam as a religion and on Muslims in general, but because it failed to understand the "roots of violence" and it arbitrarily isolates "Muslim" violence from the other levels of violence among European youth. It has two negative consequences: it does not allow to understand the motivations for violence among people joining Al Qaeda (who are far from being, as we shall see, devote Muslims fighting for their Middle Eastern brothers); it unduly concentrates on "what is the problem with Islam", precisely playing on Al Qaeda own terms, and enticing a debate that will have little or no impact among the segments of population susceptible to join Al Qaeda. Opposing *good Islam* to *bad Islam* does not make sense, not because Islam is all bad or all good, but because the process of violent radicalisation has little to do with religious practice, while radical theology, as salafisme, does not necessarily lead to violence.

Islamic terrorism is not a consequence of a religious radicalization. Al Qaeda is not a religious organization. Instead of promoting a territorial Caliphate in the Middle East, Al Qaeda is committed to a global struggle against the world power (the USA) in the continuation of the radical anti-imperialist struggles of the sixties and seventies (Che Guevara, Baader-Meinhof). It stresses political activism and addresses a wider audience than just the Muslim community (hence the numerous converts who joined AQ, a phenomenon totally unusual for any other political Islamic movements, like the Muslim Brothers). In fact religious references are far less numerous in Bin Laden's speeches that what could have been expected. Bin Laden never tries to justify in theological terms his action: he quotes some

⁴ See for instance the Rand Corporation memos "'Building Moderate Muslim Networks," by Angel Rabasa and others, 2007, or "Civil democratic Islam, partners, resources, and strategies" by Cheryl Benard, 2003, which sets the objective from the first sentence: "The Islamic world is involved in a struggle to determine its own nature and values, with serious implications for the future. What role can the rest of the world, threatened and affected as it is by this struggle, play in bringing about a more peaceful and positive outcome". In a word, counter-terrorism has to do with theology and religious dogma.

Coranic verses, but does not care to find supporting religious evidences in the centuries old legal tradition concerning *jihad* and war. As often among radical Islamic organizations, few if any leaders or militants have a real religious training: Bin Laden was trained in business, Al Zawahiri is a medical doctor, and as we shall see, very few of his followers had a real religious training.

Moreover, Bin Laden uses the term *ummah* as a motto, but never cared to turn his organization into a grass-root movement deeply entrenched in real Muslim societies. His references to the *ummah* look like the references to the “world proletariat” uttered by the western ultra-leftist movements which never really cared about the daily life of the working class.

AQ has no grass-roots networks among the Muslim population, no front-organizations, no political program, no network of mosques, no (or no more) leading theologians (Ulama) providing religious justification for the fight. Most of the recruits of AQ had no role as “community leaders” in Muslim societies or even Muslim neighbourhood in the West; none of them was known as a pillar of a local Muslim congregation; most of them had a secular way of life before jumping into radicalization. Moreover, Al Qaeda is the sole “Islamic” political organization to have a very high level of converts (from 9 to 20 % according places and estimations) and it gives them positions of responsibility (Christian Ganczarski, a Polish-born German, masterminded the attack against the synagogue in Jerba, Tunisia, in 2003, Dhiren Barot, a British citizen and alleged ringleader of a scheme uncovered in 2004 to attack financial targets in New York, and the number three of AQ, Adam Gadahn, born Pearlman). AQ recruits individuals on an individual basis, who are looking for action, not religion.

Conversely, most “fundamentalist” Muslims (of the Tablighi and Salafi trend for instance) reject political activism. In fact there is nowhere a direct connection between the intensity of religious practices and the jump into violent activism. In fact few of AQ’s militants followed strict Islamic tenets in their daily life: Malika Arroud for instance, who wrote a book praising Al Qaeda’s militants, bore a child outside the wedlock, and after her husband was killed in the terrorist attack against Massoud in Afghanistan, found her new husband (younger than her) by surfing on the web. It is a common pattern of media reports to question family members and neighbors of terrorists and to stress that most of them were not known as especially observant, at least until some months before perpetrating their attack.

Fighting AQ by promoting “good” Islam is thus both costly and inefficient. It will not deter young rebels without a cause to jump on global *jihad*, and will involve secular western governments and institutions in an uneasy management of a faith community that could take offence and responds by closing its doors and branding any liberal as “Uncle Tom”.

Youth Radicalization and the Narrative of Heroism

The main motivation to join AQ is a “narrative of individual heroism”, staged inside a small group of “buddies” and projected into a virtual global world thanks to the internet and the media. Representation (that is the visual impact as disseminated by the media, - for instance the repetitive broadcasting of the 9/11 attack) is more important than the effective strategic impact (disrupting Western economy). That is both the strength and the limits of AQ’s action: spectacular but relatively “cheap” terrorist attacks do trigger a discourse of diabolization of AQ, which position AQ as the enemy N°1, but also, by a mirror effect, as the negative symmetry of the Western World.

It is more productive to understand Al Qaeda in Europe as some sort of a youth movement, which shares many factors with other forms of dissent, either political (the ultra-left), or behavioral : the fascination for sudden suicidal violence as illustrated by the paradigm of random shootings in schools (the “Columbine syndrome”).

If we give for instance a look at the map of recruitment in France of Islamic radicals, it cross-cuts of course some of the areas where the second generation of Muslim migrants is concentrated (Lyon,

Paris, Lille-Roubaix-Tourcoing), but it left outside other heavily Muslim populated areas (Grenoble, Toulouse, Marseille). Incidentally, Lyon, Paris, Lille and Grenoble were the hotbed of the ultraleft (specially the Maoists) in the seventies. Lyon was the cradle of the first second generation religious revivalism, which took place largely among former leftist militants from migrant origin, who first joined anti-racist groups (as illustrated by the "Marche des Beurs" in 1983: hundreds of young anti-racist militants marching to Paris), and then, disappointed by the left, created local groups of born-again Muslims. Marseille never had (and does not have) a tradition of politicized youth violence, either leftist or Islamic; while in Toulouse the tradition of radicalization was more (and still is) "third-worldist": nowadays the second generation of Muslims are well represented in the secular leftist movements (embodied by the militant pop music Zebda group). In Grenoble, notably devoid of radical Islamism, although it was a hotbed of the ultra-left in the 1970's, there has been a recent burst of extremely violent delinquency among the second generation of migrants (infigtings between local gangs left dozens dead, with the use of war guns), as if the fascination for violence concentrates here on delinquency and not on political radicalism. To conclude it seems that the potential youth violence takes shape along local paradigms of violence and radicalization, not as a general phenomenon of "Islamic radicalization".

