Terrorism and the Law

Human rights and security: conflict or convergence?

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We are reminded on a daily basis that we are in the midst of a 'war on terrorism'. The war was declared by President Bush just after the devastating events of 11 September 2001 in the United States and this language of war has been adopted in many countries, including Australia. The result is what Amitav Acharya has termed 'an age of total fear' in which narrow concepts of national security trump all other ideas of freedom and human security.[2]

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

Use of the idea of war implies that the violence is somehow finite -- that we can expect an end to the war, if not this year, in the foreseeable future. But, given the phenomenon of terrorism, it is clear that we will never really be able to claim a victory in the war; and in this sense it is infinite. War terminology also is not helpful in responding to systemic, complex problems: it can distort expectations of the outcomes of the 'war' and it can narrow the range of strategies used in its conduct.

A further problem with the language of war against terrorism to the ears of an international lawyer is that, if there is a war being waged, all the armed forces and military facilities of the members of the coalition of the willing, including Australia, would become legitimate targets.[3]

If we *are* at war, it would be perfectly legal at international law for any military installation in Australia to be attacked. As Professor Vaughan Lowe, Chichele Professor of International Law at Cambridge, has pointed out, on this analysis, all Al Qaeda combatants could be killed on sight, or detained, but, under the laws of war, they could not be punished for their participation in conflict unless they had committed war crimes. It is hard to imagine that our politicians intend this consequence of their war on terror talk.

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[1] Professor of International Law and ARC Federation Fellow, Australian National University.

[2] Amitav Acharya, 'Human Security, Identity Politics and Global Governance', paper presented at Conference on Civil Society, religion and Global Governance, National Museum of Australia, 1 September 2005 available at http://law.anu.edu.au/nissl/cs.papers.html

[3] See Vaughan Lowe, '"Clear and Present Danger": Responses to Terrorism' (2005) 54 *International and Comparative Law Quarterly* 185, 187.

What relevance does the war against terror have for lawyers? I want to focus on the narrowness of the legal approaches deployed in this age of total fear; particularly the way that the fight against terrorism is presented as of such national and international significance and urgency that it makes talk of human rights seem either irrelevant, irresponsible or hopelessly idealistic.

I will argue that this is a flawed approach from a legal perspective. As Ronald Dworkin has noted, the move to sideline human rights in the wake of terrorism is a common self-inflicted harm of many western nations. Such policies, he has written, are 'not only wrong but shameful'.[4]

In the legal context, across the globe the post-September 11 era has generated laws that attempt to reduce the threat of terrorism. These laws are premised upon the existence of a warlike situation; the idea that we are vulnerable to outside forces and that tougher measures are necessary for the duration of the war.

Terrorism is a very complex phenomenon and it's crucial to understand this to be able to work effectively against it. The word 'terrorism' can very easily be used in an omnibus way to mean any activities that we do not approve of, or the activities associated with particular cultures and religions.

For example, UK Prime Minister Tony Blair said, in the wake of the Bali bombings, that the West was facing a 'monolithic' terrorist threat. This might be politically effective rhetoric, but it's inaccurate. As the Oklahoma bombing or the bombing of the Rainbow Warrior showed, terrorism is a tool of many types of disaffected groups and terrorists fit no particular profile.

The idea of a monolithic terrorism also plays into problematic stereotypes of western virtue and oriental menace which themselves can exacerbate the likelihood of violence, as we have seen so dramatically in the UK over the last two months. Failure to understand the complexity of terrorism and its causes can also lead to a judgment that the protection of human rights is a minor, marginal issue in the fight against terrorism.

The idea seems that to be that human rights are some kind of fancy optional extra, and that, in times of crisis, we should forget such frills and allow our police and security agencies to be able to operate unfettered by the troublesome guarantees of human rights. The term 'civil libertarians' is regularly used to describe opponents of these laws in a way that trivialises their concerns.

