

Protecting Human Rights while Countering Terrorism

by Philippa Schmidt

“Recent times have witnessed an especially disturbing trend of countries claiming exceptions to the prohibition on torture based on their own national security perceptions. Let us be clear: torture can never be an instrument to fight terror, for torture is an instrument of terror.”

Kofi Annan

Introduction

9/11 has changed our world and our thoughts dramatically. On 11 September 2001, two airplanes crashed into the World Trade Center (WTC) and a third one hit the Pentagon in Washington. Another hijacked aircraft crashed into a field in Pennsylvania. To date it is not clear what the final target of United Airlines Flight 93 was. The two towers of the WTC collapsed and about 3000 people died. The attacks were executed by 19 members of Al Qaeda. This terrorist organization was also involved in further attacks before and after 9/11. Terrorism is nothing new to the world, but the dimensions of 9/11 were unpredictable. Furthermore, the USA have not experienced terrorism in contrast to many European states such as Spain, Germany or United Kingdom.

Not only the size, but also the fact that the attacks were directed against locations in the heart of the USA shocked especially the public in the Western world. New feelings of vulnerability arose among many people in industrialized countries. Thus 9/11 became also a decisive point for countering terrorism. In a climate of fear the US invaded Afghanistan to prosecute Osama Bin Laden and Al Qaeda. Thereafter creating a link between Saddam Hussein and Al Qaeda, the US army intervened in Iraq without a mandate of the UN Security Council. At first, military methods were assessed as an effective tool to combat terrorism. Nowadays, many governments are disillusioned about fighting terrorism with military means: Osama Bin Laden has not been detained so far, Islamic movements are growing in several states, terrorist attacks were carried out in the United Kingdom, Spain, and India, and Iraq is affected by civil war. So far, results in the struggle against terrorism are limited. On the contrary, terrorists have been successful in creating an atmosphere in which it is customary to curtail civil rights. NGOs criticize that some states use the act of countering terrorism as an excuse to oppress the political opposition and democratization efforts. The fight against terrorism has been exploited to violate different forms of human rights. Whereas the restrictions of civil rights and freedom of opinion affect the population of a country as a whole, violation of basic human rights such as the right to life and freedom of torture can be found in the cases of suspected or convicted terrorists. On the one hand, in many cases human beings accused to be terrorist were not granted the right to a fair trial. On the other hand innocent people were denied the right to life by terrorists. Thus, it is comprehensible that governments try anything to prevent terrorist acts. But these prevention measures can lead to restrictions of human rights and civil freedoms. Since there is a realistic threat that terrorists could gain access to weapons of mass destruction, it is difficult to find a balance between the protection of the whole population and human rights of individuals.

Definition of Terrorism

In which cases is it a terrorist and when is it a freedom fighter? This key question remains unanswered so far: The term “terrorism” has not been defined by international law until today. Therefore, many different national definitions exist under domestic laws. These definitions strongly differ from each other and especially in non-democratic countries the term terrorism comprises a very broad scope. Nevertheless, there have been some approaches to find an international consensus on this question. The first attempt to define terrorism on an international basis was made under the League of Nations in 1937. The key part of the drafted League of Nations Convention reads as follows: “All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public”. Unfortunately this document never came into existence. GA Resolution 51/210 (1996) deals with the problem as follows: “1. *Strongly condemns* all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed; 2. *Reiterates* that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them”. Terrorism expert A. Schmid proposed in a report for the UN Crime Branch in 1992 to define terrorism as “peacetime equivalents of war crimes”. A suggestion which makes sense since there is an international consensus on what constitutes a war crime. Thus, Schmid says: “Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby - in contrast to assassination - the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organization), (imperilled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought” The absence of a clear definition of terrorism by international law aggravates the coordination among the UN member states in the fight against terrorism. Furthermore, it facilitates the violation of human rights under the pretext of countering terrorism. But if human rights abuses become inherent to the fight against terrorism, this also derogates the legitimate counter-terrorism.

Various forms of human rights violations in the war on terror

As outlined in the introduction, human rights violations while countering terrorism can be classified as two different forms. The first and most important one is the violation of basic human rights by methods such as torture, disappearances or even executions. Particularly convicted terrorists or suspects suffer from these kind of human rights violations.