This genealogy of violence is reflected also in AQ's groups in the Middle East: for instance the staging, by the Zarqawi led group, of the execution of hostages in Northern Iraq, in the aftermath of the US military intervention, was drawn from the video of the assassination of Aldo Moro by the Italian Red Brigades (1978): a banner with the logo of the group, a bunch of hooded armed militants, the hostage blindfolded on his knees, the reading of the "death sentence" issued by the People's tribunal, or the Islamic tribunal, then the execution: nothing here comes from a Muslim religious or legal tradition, everything from the "revolutionary justice" of the Western ultra-left, which by the way, was also a youth phenomena, and almost disappeared by the passing of a generation.

More strikingly, the jump into AQ's kind of violence shares also some patterns with the "Columbine syndrome": a youngster announces on the web that he will perpetrate an extraordinary action and become some sort of a hero; he shows himself training with weapons, post a video as a last will and after killing as much people as possible, killed himself or expects to be killed in "action". Use of Internet and "religious" markers (satanic or Islamic), staging of one's self as the negative hero, associating suicide and random killings, claiming that there is no "innocent", looking both for fame and redemption, not by love but hatred: the patterns are very close, although there is no political or strategic context in the "Columbine's" case, justifying a different coverage by the media.

Far from embodying the radicalization of a "Muslim community", Islam-related terrorism appears here to concern a fringe of youth finding in AQ a way to express a generational anger, in a way that has a global strategic meaning, instead of remaining a local and isolated action.

The generational dimension is obvious in the life patterns of the radicals: most of the radicals have broken with their family or became estranged. They define themselves what should be the principles of their lives. They never refer to traditions or to traditional Islam, they don't mention fatwas from established clerics. They act on an individual basis and outside their usual community bonds (family, mosques and Islamic associations). They usually keep aloof of the communal group. The group effect concerns the "small group": the process of radicalization takes place in the framework of a small group of friends (they knew each other before, use to have a common place of meeting: campus, local neighborhood, networks of petty delinquency etc...). Many did travel together to Afghanistan. It is a movement of age peers, not based on hierarchy.

A "transversal" approach (comparing youth violence among non-Muslims with Al Qaeda recruitment) sheds a lot of light on the present process of radicalization among youths, and seems more fruitful than a vertical approach in terms of Islamic intellectual legacy (from the Koran to Sayyid Qotb, through Ibn Taymiyya). Instead of looking vertically through Muslim History and theology to

explain Al Qaeda's violence, one should connect it to the general phenomena of radical violence among youths.

The jump into violence is not the result of a long process of indoctrination and maturation. We have already noted the predominance of activism on ideological and intellectual formation: there is a very short time between religious re-conversion and passage to violent action. Violence is at the core of the fascination for Al Qaeda: that is the meaning to this violence that makes the difference with the other forms of youth suicidal violence.

Al Qaeda provides not so much an ideology than a narrative. The first part of the narrative is the suffering of the *ummah*. But this *ummah* is a virtual one: all crimes (depicted through gruesome videos) committed against Muslims anywhere in the world are put on the same foot. These stories are not contextualized: the picture of a tortured man could come from Bosnia, Chechnya or Kashmir. The *ummah* is presented as an undifferentiated whole. The second part of the narrative is centered on the individual who is suddenly put into the situation of becoming a hero who would avenge the sufferings of the community. It plays on self-image: all personal humiliations or shortcomings are redeemed by the act of terrorism. The death is staged as is the self itself (hence the video, declaration, will etc.). There could be only one definite action that will turn the suicide bombers into a permanent icon; death is the definite seal on the story, it is part of the story.

The third part of the narrative is the religious "qotbist" dimension (as elaborated by Said Qotb), the only religious reference to play a role here: *jihad* is a personal compulsory duty, the vanguard of the *ummah* is made of a few outstanding and devoted heroes; salvation is through sacrifice and death. Occasional references to Ibn Taymiyya, Said Qotb or Palestine may be called to illustrate the narrative. The narrative allows the would-be terrorist to connect with History and religious genealogy.

But a fourth part of the narrative is less religious: it is the enactment of the fight against the global order. To people not specifically motivated by religion, Al Qaeda is the only organization present on the market that seems to be effective in confronting the "evil" that is the West. The fact that AQ is constantly presented by Western leaders as the biggest threat gives more value to the decision to join it. The narrative is substantiated by the Western reaction to it. In fact as we saw, the same patterns of radicalization are at work in AQ, the ultra-left or suicidal violence. The main difference of AQ is the particularity of its narrative, connecting the lonely actor with a virtual community and an imagined History. At a time when the leftist revolutionary narrative has been devaluated by the failure of communism, AQ provides a new version apparently anchored in real struggles (Iraq, Chechnya, Afghanistan), at least in the eyes of the young radicals: disappointment often arises when the freshmen come to realize that they don't know anything about the real people they are supposed to support. But given the short span of time between the decision to join and death or capture, they have no time to wage the reality of their connection with the real people. Training and preparation or usually achieved *incommunicado*: the recruit is kept in a virtual world: a closed training camp or *madrassa*, an apartment in the middle of nowhere, or the virtual world of Internet.

Undermining Al-Qaeda's Narrative

Clearly the main tactics of the "war on terrorism" failed: invading territories to destroy the sanctuaries only slightly undermine radical networks which are not territorialized and don't depend on the support of a sympathizing surrounding population. Promoting "liberal" and "democratic" Islam does not work from outside: most of the supposed "liberal" Muslim thinkers have little or no impact. Playing on community leaders to spot and neutralize trouble makers inside Muslim congregations and neighbourhoods never worked: the candidates for violence just stopped to go to mosques and to openly preach jihad.

The most effective way to combat terrorism is a combination of two levels: intelligence and delegitimization.

Most of the terrorists or would-be terrorists who have been caught were arrested through traditional intelligence to trace and neutralize cells and networks. Watching Internet, spotting travels, checking contacts in the framework of existing regulations and legal systems have been far more successful than military operations and extraordinary techniques, like torture or random arrests. It is nevertheless very difficult to prevent young guys to suddenly jump into violence without previous notice. The very nature of AQ related violence makes it difficult to pre-empt radical action.

