

Terrorism and Human Rights – Discussion Paper

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A. Introduction

1. In any discussion about terrorism, there are many different ideas and emotions that surge together and are readily conflated. It is important to distinguish between the different questions involved to enable us to tease out the strands of this Gordian knot.

B. “Terrorism”

2. Kofi Annan defined terrorism in this way:
“any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act.”
3. However, the meaning of the term “terrorism” is contested, and whether particular measures to counter terrorism are justified will depend on what it is meant by the term.

4. As colloquially used, the term “terrorism” does not include the acts of governments. We can have “state-sponsored” terrorism, but that very term denotes that the terrorism is not conducted by the state itself. This is not to say that states do not engage in acts of terror: “The Reign of Terror” was conducted by the rulers of France, while “The Red Terror” and “The Great Terror” were both conducted by the rulers of the Soviet Union. Although there may be times when violence by the state is justified, any presumption of legitimacy when violence is used by the state is false. However, the issue is distinct from a discussion of terrorism as normally understood. To point to State terrorism does not provide an answer to “private” terrorism.
5. Generally, terrorism describes violent techniques such as bombing, kidnapping or hijacking, aimed at civilians (although the term is sometimes used when the violence is aimed at military targets), and motivated by religious or political grievances.
6. As such, terrorism is a technique, not a philosophy or ideology.
7. Terrorism, excluding from that term such things as mass bombings of civilian populations by military means, is the weapon of the desperate.
8. There are in the world today numerous movements which use the techniques of terrorism. As well as Al-Qaeda and related groups, there is the Maoist rebellion in Nepal (and a number of other such groups in the Indian sub-continent), the FARQ “guerillas” in Colombia, and a range of similar groups in Latin America. There are several such movements in Africa.
9. Terrorist violence is a crime. All such conduct was already criminal before September 11th 2001.
10. Terrorist violence is wrong and should be condemned.

C. The phenomenon of terrorism

11. Politically-motivated violence is ancient.
12. Religiously-motivated violence is ancient.
13. Violence against non-combatant civilians, whether as part of war or as part of a political/religious campaign, is also long-standing. Examples from history are:
 - a. The Gunpowder Plot;
 - b. Anarchist bombings of London in the late 19th Century;
 - c. The Hilton Hotel bombing in Sydney in 1978.
14. Terrorism today has distinct features from previous times, most importantly that it is, like so many things, “globalised”. There has also been a higher loss of life in the incidents which have occurred, and the availability of weapons of mass destruction makes the prospect of serious harm greater.
15. Although assassination is distinct from terrorism, sometimes assassination is a technique of terrorism.
16. The term “terrorism” is value-laden. Many of us would not condemn the actions of General Gersdorff on 21st March 1943, when he attempted to assassinate Hitler by suicide bombing, but we would condemn suicide bombing in a cause we oppose. Violence against non-combatant civilians should be condemned.

D. Use of terms

17. Governments today (and in previous times) frequently use the term “terrorist” to describe any independence movement (opposed to such governments) which uses violence. Examples are:

- a. Use of the term by the Indonesian government to describe the Free Aceh Movement;
- b. Use of the term by the South African government to describe Nelson Mandela and the ANC;
- c. Use of the term to describe adherents of the “Arabi” Revolt in Egypt in 1882, which led to Britain invading Egypt and taking control of the Suez Canal;
- d. Use of the term to describe the so-called “Mau Mau” uprising led by Jomo Kenyatta in the 1950s in Kenya;
- e. Use of the term by the British in relation to the IRA;
- f. Use of the term by the British in relation to the Malayan insurgency;
- g. Use of the term by the Chinese about the Taiwanese;
- h. Use of the term by the Russians about the Chechens;
- i. Use of the term by the Nazis to describe the resistance movements to their rule in various countries, including Germany itself.

Whether the term “terrorist” is justified in any of these cases depends on one’s point of view (value judgments) as to the movement’s aims and whether its violent methods were necessary.