An extensive restriction of civil rights such as freedom of expression or the rights of peaceful assembly can be noticed in many countries as chain of events. It is out of the question that special situations require adequate responses. Therefore the *International Covenant of Civil and Political Rights* (ICCPR) says in article 4.1: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” This means that civil rights such as described above can be suspended. But

what constitutes a “public emergency”? Article 4.1 is prone for abuse and overreaction. A democratic society is always threatened when civil liberties are restricted by the state. Therefore, experts like Martin Scheinin, the *Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism*, criticize the restriction of civil liberties in several countries. He analyzes in his last report that terrorist profiling-practices such as the German *Rasterfahndung* initiative violate the right to privacy and the guarantees of non-discrimination both granted by the ICCPR (article 17,2 and 26). In the end, terrorists achieve one of their most important aims: They destroy democratic values and the confidence in the democratic system. Thus, beside dealing with fundamental human rights violations, a discussion on civil liberties could be a vital part of your debate.

Violations of the right to life and freedom of torture are severe human rights abuses. They are under no circumstances compatible with the ICCPR: “4.2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.” Torture in all its forms is totally prohibited by international law. Nevertheless, several cases of torture and ill-treatment have occurred under the pretext of combating terrorism. Torture is defined in article 1 of the *Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment* (CAT) as follows: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Ill-treatment is mistreatment which is not that serious as torture. International law poses several obligations connected with the ban on torture. Governments are obliged to criminally prosecute persons suspected to have committed torture. Furthermore, courts of state parties to the CAT do not have the right to use evidence extracted under torture. Another breach of international law is sending a person to a country where he or she might become victim of torture or ill-treatment. Experiences have shown that so-called diplomatic assurances by the receiving governments are worthless. Various deported persons have been tortured despite a prior assurance by the receiving country. Detentions in secret facilities are in any case against international law and constitute the crime of enforced disappearance.

Country Studies

“Safe but free” the society affected by methods of counter-terrorism should be, according to Ben Wizner, an expert of UCLA International Institute. This is an ideal which is hard to achieve: The reality is different. There are many states which fundamentally violate human rights under the pretext of countering terrorism.

USA

Critics especially focus on human rights abuses in the USA. First of all, Guantanamo Bay is a controversial issue. The UN, several governments, and NGOs asked for the closure of the US detention camp. Even the British government which is the closest ally of Washington requested the closure of “Gitmo”. The camp was established in 2002 to hold foreign terrorist suspects, captured during the “war on terror” in Afghanistan. The detention facilities are located on a US military base on the southern coast of Cuba. The advantages of the location for the USA are on the one hand that the detainees could not be freed by their allied combatants, on the other hand, the government obviously hoped to evade obligations of international and domestic law. Most of the detainees were captured in 2001 or 2002 and are

now in their sixth year of arrest without court proceedings. Such a treatment is a violation of several human rights documents like the ICCPR. Although some of the inmates were released to their home countries, there are still about 400 prisoners from 30 states in Guantanamo Bay. The global public has been shocked by several scandals which occurred in the detention camp. The living conditions in Camp X-Ray, where the detainees were initially held, were absolutely insufficient, since this camp consisted of open air facilities without running water. Although the prisoners were transferred to Camp Delta in April 2002, the scandals and criticism did not stop. Over and over again critics reported misconduct by the US detention personnel. In May 2005, a US magazine published accusations that a Koran was flushed down a camp toilet. This report has never been proven and the magazine later on withdrew its accusations. In June 2006, three detainees committed suicide. The detainees were only granted the legal status of “enemy combatants” and not that of prisoners-of-war. Consequently, the US government does not adhere to the Geneva Conventions. Nevertheless, some progress has been made concerning detention conditions. The legal situation of the detainees has improved since the US Congress passed the *Military Commission Act* in 2006. This new law is based on a decision of the Supreme Court to set up a commission to try suspects who are not US citizens. However, due to the fact that the military court does not recognize the defendants as regular war combatants military judges dismissed two charges against the first defendants in June 2007. This has led to a suspension of all trials. The decision was based on the fact that the defendants have not been designated as “unlawful enemy combatants”, but only as “enemy combatants”. “Lawful” combatants must be treated as prisoners of war and thus would be protected by international law. Since the *Military Commission Act* requires the designation as “unlawful enemy combatants”, all trials have been stopped to date. But even if the court proceedings will start again in the near future, only 60 to 80 out of 400 detainees will face trials. So far it is not clear what is going to happen with all other prisoners who cannot be charged due to a lack of evidence. Amnesty International criticizes the military tribunals and hereby the *Military Commission Act* for several reasons, among them the fact that the military judges can permit evidence obtained under torture or ill-treatment.