The second level would hence be to destroy AQ's narrative, that is delegitimizing it. The first thing here is to undermine the image of AQ as *the* main threat to the world order, and to mock its pretense of heroism. We should stop to endorse the mirror effect that is playing along AQ's words. As mentioned earlier, AQ's main assertions are:

- 1) AQ is the vanguard and the paroxysm of the "Muslim wrath"
- 2) AQ embodies radical Islam, or more precisely "radically" embodies Islam
- 3) Terrorists are heroes.

To nullify the two first statements, we should stop to speak of Muslims through the lens of terrorism, and should establish a coherent long-term process of integration of Islam as a mere religion in a Western context. Opposing "good" Islam to the "bad" Islam of AQ still presupposes that AQ embodies some sort of Islam, but an Islam that the West does not like. It also makes AQ the beneficiary of all the mistakes the West might do (and will do) in dealing with the Middle East. Disconnecting AQ from Islam simply means dealing with Muslims outside the lens of terrorism. The same way that the Christian community is not held responsible or even answerable for the burning of the Koran by some crazy Florida's evangelical pastor, the Muslim community (which is as diverse as the Christian one) should not be approached with pre-conditions concerning theological issues, like *jihad* and terrorism. The trivialization of Islam is part of the delegitimizing of AQ. This is the more possible than the Arab spring in the Middle East showed how the reference to not only radical but also political Islam has lost its pervasiveness. There is no "Muslim wrath" but different layers of specific conflicts, where political factors (democracy, corruption, integration, religious freedom) play a bigger role than cultural and religious elements.

The West should stop to promote "good" versus "bad" Islam, because it supports the idea that AQ is a religious organization. AQ is not a religious organization; AQ is not the armed branch of salafisme. And by the way, to promote "good Islam" through governmental means is to give a kiss of death to "liberal" Muslim thinkers. If AQ is a modern phenomenon and not the expression of fundamentalist Islam there is no point to promote modern liberal Islam against AQ. The process of secularization or accommodation of Islam in the West may take place, but to be successful it should be undertaken outside the anti-terrorism framework, and by the Muslim themselves. The road is often bumpy but, once again, two long term trends allow to be optimistic: the democratic movement in the Middle East shows how societal and political evolutions are not linked with a religious reform, -on the contrary a religious reform might be a consequence of political changes, not a pre-requisite (and by the way many forms of religious fundamentalisms are perfectly compatible with democracy). Secondly the rise of a well integrated Muslim Middle class in the West, although overshadowed by the perpetuation of destitute neighbourhoods, is a proof of the de facto compatibility of Islam with Western societies (illustrated by the recasting of religious norms into ethical values, the individualization of faith and the definition of religious freedom as a human right and not as a minority right).

To destroy the third assertion (suicide bombers as heroes), we should stress the real nature of the radicals: not powerful devils, but petty and often unsuccessful delinquents, in a word "losers" who have no future. And by the way it is something which seems already on its way: the repetitive dimension of AQ's actions diminishes their power of fascination and attraction; the fact that there are more botched attempts which failed miserably (the attack on Glasgow airport) stresses the growing vacuity of terrorism.

This means that fighting terrorism should be done by using existing laws and institution. Any endeavor to create special legislation or to establish special courts or jails (as Guantanamo), contribute to define terrorists as exceptional people, and paradoxically re-enforces the fascination they could inspire among rebels without a cause.

AQ needs frightened spectators; the worst thing for it is indifference, which is precisely what is happening now in the Middle East.

Best Practice in Counter-Terrorism

Martin Scheinin*

Introduction

This paper represents a global, rather than Western or Transatlantic, perspective to counter-terrorism. It is based on taking seriously the position expressed in the 2006 Global Counter-Terrorism Strategy adopted by the United Nations General Assembly,¹ that in a strategic perspective the promotion and protection of human rights and the imperative of countering terrorism are not mutually exclusive goals but, rather, support each other. While short-term advantages in counter-terrorism can be sought by compromising certain human rights guarantees, in the long run the taking of such shortcuts is likely to have counterproductive consequences. Rightly, the Global Strategy identifies various forms of human rights violations among "conditions conducive to the spread of terrorism", something social scientists might call "root causes" or "structural causes" of terrorism.

Following the classification of "causes" of terrorism as structural, facilitating and triggering causes, one can, also on the basis of empirical studies,² assert that human rights violations have a role both in the first and the third link of the chain. Deeply embedded, systematic and divisive human rights violations in any society are likely to create a breeding ground for future waves of terrorism, i.e. to amount to structural causes. And research about suicide bombers (and other terrorists) indicates that personal or family experiences of humiliation and of human rights violations may often be the triggering cause that allows an individual to make the morally inexcusable decision to resort to methods of terrorism in the furtherance of his or her cause, be that cause on its own justified or not. Promotion and protection of all human rights for all, and the integration of human rights awareness in the professional culture of civilian and military authorities involved in counter-terrorism are important elements in a counter-terrorism strategy through addressing structural and triggering causes of terrorism. While it may be impossible in a given society to eliminate those causes, the likelihood of acts of terrorism can be reduced. After all, speaking about "causes" of terrorism is more about correlation than causality.

The situation may be a bit more complex with the middle link in the chain, the facilitating causes of terrorism. By facilitating causes we refer to networks, funds, explosives, weapons and logistical support required in the commission of a terrorist act. Structural human rights violations and individual experiences of humiliation do not result in actual acts of terrorism without these facilitating causes. And here, human rights and counter-terrorism at least seemingly are often in tension with each other. Restrictions on freedom of association, freedom of movement, freedom of expression (including in the Internet) and the right to privacy appear necessary in addressing the facilitating causes.

My answer to this dilemma is simply that not only does compliance with human rights result in better counter-terrorism (by addressing the structural and triggering causes) but also the converse is true: better counter-terrorism may result in better human rights law. The framework of human rights law is flexible enough, including through the notions of permissible limitations, necessity in a democratic society, legitimate aim, and proportionality, to leave room for carefully designed and optimally effective counter-terrorism measures. Here, taking on board proper human rights assessment

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¹ General Assembly resolution 60/288.

² See, Alex P. Schmid, *Why Terrorism? Root Causes, Some Empirical Findings, and the Case of 9/11*. Compilation issued as Council of Europe document Conf Prev Terr (2007)18 rev.

at the outset is the best way not only to comply with international law but also to avoid the counterproductive effects of insensitive counter-terrorism measures.