18. The use of the term “War on Terror” has created great confusion:
 - a. It falsely created the impression that the fact of terrorist crime meant that a state of war existed;
 - b. It falsely created the impression that terrorist crime, terrible though it is, threatened the existence of western nations subject to it;
 - c. It legitimized terrorism – if we fight them in a war, it is only to be expected that they will fight back;

- d. It created the impression that the “war” could be won, that is, terrorist violence eliminated;
 - e. It was used to justify the abrogation of hitherto-recognised rights.
19. The threat of terrorism is unlike a war because there is no threat to the territorial integrity of a State or to its vital interests beyond its borders. Terrorism threatens the safety and security of a people, within or beyond its borders, to secure a political or military objective. That objective is usually limited and does not extend to the destruction of the State or the society whose people are threatened. Accordingly, the justification for encroachment on civil liberties provided by war is not present in the so-called “war on terror” or is of reduced significance.
 20. In fact, the risk level in Australia remains at “medium – terrorist attacks could occur” the second lowest of four levels. It has been at that level since 11th September 2001.
See <http://www.nationalsecurity.gov.au>
 21. Australia has at no stage sought to derogate from its obligations under the ICCPR, something that would be permitted in times of national emergency, although this probably would not justify many of the laws which have been passed.
 22. Terrorism, and terrorist acts, have also given rise to a number of hysterical and even absurd mantras which are repeated by both politicians and the media, including:
 - a. “The world changed on 9/11”; “we live in a different world now”; We are more conscious of our safety, but the Oklahoma bombing occurred just a few years before without the same kind of response. To say “the world has changed” is to do exactly what the terrorists want: to amplify the impact of their

work. To overstate the impact of the terrorists is to reward them.

- b. “We have to do something”;
 - c. “We must not appease the terrorists”;
 - d. “You are either against the terrorists or you support them”;
 - e. The perpetrators are “sub-human” (and similar remarks).
23. We should not accept a paradigm that divides these issues into “good and evil”, “black and white”, “for and against” dichotomies. There are in fact so many variables that this will usually provide responses that are simplistic and wrong. For example, Kim Beazley described the London bombers as “sub-human filth who must be captured and eliminated”. In describing them in this way, he immediately placed himself and those with him in the “human” category, and other people in a different category – so different that it is apparently morally justified to “eliminate” them. This kind of talk from our leaders, which appears to advocate the killing of terrorists, is particularly insidious.
24. As well as the value-laden term “terrorism” there are also a number of other value-laden terms associated with it. Examples are:
- a. “insurgents” – used to describe those violently resisting the occupation of their country by foreign forces;
 - b. “extremists” – applying to small relatively powerless groups only;
 - c. “radicals” – to describe certain views within Islam, and which sets up an absurd paradigm within that religion.
25. “Security” needs to be considered as the other half of the “terrorism” equation. Security is a social and cultural state which

involves having sufficient food and shelter, having access to medical care, education, and expectations of involvement in government decision-making.

26. One of the ways of keeping the world community more secure is to have a globally-respected forum in which nations can have a voice. When Australia moves outside the UN, we are made less secure.

E. Response to terrorism

27. Removing sources of injustice, alienation and grievance is the best long term strategy for reducing terrorism. Those with nothing left to lose are dangerous, and wise rulers will take pains to eliminate sources of discontent.
28. Moreover, living by violence, or acting with violence, will also promote the cycle of violence. If we sow the wind, we all too often reap the whirlwind.
29. The security apparatus erected following “9/11” has been directed solely against Islamic groups. This has at times displayed ignorance (eg use of the Christian term “fundamentalists” in relation to Muslims; or referring to “the Muslim community” which is about as meaningless in Australia as “the Christian community”). The operation of that security apparatus has been frankly racist. This includes the former ASIO operative suggesting that we should look carefully at men of middle eastern appearance lest they be bombers. The operation of this security regime has also isolated, angered and radicalized some Muslim young people. This same ignorance has also lead to significant discrimination against Muslim women both within and outside the Muslim community. Visits by political leaders to Christian fundamentalist

churches, eg Hillsong and Catch the Fire Ministries at the same time as the introduction of anti terror laws targeting Muslims, and in Costello`s case also while the VCAT decision was pending, added to the tensions (see Joseph p.5).