On 20 July 2007, US President George W. Bush issued an executive order concerning the interrogation of prisoners. Bush stated that the CIA has to comply with the Geneva Convention prohibition on “outrages upon personal dignity, in particular humiliating and degrading treatment.” But it is still not clear if this order includes practices such as sleep deprivation or “water boarding”¹. Although the situation of Guantanamo Bay detainees has been improved, they are still not recognized as “combatants of war”. Additionally, many interrogation techniques which are still allowed and indefinite detention are against CAT and other specific human rights documents. Furthermore, Amnesty International (AI) accuses the USA to hold terror suspects in secret detention facilities all over the world. These detainees are deprived of their basic human rights, humiliated and suffer from forced nudity, subjection to noise and extreme isolation according to AI. To maintain secret detention facilities is in any case a clear breach of international law.

China

China has perceived the global war on terror since 9/11 as a very useful tool to fight and oppress separatists, especially the Muslim Uighurs in the province Xinjiang, Northwestern China. The Uighurs are a very old and traditional Turkic people who call their Chinese homeland East Turkestan. The Uighur calls for independence are rooted in the 19th century and national sovereignty was successfully achieved from 1931 to 1934 and from 1944 to

¹ Simulated drowning

1949. Although Xinjiang is legally defined an autonomous region, cultural and religious traditions were restricted by Beijing. Since 9/11, separatist acts involving the use of force are defined as “international terrorism” by China, whereas peaceful acts of separatism are further labeled as “separatism”. Nevertheless, also political activist who are not at all involved in violent resistance are detained by the Chinese government. Ismail Samed, a peaceful political thinker and Uighur was sentenced to death, after he was tortured into a confession. He was executed in February 2007. Refugees from Xinjiang who live in neighbouring countries such as Nepal, Pakistan or Kazakhstan have been extradited since China put pressure on the respective governments. Some Uighurs are also detained in Guantanamo Bay. China accuses the Uighurs to maintain relations to the Taleban and to send persons to training camps in Afghanistan. According to Foreign Affairs author Chien Peng Chun only one separatist organization, the *Eastern Turkestan Islamic Party of Allah*, has sent members to Afghanistan. This group has been classified as terrorist organization by the USA and the UN. Other organizations such as the *East Turkestan Opposition Party* and the *Organization for the Liberation of Uighuristan* have links to guerilla groups in the Takliman Desert within Xinjiang. The Chinese government is right in the accusation that there is an armed separatist movement, however, it is obvious that this resistance is based on the harsh living conditions and widespread human rights violations in Xinjiang. Most Uighurs practice a moderate form of Sufi or Sunni Islam, but the fact that Han Chinese are flooding into Xinjiang and making Uighurs a minority in their own homelands, frustrates the population and creates a new basis for resistance. *Times online* quotes a western intelligence officer “that Chinese repression was creating recruits for terrorism.” Only a very small minority of Uighurs do really have terrorist intentions and relations to terrorist organizations. Nevertheless, China antagonizes a whole people. The Chinese “war on terror” is not limited to Xinjiang. Even though the Muslim belief seemed to be an ideal pretext for accusations of terrorism, Chinese authorities also label non-Muslim activists as terrorists. The Tibetan monk Tenzin Delek Rinpoche and his scholar Lobsang Dhondup were both sentenced to death for “crimes of terror” in Sichuan 2002. They were accused to have carried out bomb attacks. Lobsang was executed shortly after his conviction, whereas Tenzin Delek’s verdict was commuted to life imprisonment in 2005. Both denied all charges and it is highly unlikely that they were involved in any violent resistance, since they were adherents to the Dalai Lama and are committed to a Buddhist non-violent way of living. It rather seems to be probable that Tenzin Deleks unhidden loyalty with the Dalai Lama, his support for renovation for monasteries and his opposition against extensive logging in the region sealed his fate.