This leads me to the metaphor of "balancing". As UN Special Rapporteur on human rights and counter-terrorism I have been highly critical of the increased use of a balancing rhetoric, often presented as a choice between law and security and almost without exception used to justify deviation from the law, or amending the law. In my final report to the UN Human Rights Council as the critical position was expressed as follows:

"Through the careful application of human rights law it is possible to respond effectively to the challenges involved in the countering of terrorism while complying with human rights. There is no need in this process for a balancing between human rights and security, as the proper balance can and must be found within human rights law itself. Law is the balance, not a weight to be measured."³

Feasibility of a Best Practice Approach

While "more law" or "better law" may be a proper methodology in resolving some of the tensions between effective counter-terrorism and the (seeming) constraints caused by human rights law in relation to "facilitating causes", from a policy perspective, and particularly when addressing terrorism on a global level, a "best practice" method has significant advantages. It is true that the UN Security Council has had much success through its use of Chapter VII powers under the UN Charter, i.e. by adopting resolutions that are mandatory to all Member States.⁴ However, as evidenced by the work of the Counter-Terrorism Committee of the Security Council, its Counter-Terrorism Executive Directorate and the UN level coordination body, the Counter-Terrorism Implementation Task Force, also softer methods of persuasion are needed in order to reach true compliance, commitment and optimal performance in countering terrorism.

A second advantage of a "best practice" approach is in its capability of resolving the tension between counter-terrorism and human rights through a pragmatic method of dialogue and learning. While there are legal obligations both on the counter-terrorism side and the human rights side of the equation, and while a concrete clash between the two can be resolved through the approach of "more law", it is safer - both for human rights and for counter-terrorism - to look for broadly applicable solutions, rules of thumb that work - in short, for best practice.

A third advantage of a "best practice" approach is in its explicit combination of law and policy. Policy-makers cannot be reduced to mere messenger boys who pass the issue to the judiciary for the application of "better law". Policy-makers need to look into the future, be proactive and search for general solutions and not just for the resolution of an actual hard case. Here, "best practice" can be guided from the results of a "better law" approach but not limited by what it has already had the time and chance to produce.

In the Special Rapporteur's recent (and final) report to the UN Human Rights Council, the notion of "best practice" is defined as follows:

"Best practice refers to legal and institutional frameworks that serve to promote and protect human rights and the rule of law in all aspects of counter-terrorism. Best practice refers not only to what is required by international law, including human rights law, but also includes principles that go beyond these legally binding obligations. The identification of best practice is based upon three criteria: (a) a credible claim that the practice is an existing or emerging practice, and/or one that is

³ Ten areas of best practices in countering terrorism: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/16/51, paragraph 12.

⁴ Notably, Security Council resolutions 1267 (1999) and 1373 (2001) need to be mentioned here as two cornerstones of the UN counter-terrorism architecture, built upon Chapter VII powers of the Security Council.

required by, or has been recommended by or within, international organizations, international treaties or the jurisprudence of international, regional or domestic courts; (b) the practice relates to and promotes the effective combating of terrorism; and (c) the practice complies with human rights and/or promotes the enjoyment of human rights and fundamental freedoms."

The criteria presented here are primarily substantive, emphasizing the point that best practice is both effective in countering terrorism and at the same time in compliance with human rights. The report just quoted did not seek to define or describe the normative status of "best practice", for instance as compared to "soft law" or "recommendations". The last-mentioned notion clearly creates a presumption of lack of legally binding nature. The power of an international organization or a specific body within it to issue recommendations may be regulated in law, for instance in an international treaty. While the unanimous support by a group of governments for the adoption of a recommendation may be one form of state practice, the decision to call the document a recommendation speaks against the existence of *opinio juris*, the intention to become legally bound. Conceptually, "soft law", in turn, is an oxymoron. The inclusion of "law" in the notion suggests legally binding nature or at least legal relevance. But the adding the word "soft" implies the opposite.⁵ A satisfactory explanation for "soft law" would be to characterize the document in question as not comprising legally binding norms but nevertheless as being capable of informing the interpretation of (other) norms of legally binding nature.

And what about "best practice", then? The inclusion of "practice" in the notion suggests a potential of the identified practice to evolve into legally binding norms, if the practice in question becomes widespread and is supported by *opinio juris*. Until such time the word "best" entails a normative assessment of the practice as being favoured, when compared to other legally permissible options. However, there is no suggestion that the normativity involved would be of legal nature. Hence, in comparison with "soft law", "best practice" represents a lower degree of legal bindingness or relevance, up to the point when the practice, supported by *opinio juris*, is widespread enough to allow a conclusion of the emergence of a customary law norm.

The remaining part of this paper will provide the compilation of ten areas of best practice in counter-terrorism as formulated in the report mentioned above. One can ask a whole line of questions about the merits of this effort: (1) How much can be said on the global level about "best practice" in counter-terrorism, taking into account the huge differences between countries? (2) Are the ten identified areas of "best practice" the correct ones, or at least among a broader set of justified ones? (3) Are the proposed formulations of "best practice" adequate in the light of the definition quoted in the preceding paragraph, or are they too vague, or too ambitious?

These are relevant questions and different people may have different answers to them. But addressing these questions will hopefully give further support to the usefulness of a best practice approach, as a complement to a "better law" approach that is also needed.

⁵ See, Jan Klabbers, 'The Redundancy of Soft Law.' 65 *Nordic Journal of International Law*, 167-182.

Ten Areas of Best Practice

Practice 1. Model provisions on consistency of counter-terrorism law with human rights and refugee law, and humanitarian law

All legislation relating to the combating of terrorism is subject to the following guarantees and procedures:

1. Proposals for new legislation or amendments to existing laws, shall include a written statement bringing to the attention of the Legislature any provision in the proposal that appears to be inconsistent with the purposes and provisions of norms of international human rights and refugee law that are binding upon the State.
2. The Legislature shall, through a specialized body or otherwise, review and ensure that any law approved by it conforms to the norms of international human rights and refugee law that are binding upon the State.
3. The judiciary shall be entrusted with ensuring that laws do not breach norms of international human rights and refugee law that are binding upon the State. In discharging this duty, the courts shall apply the techniques available to them under the Constitution, such as:
 - (a) Adopting an interpretation of the law that is consistent with the purposes and provisions of norms of international human rights and refugee law that are binding upon the State;
 - (b) Declaring that part of the law is without legal effect;
 - (c) Declaring that the inconsistent law is to be of no force or effect, either with immediate effect or after a period of time that allows the Government to take remedial steps.
4. If the State is involved, as a party, in an ongoing armed conflict, the above provision shall apply also to securing compliance with principles and provisions of international humanitarian law, without prejudice to the obligation to comply with international human rights and refugee law.