The style of the new wave of security laws is strikingly similar: they typically

- mandate strict immigration controls
- restrict the due process rights of persons who are suspected of having some knowledge of terrorist activities

[4] *New York Review of Books*, 6 November 2003 p 37.

- create a regime without the safeguards of the regular criminal law to detain and question and try suspects, and,
- (more recently) move to restrict freedom of speech and religious practices.

While these laws are justified by their drafters as essential for the preservation of our civilisation, the darker side of their implementation has been little analysed. Some anti-terrorist laws and practices have targeted particular groups such as political activists, asylum seekers, refugees and religious and ethnic minorities.

Ronald Dworkin has made the point that in practice "no American who is not a Muslim and has no Muslim connections actually runs the risk of being labelled an enemy combatant and locked up in a military jail."[5]

A 2002 report by the UN Secretary-General's Special Representative on Human Rights Defenders, Hina Jilani, has illustrated how terrorism laws have been used to target human rights groups in many countries. For example people advocating for the independence of Tibet have been labelled as terrorists by the PRC government. The presumption of innocence, the right to privacy and the right to a fair trial (or indeed any trial at all) have all been regularly waived in the name of counter-terrorism.

Moreover, criminologists are now noting a phenomenon they have labelled "transubstantiation" by which the very broad powers asserted against terrorist suspects are making their way into mainstream policing through indiscriminate application to "ordinary" criminals.[6]

It's striking that both sides in this debate invoke the idea of a balance to explain their support or criticism of the anti-terror laws. The idea is that law should strike a balance between the rights and freedoms we associate with democracy on the one hand and with the hard headed realisation that tough action is essential to respond to terrorism and to achieve security. The only conceptual difference between the two positions is where the balance should be struck.

I want to argue (along with others)[7] that the idea of balance is not a useful one in this context because of the implication that the protection of human rights and the prevention of terrorism are somehow inevitably at odds with each other. The notion of a balance or a set of scales gives a quasi-scientific air to the discussion, but it does not explain what will be placed into the balance or how the right balance will be judged or who is best placed to judge it.

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[5] *Ibid.*

[6] William Stuntz, 'Local Policing After Terror' (2002) 111 *Yale Law Journal* 2137, 2157.

[7] Lucia Zedner, 'Securing Liberty in the face of Terror' (2005) *Journal of Law and Society* (forthcoming December 05); Christopher Michaelsen, Counterterrorism and the Misleading Rhetoric about Balancing Liberty against Security, Unpublished seminar paper (delivered at the ANU May 2005); Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *The Journal of Political Philosophy* 191.

It quickly becomes a lopsided debate because it pits the interest of "us" – the majority -- against the interests of particular individuals; as Lucia Zedner points out – "the weight of numbers hangs implicitly in the balance to tip it in our favour. Claims to rebalance in the 'public interest' or 'national security' are laid down as trump cards against which any individual claim to liberty cannot compete."

This polarisation is evident in judicial approaches to the new wave of security laws. Researchers have chronicled the tendency of the judiciary to defer to the executive on security issues, especially in the wake of terrorist violence.[8]

We can see this deference in both United Kingdom and US decisions dealing with anti-terror laws, although the December 2004 decision of the House of Lords in *A v Home Secretary* is a strong and dramatic counter-example in which the Judicial Committee used the UK HRA to declare provisions in the Anti-Terrorism legislation that allowed indefinite detention of non-UK nationals (but not UK nationals) inconsistent with human rights.

I want to suggest that a better course would be to develop a more symbiotic understanding of the concepts of human rights and security: they are not antithetical human goods.

In fact, the definition of international human rights principles already strikes a balance between the enjoyment of particular freedoms and national security. The ICCPR, for example, provides that some rights *can* be limited in very specific circumstances. The Covenant refers to 'times of public emergency which threaten the life of the nation and [which] … is officially proclaimed'.[9] There are parallel provisions in all major international and regional human rights treaties.