The USA and China are not the only countries which violate human rights under the pretext of countering terrorism. Countries such as Egypt, Indonesia, Russian Federation, United Kingdom of Great Britain and Northern Ireland and Uzbekistan are also among states violating human rights in the “war on terror” according to Human Rights Watch and the International Helsinki Federation of Human Rights . If your country is not listed above this does not mean that you do not have human rights problems linked to counter-terrorism. Please check in your individual research if reliable NGOs accuse your country of having abused human rights in the “war on terror”.

International law and measures to protect human rights violatons while countering terrorism

In the aftermath of September 11, it became obvious that human rights are especially imperilled in an environment eager on fighting any terrorist threat. Therefore the *Commission on Human Rights* decided in resolution 2005/80 to appoint a *Special Rapporteur on the*

Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. His appointment is mandated for three years. The current rapporteur is Dr. Martin Scheinin, a Finnish diplomat. His tasks include providing technical assistance and provisory services for governments concerning the promotion and protection of human rights while countering terrorism, gathering information on human rights violations in specific countries (a visit is only possible with the consent of the state concerned), cooperating with all relevant actors within the UN system, and reporting regularly to the Human Rights Council and to the General Assembly. Scheinin has already visited Turkey, South Africa, the USA and Israel. Further visits and reports are in preparation.

The most important resolution on counter-terrorism is *SC resolution 1373*, which was passed two weeks after 9/11. This document was adopted under chapter VII of the UN charter and thus is legally binding for all UN member states. It obliges governments to implement effective counter-terrorism measures and to improve the international cooperation in the struggle against terrorism. Based on this paper the Security Council established the *Counter-terrorism Committee (CTC)* which monitors the implementation of 1373, cooperates with member states and promotes closer coordination within the UN system. Since 2002 the CTC and the UN *Human Rights Committee* have deepened their cooperation and exchange briefings on their work and areas of concern. As a reaction to various human rights violations under the pretext of countering terrorism the Security Council included Article 6 in resolution *1456 (2003)*, which reads as follows: “6. States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.” Further resolutions concerning terrorism and human rights have been passed by the General Assembly and the Commission on Human Rights.² Based on these resolutions it is the task of the *Office of the High Commissioner on Human Rights (OHCHR)* to: “a) examine the question of the protection of human rights and fundamental freedoms while countering terrorism, taking into account reliable information from all sources; b) make general recommendations concerning the obligation of States to promote and protect human rights and fundamental freedoms while taking actions to counter terrorism; and c) provide assistance and advice to States, upon their request, on the protection of human rights and fundamental freedoms while countering terrorism, as well as to relevant United Nations bodies.”

Other documents which are relevant in the field of protecting human rights while countering terrorism are the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *Convention against Torture and other cruel inhuman or Degrading Treatment or Punishment* and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

Conclusions

Protecting human rights while countering terrorism is a very sensitive issue. It is difficult to find the adequate balance between effectively combating terrorists and protecting human rights, especially since countering terrorism is aiming at protecting the most fundamental right: the right to life. The international community has created various bodies and documents dealing with human rights and terrorism. But still there is a lack of coordination and as long as no comprehensive legal definition of terrorism exists, questions remain. Is any armed group fighting a government a terrorist group? In the eyes of Dr. Hans Koechler, president of the *International Progress Organization*, this would be “over-simplistic” foremost in the case of

² A/RES/58/174, A/RES/58/187, E/CN.4/RES/2003/37, E/CN.4/RES/2003/68

groups fighting against a state which is occupying its territory. One should be aware of the fact that, if each armed group is defined as terrorist organization, resistance groups during the World War II would also have been defined as terrorists. It is your most important task to at last find a definition for the term terrorism. Furthermore, you must not forget that in many states political activists who have not been involved in violent resistance at all are convicted or designated as terrorists. Although governments and the civil society are nowadays much more aware of the threats which are linked to the “war on terror,” there are still human rights violated under the pretext of countering terrorism. As long as terrorist acts are carried out, human rights violations linked to reactions to terrorism remain on the global agenda. Since there have been (attempted) terrorist attacks in the last months in countries such as the United Kingdom, Germany and India, the debate on restricting civil liberties continues. Therefore, reminding all member states that they do not only have a responsibility to protect lives but also to protect human rights and democratic values is of utmost importance. Last but not least protecting human rights is a key instrument to combat the root causes of terrorism. Your task as a delegate is very urgent and you bear a high responsibility since the topic affects all of us.