Practice 2. Model provision on consistency of counter-terrorism practices with human rights and refugee law, and humanitarian law

In the application and exercise of all functions under the law relating to terrorism, it is unlawful for any person to act in any way that is incompatible with the purposes and provisions of international human rights and refugee law that are binding upon the State. In this regard:

1. The exercise of functions and powers shall be based on clear provisions of the law that exhaustively enumerate the powers in question.
2. The exercise of such functions and powers may never violate peremptory or non-derogable norms of international law, nor impair the essence of any human right.
3. Where the exercise of functions and powers involves a restriction upon a human right that is capable of limitation, any such restriction should be to the least intrusive means possible and shall:
 - (a) Be necessary in a democratic society to pursue a defined legitimate aim, as permitted by international law; and
 - (b) Be proportionate to the benefit obtained in achieving the legitimate aim in question.
4. If the State is involved, as a party, in an ongoing armed conflict, the above provisions shall apply also to securing compliance with principles and provisions of international humanitarian law, without prejudice to the obligation to comply with international human rights and refugee law.

Practice 3. Model provisions on the principles of normalcy and specificity

1. To the broadest possible extent, measures against terrorism shall be taken by the civilian authorities entrusted with the functions related to the combating of crime, and in the exercise of their ordinary powers.
2. Unless a state of emergency has been officially declared because terrorism genuinely threatens the life of the nation and requires the adoption of measures that cannot be undertaken through restrictions already permitted under international human rights law, terrorism does not trigger emergency powers.
3. Where the law includes particular provisions that, for a compelling reason, are considered necessary in combating terrorism and entrust certain authorities with specific powers for that reason, the use of such powers for any purpose other than the combating of terrorism, as properly defined pursuant to practice 7, is prohibited.

Practice 4. Model provisions on the review of the operation of counter-terrorism law and practice

1. Where specific counter-terrorism powers have been created pursuant to practice 3 (3), they shall lapse 12 months after their entry into force, unless the Legislature reviews and renews them before that date.
2. The Executive shall appoint a person or body to act as independent reviewer of the application and operation of the law relating to terrorism. The person so appointed shall, at least every 12 months, carry out a review of the operation of the law relating to terrorism and report the findings of such review to the Executive and the Legislature. The report shall contain an opinion on:
 - (a) The implications of any proposed or recent amendments or additions to the law relating to terrorism, including an opinion on whether these are compatible with international human rights and refugee law that is binding upon the State, as well as, when applicable, principles and provisions of international humanitarian law;
 - (b) Whether the application in practice of the law relating to terrorism, during the period of review, has been compatible with international human rights and refugee law that is binding upon the State, as well as, when applicable, principles and provisions of international humanitarian law.

Practice 5. Model remedies provision

Any person whose human rights have been violated in the exercise of counter-terrorism powers or the application of counter-terrorism law has a right to a speedy, effective and enforceable remedy. Courts shall have the ultimate responsibility to ensure that this right is effective.

Practice 6. Model provisions on reparations and assistance to victims

1. Damage to natural or legal persons and their property resulting from an act of terrorism or acts committed in the name of countering terrorism shall be compensated through funds from the State budget, in accordance with international human rights law.
2. Natural persons who have suffered physical or other damage, or who have suffered violations of their human rights as a result of an act of terrorism or acts committed in the name of countering terrorism shall be provided with additional legal, medical, psychological and other assistance required for their social rehabilitation through funds from the State budget.

Practice 7. Model definition of terrorism

Terrorism means an action or attempted action where:

1. The action:
 - (a) Constituted the intentional taking of hostages; or
 - (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
 - (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it;

and

2. the action is done or attempted with the intention of:
 - (a) Provoking a state of terror in the general public or a segment of it; or
 - (b) Compelling a Government or international organization to do or abstain from doing something;

and

3. The action corresponds to:
 - (a) the definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
 - (b) All elements of a serious crime defined by national law.

Practice 8. Model offence of incitement to terrorism

It is an offence to intentionally and unlawfully distribute, or otherwise make available, a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a danger that one or more such offences may be committed.

Practice 9. Core elements of best practice in the listing of terrorist entities

Irrespective of the continued existence of the practice of the Security Council to list individuals or entities as terrorist, the implementation of any sanctions against individuals or entities listed as terrorist shall comply with the following minimum safeguards:

1. Sanctions against the individual or entity are based on reasonable grounds to believe that the individual or entity has knowingly carried out, participated in or facilitated a terrorist act (as properly defined pursuant to practice 7 above);
2. The listed individual or entity is promptly informed of the listing and its factual grounds, the consequences of such listing, and the matters in items 3 to 6 below;
3. The listed individual or entity has the right to apply for de-listing or non-implementation of the sanctions, and has a right to court review of the decision resulting from such application, with due process rights applying to such review including disclosure of the case against him, her or it, and such rules concerning the burden of proof that are commensurate with the severity of the sanctions;

4. The listed individual or entity has the right to make a fresh application for de-listing or lifting of sanctions in the event of a material change of circumstances or the emergence of new evidence relevant to the listing;
5. The listing of an individual or entity, and the sanctions resulting from it, lapse automatically after 12 months, unless renewed through a determination that meets the requirements of items 1 to 3 above; and
6. Compensation is available for persons and entities wrongly affected, including third parties.

Practice 10. Core elements of best practice in arrest and interrogation of terrorist suspects

1. Any form of secret or unacknowledged detention is prohibited.
2. Every person has the right to contact a lawyer of his or her choice from the moment of arrest or detention. The scope of such choice may be restricted for genuine reasons of national security.
3. Any form of torture or other cruel, inhuman or degrading treatment or punishment is prohibited. Compliance with this prohibition shall be effectively monitored.
4. Information obtained through torture or other cruel, inhuman or degrading treatment or punishment, anywhere in the world, shall not be used in any proceedings, and shall never be solicited or condoned.
5. Anyone arrested as a terrorist suspect who would face a real risk of torture or other cruel, inhuman or degrading treatment or punishment shall enjoy the right of non-refoulement, and may not be extradited, expelled or otherwise formally or informally removed to a country or area if the foreseeable consequence of that measure is the person's exposure to such a risk.