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

The ICCPR also makes clear that there are particular rights from which derogation is never permitted: these include the rights to life, to be free from torture, not to be enslaved, and the right to freedom of thought, conscience and religion. It is also clear that the elements of a right to a fair trial must be respected even during an emergency. All of the rights contained in the Convention on the Rights of the Child apply even during times of emergency.[10]

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[8] Oren Gross & Finola Ni Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' 15 *Human Rights Quarterly* 625, 640 (2001).
[9] Article 4.
[10] Article 38.

Mary Robinson, as UN High Commissioner for Human Rights, proposed criteria for the building in human rights protection with the combating of terrorism in 2002.[11] Her proposals included the requirement that laws restricting human rights in a time of emergency would have to:

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

The proposals also make clear that any limitations must:

1. Conform to a principle of proportionality
2. Respect the principle of non-discrimination
3. Be compatible with the objects and purposes of human rights treaties and not impair the essence of any right
4. Be necessary in a democratic society.[12]

Some provisions of the Australian anti-terrorism legislation do not appear to meet these standards. Take for example, the ASIO legislation that was enacted in June 2003. Although the draft legislation was held up by the scrutiny of a number of parliamentary committees, and considerably amended in the process, eventually the opposition agreed to it, saying that it was the best outcome under the circumstances.

In essence, the ASIO Act allows ASIO the power to detain people, not just those who are suspected of terrorism, but also who are thought to have information about terrorism, for up to 7 days and to question them for up to 24 hours in that 7 days.

The law effectively reverses the onus of proof, removes the right to silence and restricts access to independent legal advice while a person is in detention (eg ASIO can apply for particular lawyers to be disallowed). Questioning of a person held by ASIO can begin without a lawyer being present; and a lawyer can be removed.

A very troubling aspect of the legislation is the criminalisation of releasing what is termed ‘operational information’ about detention, even if the information is a part of a media story on the detention system within two years of the detention. The effect of this provision is to give ASIO an immunity from media scrutiny for abuses of the detention system.

George Williams has called the law: 'an extraordinary law for an extraordinary time. It can be justified only as a temporary response to the threat of terrorism'.

But my concern is that this law will in fact have a longer life and impact and set a precedent for scaling back human rights. There have already been proposals to remove the sunset clause from the ASIO legislation. This is unsurprising: The war on terror as

[11] UN Doc. E/CN.4/2002/18, Annex, 27 February 2002.
[12] See also the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, 15 July 2002 available at http://press.coe.int/cp/2002/369a(2002).htm.

depicted by our politicians can never end and thus these laws will always appear necessary.

The bi partisan support for the flawed ASIO legislation indicates I think the importance of having a set of human rights standards against which governmental action in relation to terrorism can be measured. As we have no bill of rights, no such set of standards is available in Australian law to measure counter-terrorism measures. The international human rights regime can thus provide a useful framework for assessing Australian law.

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

We know from the United States experience that a certain insouciance about truth, justice and human rights can develop in agencies responsible for security. Indeed the secret federal court that approves spying on suspected terrorists in the US found in 2002 that the Justice Department and FBI officials supplied erroneous information to the court in more than 75 applications for search warrants and wire taps.[13]

The tragic shooting of an innocent person by the London police after the July bombings is another example of the fallibility of security experts.

Another strategic issue is that all the evidence we have about the causes of terrorism indicates that the enactment of tough security laws without securing human rights is counter-productive. There is research that reveals that both alienation and humiliation play a large part in the decision to engage in terrorism or political violence.[14] Laws that are repressive or that appear discriminatory in operation can exacerbate a sense of grievance and injustice, and push moderates to support extreme action.

My point is that legal responses to terrorism require a human rights framework.

Just as no political or religious or philosophical cause can justify violating the right to life of civilians, no response to terrorism can justify violating fundamental human rights.

I should note that recently, the Attorney-General and the head of his department, Robert Cornall, have moved outside the metaphor of balance in the context of anti-terror laws, borrowing ideas from the Canadian Attorney-General Irwin Cotler.