Useful Links

www.un.org

Main website of the UN

www.un.int

Permanent missions of the member states

<http://www.ohchr.org/english/bodies/hrcouncil/>

website of the Human Rights Council

http://www.unodc.org/unodc/terrorism_definitions.html

Definitions of terrorism by the United Nations Office on Drugs and Crime

<http://www.un.org/sc/ctc/humanrights.shtml>

Security Council Counter Terrorism-Committee on Human Rights

<http://www.ohchr.org/english/issues/terrorism/rapporteur/srchr.htm>

Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while countering terrorism

<http://www.ohchr.org/english/>

Office of the UN High Commissioner on Human Rights (OHCHR)

<http://www.un.org/sc/ctc/ohchr1.htm>

“A human rights perspective on counterterrorist measures” by OHCHR

<http://www.unhchr.ch/terrorism/index.html>

OHCHR concerning Protecting Human Rights while countering Terrorism

<http://www.un.org/Overview/rights.html>

Universal Declaration of Human Rights

http://www.unhchr.ch/html/menu3/b/a_ccpr.htm
International Covenant on Civil and Political Rights

http://www.unhchr.ch/html/menu3/b/h_cat39.htm
Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

<http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>
European Convention for the Protection of Human Rights and Fundamental Freedoms.

<http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>
SC Resolution 1373

<http://daccessdds.un.org/doc/UNDOC/GEN/N03/216/05/PDF/N0321605.pdf?OpenElement>
SC Resolution 1456

<http://daccessdds.un.org/doc/UNDOC/GEN/N03/505/02/PDF/N0350502.pdf?OpenElement>
GA Resolution 58/174

<http://daccessdds.un.org/doc/UNDOC/GEN/N03/505/80/PDF/N0350580.pdf?OpenElement>
GA Resolution 58/187

[http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.RES.2003.37.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.2003.37.En?Opendocument)
Commission on Human Rights Resolution 2003/37

[http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.RES.2003.68.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.2003.68.En?Opendocument)
Commission on Human Rights Resolution 2003/68

http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_02_06_un_guantanamo.pdf
Report by the ECOSOC on the situation of detainees in Guantanamo Bay

<http://www.fco.gov.uk/Files/kfile/QS%20Draft%2010%20FINAL1.pdf>
“Counter Terrorism Legislation and Practice: A Survey of Selected Countries” by the UK government

<http://www.counter-terrorism-law.org/>
Homepage on counter-terrorism and law

<http://hrw.org/un/chr59/counter-terrorism-bck.htm>
“In the Name of Counter-Terrorism: Human Rights Abuses Worldwide”, report by Human Rights Watch

<http://davos.amnesty.org/?p=14>
Amnesty International on Human Rights and Terrorism

http://www.ihf-hr.org/documents/index.php?sec_id=58&s_countries%5B%5D=0&s_topic=0&s_year=&s_keyword=Terrorism&s_doctype=0&submit=Search

International Helsinki Federation for Human Rights on Terrorism and Human Rights

<http://www.hrw.org/english/docs/2004/01/09/usdom6917.htm>

Human Rights Watch

<http://i-p-o.org/int-terrorism.htm>

The International Progress Organization

<http://www.international.ucla.edu/article.asp?parentid=3576>

UCLA International Institute on terrorism vs. Civil rights

<http://www.iht.com/articles/2005/03/03/news/edlord1.php>

The International Herald Tribune on Terrorism vs. Civil Rights

<http://www.washingtonpost.com/wp-dyn/content/article/2005/06/02/AR2005060201749.html>

Article at washingtonpost.com on the US war on terror

<http://news.bbc.co.uk/2/hi/americas/6241123.stm>

Very useful and extensive website of BBC on Guantanamo Bay

<http://web.amnesty.org/pages/guantanamobay-index-eng>

Amnesty International on Guantanamo Bay

http://news.bbc.co.uk/1/hi/not_in_website/syndication/monitoring/media_reports/2241025.stm

Chinas “war on terror” by BBC

http://www.cfr.org/publication/4765/chinas_war_on_terror.html

Foreign Affairs article on Chinas “war on terror”

<http://web.amnesty.org/wire/August2004/China>

Amnesty International on Chinas “war on terror”

<http://www.timesonline.co.uk/tol/news/world/asia/china/article2116123.ece>

Times online on the situation in Xinjiang