Bringing Security Services under the Rule of Law in the Global Anti-Terror Campaign

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In the Soviet Union, political problems were often marked by jokes. “What is the most constant element of the Soviet system?” went the question. “Temporary problems,” was the answer. The joke, of course, was that the problems of the Soviet Union were structural and not really temporary, but the myth was that the inevitable progress of socialism would sweep them all away.

This joke may feel familiar in the global anti-terror campaign. In fighting terrorism, states are beset by temporary problems that security experts have assured us will all be solved one day. With just one more technological fix, one more extension of extraordinary powers and a few more legal limits temporarily suspended, terrorism can be effectively fought – or at least so a worried public is told. As a result, what is the most constant element of the global anti-terrorism fight? Emergency measures, workarounds, quick fixes – and, yes, temporary problems made worse by exceptional solutions.

The problems created by exceptional measures in the anti-terrorism campaign are serious. After 9/11, country after country passed anti-terrorism frameworks, laws and decrees, under the encouragement of international organizations from the UN Security Council to regional bodies. Many of these anti-terrorism policies were defended as temporary measures to solve a short-term problem: the threat posed by Al Qaeda and the Taliban. But, ten years later, those temporary measures are looking rather permanent, even as Al Qaeda is seriously weakened and the current Afghan government is negotiating with the Taliban to bring them in from the political cold. The extraordinary practices launched to fight global terrorism deviate substantially from what had been normal before 9/11, but they will almost surely outlive the specific threat that brought them into being. In fact, many have already become entrenched in permanent law.

Among the extraordinary measures are: 1) a cluster of new and vague terrorism offenses inserted in criminal codes around the world, 2) trials that suspend normal procedures or feature unusual restrictions on the rights of defense, 3) preventive detention measures that avoid putting suspected terrorists on trial, 4) driftnet surveillance measures that cast a wide net and indiscriminately haul in huge amounts of information, and 5) the creation of blacklists that target individuals for sanctions with little or no process in place to ensure that the sanctions are either justified or efficacious.

These five examples of anti-terrorism policy run amok have a common cause. At their root is deep dilemma of evidence. If states had reliable and properly gathered evidence about imminent terrorist plots, they wouldn't need the odd crimes and special trial procedures that have been created to deal with terrorism. If states had reliable and properly gathered evidence that they could show to a judge in open court, they wouldn't need preventive detention. If states knew precisely whom they were targeting, they wouldn't need driftnet surveillance or extensive blacklists. All of these problematic policies can be traced to unreliable and problematic evidentiary foundations for the actions that states want to take. But the evidentiary foundations are unreliable and problematic precisely because much of the anti-terror campaign is fought through cooperation among state security services that are not accustomed to gathering information in a way that permits a rule-of-law system to use the information fairly in individualized proceedings.

Before 9/11, the primary job of most state security services was to figure out the hostile intentions of enemy states, probe the technologies of weapons development by foreign militaries, and detect specific state-based threats. But after 9/11, state security services are now called upon primarily to

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track individuals and small groups as well as to compile information on specific people who have no official positions within state structures. State security services are, as a result, newly in the business of compiling files on individuals rather than creating profiles of countries, militaries or competing security services. They are now collecting information on specific named individuals who are never “off duty” or “out of hostilities,” but who are targeted as individuals. But if the information gathered about suspected individuals cannot be used in ordinary systems of public accountability like trials, then the rule-of-law system on which constitutional democracies rely for preserving human rights and civil liberties is threatened.

This is not the first time that states have sought to act against individuals on the basis of questionable information. Domestic police once routinely used harsh measures against criminal suspects and colluded with patently unfair procedures. In some countries, they still do. But while domestic police in constitutional rule-of-law states have been progressively reined in over the course of the last century to be more aware of the rights of criminal suspects, state security services – even in constitutional rule-of-law states – have generally not had the same socialization. Until recently, state security services were not dealing with specific individuals as their primary targets and so there was not such an urgent need to ensure that they understood constitutional criminal procedure or even human rights law. Now that this hunt for suspects requires security services to discover information about individuals but they are doing so without the constraining effects of criminal procedure rules. This means that states are often in possession of information that they want to use in ordinary procedures but can’t – unless they bend the rules.

To be fair, the security services in constitutional rule-of-law states have rarely been constrained to date by the same laws that apply to the domestic police. Often, the security services are exempted from considering constitutional rights protection when they act outside the border of the state that might regulate them. Even within state borders, they are often given the capacity to act in ways that domestic police cannot. But in countries with horrible human rights records, the records of the security services are even worse. Unfortunately, the logics of the global anti-terror campaign have pushed countries to lean more on their own security services to track down cross-border threats, and have also put constitutional rule-of-law states into daily cooperation with states whose security services respect human rights even less. This cooperation has produced information that rule-of-law states have found useful. The new information, however, does not have a reassuring pedigree. Without knowing where it came from or how it was collected, judges cannot use this information in ordinary courts or in other targeted public proceedings. That gap between available and usable information creates the demand for the workarounds, exceptional solutions and emergency measures.

If states are to bring their anti-terrorism campaigns under the rule of law, however, this will require us to think about how to bring security services themselves under more precise legal regulation. It will be a difficult enough task to bring the security services of states that are already committed to constitutional democracy under the rule of law. It will be even harder to get the security services of autocratic states to use acceptable and documentable methods of acquiring information. But state security services are the crucial institutions that have to be reformed before the rule of law can be fully restored to the anti-terrorism campaign.

As long as state security services exist outside meaningful legal regulation and as long as state security services are key providers of evidence against concrete individuals in the fight against terrorism, pressures will mount to use extraordinary measures for fighting terrorism in violation of human rights and civil liberties.