They have suggested that the Australian government's approach to terrorism does not scale back human rights, but is in fact aimed at delivering human rights, or at least one human right; the human right at the centre of this new approach is one sourced to the

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[13] 'Secret spying court rebuffs Ashcroft' *Guardian Weekly* 29 August-4 September 2002, p 31.
[14] E.g. Jeff Victoroff, 'The Mind of the Terrorist', (2005) 49 *Journal of Conflict Resolution* 3 ; see also Walter Reich, ed., *Origins of Terrorism: Psychologies, Ideologies, Theologies, States of Mind* (Washington, D.C.: Woodrow Wilson Center Press, 1998), Jessica Stern, *Terror in the Name of God: Why Religious Militants Kill* (New York: Ecco, 2003) pp 9-62, cited in Michaelsen, above note 7.

Universal Declaration of Human Rights (UDHR) and described as a human right to security.

In my respectful view, the Attorney-General's new approach is very problematic because it misreads the actual text of article 3 of the UDHR which is that 'everyone is entitled to life, liberty and security of the person' and converts an individual right to one belonging to the state and society.

The dropping of the reference to liberty and the elevation of the idea of community security is completely at odds with the accepted meaning of the right in international law.

The Attorney-General's approach is, at heart, a proposal of a right to homeland security, not to *human* security.

Individual liberty, properly understood, is basic to the public interest; and security must also include security of the individual from unwarranted interference by the state. Many governmental reactions to terrorist incidents do not realise is that 'building a durable global human rights culture, by asserting the value and worth of every human being, is essential if terrorism is to be eliminated'.[15]

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

The Chief Justice of Israel, Aharon Barak, has said, memorably, in a 1999 case where the Israeli Supreme Court declared some practices of the Israeli Security Forces illegal:

> This is the destiny of democracy as not all means are acceptable to it, and not all practices employed by its enemies are open before it.
>
> He went on:
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> Although a democracy must fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.[16]

Rather than rushing to appear to appear draconian in the face of terror, it's worth taking some time to consider the most effective long-term strategies. At the end of the day, true human security depends on broadening respect for human rights, rather than treating human rights as dispensable when the going gets tough.

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[15] Mary Robinson, above note 11.
[16] 38 *International Legal Materials* 1471.

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

One way ahead would be to consider terrorism, not as a distinct crime, but one that can be dealt with through the criminal law. On this analysis alleged terrorists would be regarded as criminal suspects to whom the standard principles of due process should apply.

As Professor Lucia Zedner of Oxford University has argued, the criminal law can offer a principled approach to managing the tensions between security and human rights.[18] This would require national legal systems incorporating a set of rights that could be safeguarded through rules of procedure and evidence.

The values of the criminal process offer a framework for anti-terrorist policies including 'the principles of reasonable cause; no detention without trial; *habeas corpus*; innocent until proven guilty; an open trial in a judicial court; legal advice and representation of choice; and punishment reflecting the seriousness of the crime.'[19]

Such an approach does not preclude specific anti-terror measures in particular circumstances, but emphasises the need for these measures to have in built human rights safeguards, respecting the values of necessity, proportionality, non-discrimination, transparency and accountability.[20]

We need to think much more seriously about long term strategies and the causes of terrorism – talk of the 'war on terror' gives the impression of strong action while in fact exacerbating the very phenomenon it seeks to eradicate.

For the short term, however, the most useful legal approach to terrorism, I want to suggest, would be one based on the rule of law and which ensures respect for human rights.

The judiciary has a really important role in making this possible.

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

[18] Lucia Zedner, above note 7. For a contrary view see Bruce Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029, 1034 (arguing that the nature of the current terrorist threat goes beyond the criminal law).

[19] P Thomas, 'Emergency and Anti—Terrorist Powers 9/11: USA and UK' (2003) 26 *Fordham International Law Journal* 1193, 1194-5.

[20] Lucia Zedner, above note 7.

As Kofi Annan has said ‘If we compromise on human rights in seeking to fight terrorism, we hand terrorists a victory they cannot achieve on their own.’[21]

[21] Press release SG/SM/8798.