To provide some evidence for this general proposition, let me review some of the developments we have seen in the anti-terrorism campaign and show how the problem of evidence is implicated in each:

1. New crimes. After 9/11, many states codified a whole host of new terrorism offenses that are vague, overbroad and easily applied to individuals who were simply in the wrong place at the wrong time without criminal intent. These new crimes were thought to fill important gaps because suspected

terrorists are often detained at early stages in the planning of plots before an attack can materialize. At that stage, evidence may not yet exist to convince judges that the suspects are really guilty of first-order terrorism. So, the definition of terrorism has expanded in many countries to include all of the elements of planning and preparation of a plot, elements that could well be consistent with a variety of perfectly innocent activities. New crimes now routinely include conspiracy to commit a terrorist act, providing material support for terrorism, withholding information from the police about other people engaged in terrorist activity, glorifying or supporting terrorism, and even (in France) being in possession of large amounts of unexplained cash when the authorities believe the person's friends are terrorists. Some of these crimes are perilously close to thought crimes. Not all require the accused to know that he is involved in what the authorities consider a terrorist plot. Some easily blur the line between perfectly legitimate activity and criminal conduct. For example, if someone photographs a tourist site, it could be considered surveillance for a terrorist plot if purely statistical data show that the accused stayed at the same hotel as a known terrorism suspect. Or, if someone allows a friend to stay over for a weekend, this could implicate the generous host in a conspiracy even when he didn't know the friend was suspected of being a terrorist. When the focus of criminal justice shifts from punishment to prevention and when the evidence shifts from properly collected individuated evidence to merely statistical or associational proof, the result is the proliferation of crimes that could well sweep up many who have done nothing knowingly wrong.

How is this related to the problem of evidence? Authorities often feel compelled to act before a plot gets very far, when the sketchy evidence available is still consistent with alternative explanations. As a result, a suspected terrorist's allegedly criminal actions may not yet be tied to any concrete plot or target. But if the state doesn't have to prove the concrete details of plots and targets, then doesn't that make convictions easier? The fairness of the criminal justice system is threatened by the existence of political crimes that provide a handy tool for states to use when they want to lock someone up without going into the specifics. Moreover, the evidence in terrorism cases often comes from foreign sources, particularly from intelligence services that use methods like torture and other abusive tactics to gather information. As a result, the authorities may well believe that someone is dangerous without having enough evidence to act to arrest, detain, charge and convict the person on ordinary criminal charges, unless those charges are made very easy to prove. The result is that suspects may be charged with inchoate offenses (conspiracy, planning and "material support") that evade the need to prove just what actual plot a suspected terrorist might have joined even when the authorities have such information. Some of these new crimes dispense with the hard-to-prove element of criminal intent altogether.

2. Novel courts and trial rules. Terrorism trials using ordinary criminal procedure to charge ordinary serious crimes are disappearing. Around the world, one can see the creation of specialized terrorism tribunals with their own separate rules (for example in India and Pakistan), or "special advocates" who can see evidence their clients cannot (for example, in Canada and the UK), or military commissions (for example, in the US) or special procedural and evidentiary rules in ordinary courts (for example, in the use of anonymous witnesses or redacted summaries of statements made to the security services in countries ranging from Spain to France to Germany), or trials that are secret in whole or in part.

Why is this happening? States are developing trial procedures to fit the evidence they have rather than build up the evidence to meet the standards in place before 9/11. If they are getting information from their own or from foreign intelligence services that pass on information with the condition it not be publicly disclosed, states have been willing to adjust the trial procedures to suit. In an atmosphere of terrorism panic, when states do not feel they can afford to let a suspect go free when the proof against that suspect is only partial, then the result is to design the rules of the proceedings so that the outcomes are more predictable. Most of the adjustments to fair trials have come because the new proceedings make it easier to prove crimes in light of sorts of evidence that intelligence cooperation makes available.

3. Preventive detention, once thought to be a temporary adjustment to an emergency situation, is becoming entrenched. Countries that never before (or only in wartime) had domestic preventive

detention regimes are rushing to get new legal authority to hold suspected terrorists without trial. This is often a response to the sense that ordinary criminal procedure is not suitable for all terrorism suspects, especially those against whom the dominant evidence has come from sources that cannot be disclosed. Preventive detention, with or without periodic judicial review, is often framed as a necessary administrative procedure (within the immigration system, for example) and is therefore immunized from the rigors of criminal procedure. It is called different things in different countries, but a surprising array of states now have some method for holding suspected terrorists without trial – or at least, without an imminent trial – for long periods of time.

Why do states need preventive detention in fighting terrorism? Systems of preventive detention are made necessary by weak evidence. If the evidence against a suspect could be presented in open court and were strong enough to provide the basis of a conviction, then a trial through to a conviction would clearly be the best option for any state to follow. Preventive detention regimes are usually made necessary by having either incomplete evidence (i.e. there is a plausible but not a knock-down case that a person is a terrorist) or evidence that cannot stand up in open court (i.e. evidence that used sources and methods that cannot be publicly disclosed, or that used tainted methods like coercion and deception). If states had clear and convincing evidence from reliable and accountable sources, preventive detention would not be necessary.

4. “Driftnet” surveillance, like driftnet fishing, casts out a wide net and hauls in for further examination anything that is captured by that net. As a result, wide swaths of internet traffic, vast files of financial transactions, wholesale interceptions of mobile phone transmissions, or giant databases amassed by both public agencies and private institutions are captured for review and use. The individuated search, in which police first have a particular reason to put a particular person under surveillance, is vanishing in favor of network searches, where links of people with each other, determined in a purely statistical fashion, constitute the basis for inquiry. Fishing through huge piles of personal data looking for telltale signs of terrorism has become the signature method for fighting terrorism, often “legalized” as temporary exceptions to normal criminal investigation.

Driftnet surveillance is obviously damaging to rights to privacy and informational self-determination. But here too, this tactic would not be necessary if the state knew enough to develop targeted searches based on individuated information. Driftnet or network surveillance is used when targeted intelligence is not available or when the information that could be used for targeting cannot be shown to judges in order to get legally appropriate warrants because the evidence has been gathered inappropriately. Here, too, more reliable evidence, obtained according to rules that allow it to be used in rights-respecting processes, would reduce the need for abusively broad searches.

5. Blacklists. States are called upon to blacklist individuals who appear on transnational terrorism watch lists, without being given the information that would allow those same states to explain to the targeted individuals why their assets are frozen, their travel is blocked or their transactions are limited. As a result, individuals exist in a legal limbo, subject to procedures within states when the evidence and the rationale for the use of these procedures exist outside states. Targeted individuals cannot be given their procedural rights if states cannot muster the evidence to justify the punitive measures taken against them.

Much of the blacklisting problem is also an evidence problem. In international blacklisting processes, like the one at the UN Security Council, blacklisting is done without requiring the requesting state to provide evidence to the other states whose votes are required. Sometimes states will show redacted or “eyes only” evidence to other states on a bilateral basis to get them to go along with the sanctions. But then the international organization itself does not hold the supporting evidence in its files to respond to requests from states that need it to justify why they acted to freeze assets, refuse visas or seize passports. The need asserted by some states to maintain this information as tightly secret makes it impossible for the transnational organizations to provide states with the information they need to defend challenge to the system.

As all five of these examples show, states are using methods for locating suspected terrorists that do not comply with the rules for criminal investigations or even fair civil process required by their own legal systems. Instead, many states go to great lengths to distinguish “criminal investigation” to which full legal protections attach from “intelligence gathering” where legal protections for the individual are weaker. Back in the days of the Cold War, when intelligence gathering meant bugging embassies, figuring out troop movements, and using spies to gather information on the development of weapons systems, intelligence was used for structural purposes: to adapt the military posture of the intelligence-gathering country to the persistent threats in the environment. It was not used, except in rare cases involving trials of spies or traitors, in individualized legal proceedings. In the global anti-terror campaign, when states are hunting for terrorists who exist as named individual targets, information of an individually identifiable kind is now being produced through the security services as intelligence, without the procedural guarantees that come with criminal investigations.

Because intelligence information is often gathered outside normal legal parameters, it is not usable in public proceedings of any sort, including trials. If governments want to defend the secrecy of their security services, they fear that “sources and methods” might be disclosed and illegal activities might be exposed. Surely, procedural guarantees and their associated paper trails were never assured in the first place. We see the result in the growing pressures for exceptional procedures in trials, preventive detention and limited privacy protection. States are basing their decisions about key threats on information that they cannot put before neutral decision-makers who are charged with ensuring that individuals involved are treated fairly.

The problem of questionably gathered evidence is even more serious when states work cooperatively with other states. Terrorism investigations almost always require the cooperation of police and security services across national borders, which often means in practice that one state must live with the methods of regulation (or lack thereof) that its partner states have for their own security services. While some constitutional states have detailed legal control over intelligence gathering, police states rarely do. Even within jurisdictions as tightly linked as those of the European Union states, proper regulation of security services is not a matter of common agreement. What do states then do? They generally look the other way, and take the information they are offered from foreign security services without asking too many questions.

Because states have been urged to share information in the global anti-terror campaign as a matter of legal obligation under the UN Security Council framework and the parallel frameworks of regional bodies, we have witnessed since 9/11 the creation of a global legal “soup” of information into which every cooperating country throws the intelligence it has on hand. The origin and legal *bona fides* of any particular contribution to this soup may not be clear, as a result. States throwing in the information cannot be checked by the states taking out the information. Does the UK know (or care) whether German authorities exceeded their domestic legal mandate in producing useful information later handed off to the UK? Does the US examine whether one of its Middle Eastern allies abused detainees in its custody in order to provide valuable information to the US? States might of course prefer that their partners in the common anti-terror fight use methods that are legal within their own legal systems and compliant with international human rights obligations in general, but they have not insisted on it. When states feel that they desperately need information to prevent their own populations from being attacked, we have seen after 9/11 that they will look the other way rather than examine closely the methods used by other states to obtain that information.

The logic of the global anti-terror campaign means that constitutional rule-of-law states are often working hand-in-glove with police states, whose domestic methods of operation would be illegal if performed within the very constitutional rule-of-law states that benefit from the information these methods produce. The pressures to use vague crimes, exceptional trials, preventive detention, loosened regulation on privacy in searches of personally identifiable information and the procedure-free blacklists have their origins in the problem of evidence. The world-wide production of individually

actionable information by security services is occurring in a zone of questionable legal regulation and frequent legal abuse.

What is to be done? At the start of the 20th century, domestic police practices in most states were appalling to our contemporary eye, much the same way that security services practices are appalling now. A century ago, even in constitutional states, police often forced confessions and routinely violated the rights of those whom they investigated. It took both a revolution in public consciousness and a revolution in criminal procedure to bring the police under legal control over the course of the century. Even now, the success in this fight is only partial. It is, however, real. The fight to bring domestic police under rule-of-law control over the last century can be used as a model for bringing the security services under the same sort of control now.

Parliaments and courts need to develop frameworks for regulating intelligence gathering, especially when their own intelligence services are producing information about specific individuals for later use against them. How can this be done?

First, the constitutional rule-of-law states that have brought their domestic police into constitutional compliance have to get their laws in order to do the same with their security services. States can extend extraterritorial liability for people harmed by actions of a state security services acting abroad; they can also require state security services to use safeguards in locating and deploying evidence that would implicate individuals, making such evidence inadmissible in key decision-making processes if not procured in a proper manner, or at least giving it far less weight. If state militaries can be trained to follow international humanitarian law on the battlefield, including the establishment of battlefield screening procedures to determine who may be legitimately detained under the Geneva Conventions, then state security services can be trained to comply with human rights requirements in the course of their work as well. At a minimum, torture, threatening individuals or their family members for information, blackmailing people and other coercive tactics should be eliminated from the repertoire of legitimate methods of evidence-gathering.

Second, constitutional rule-of-law states can pressure less human-rights-respecting states to improve their own security services. In the anti-terror campaign after 9/11, the US openly worked with states that had dreadful human rights records, even ferrying captured terrorism suspects to states that openly engaged in torture and indefinite administrative detention without trial. If the US did not want to get its hands any dirtier than they already were, it was certainly willing to take advantage of other states' willingness to sully themselves. Obviously, if some states allow other states to do their dirty work for them, this undermines not only respect for human rights, but also integrity of the information that is produced in this manner. In fact, it was this system of coercing information and then attempting to use it to target specific individuals that has provided the rationale for many of the most worrisome developments in the anti-terrorism campaign. Constitutional rule-of-law states need to use their persuasive powers to encourage other states to refrain from using abusive methods if they are to work together in fighting terrorism.

Of course, it is not easy to acquire reliable and appropriately collected evidence for use in fighting terrorism. But while it may look like it promises a quick fix, the use of abusive evidence-gathering methods only postpones the time when states can reliably identify and eliminate threats to their national security. Just because methods are brutal doesn't make them better. In fact, abusive methods of information gathering are likely to generate distracting and dismaying false positives that throw terrorism investigations off course. And, as we have seen, they have dreadful effects not only for those who have been abused, but also for whole systems of justice.

As we consider the very difficult issues raised in the fight against terrorism, we should realize that many have a common source in the insufficient legal regulation of state security services on the front lines of evidence collection. And until intelligence gathering comes under legal control so that the information generated about concrete individuals can be used in public legal proceedings, we will have persistent "temporary problems" in fighting terrorism while respecting human rights.