30. Whilst we should be responsible in protecting safety, it must be recognized that safety is not something that can be fully achieved: to live involves risk. To give in to fear is usually to diminish life. To legislate because of manufactured or exaggerated fear usually diminishes our body politic.
31. Amid the response to the recent London bombings, our leaders have flagrantly denied the obvious impetus to such attacks given by the occupation of Iraq (and Afghanistan). Whilst the occupation in no way justifies such bombings, aggressive military action obviously provides a motive for the desperate and outraged to respond in just this way. Since Mr Blair has said that it is better to fight the terrorists in Iraq than to leave them to operate in England, he has made the link explicit. For our leaders to talk of repressive measures here – such as random bag searches on public transport – whilst failing to acknowledge that our troops in Iraq (and Afghanistan) increase the dangers to our community is to refuse to accept our own responsibility in the matter.
32. The war in Iraq:
 - a. was not sanctioned by the UN;
 - b. was not conducted in conformity with international law;
 - c. was launched on a false basis (on the evidence, knowingly false);
 - d. has cost at least tens of thousands of civilian lives;
 - e. destroyed such order as existed in Iraq;

- f. has so far provided only illusory benefits to the population of Iraq;
- g. has been accompanied by the inflammatory and degrading treatment of prisoners;
- h. has occasioned the ongoing occupation of Baghdad and other holy Islamic sites.

In such circumstances, to deny the link between that war and further terrorist acts flies in the face of reality.

- 33. If we use violence against others, they will often use violence back. If they don't have an army, they may well try terrorist violence.
- 34. We should remind ourselves that as yet there has been no Islamic-motivated terrorist outrage in Australia. There has been the bombing of the Hilton Hotel in CHOGM in 1978, but as yet that crime remains unsolved. The Bali bombing was a terrible crime costing 88 Australians and many Indonesians their lives, but from the statements of the perpetrators it appears to have been aimed more at US citizens than at Australians. The bombing of the Australian embassy in Jakarta killed 11 civilians, none of them Australian. The impact on the victims and their families of these crimes is horrendous. Indonesia responded by applying its criminal justice system. In contrast the direct impact of terrorism in Australia has been very limited and yet we have enacted very oppressive laws. This raises the issue of whether we are boxing at shadows, or at the very least, providing a disproportionate response.
- 35. Put another way, domestic violence is far more significant in terms of people killed or injured in Australia than terrorism. So is road rage, AIDS, abuse of alcohol, and any number of other issues.

Since 9/11, terrorism has not happened here. Responses to the threat may be justified, but we do well to make those responses proportionate to the genuine threat. This requirement should not be hijacked by the politics of fear.

36. Liberty assesses proposals to combat terrorism against the following criteria:
 - a. Effectiveness in preventing terrorist attacks;
 - b. Whether the measures are proportionate to the threat;
 - c. Impact on fundamental rights;
 - d. Social impact;
 - e. Institutional impact;
 - f. Whether other measures, such as a charter of rights, could render them more acceptable;
 - g. The degree of secrecy surrounding such measures;
37. Some aspects are not negotiable. These include:
 - a. An absolute prohibition on torture;
 - b. Measures should in no way discriminate on the grounds of race, religion, gender, or sexual orientation;
 - c. Any law enacted should be decided upon and promulgated through an open and democratic process
38. There are a number of good articles which do analyze the current terror laws against international human rights criteria. Most significant in recent times are:

Prof Sarah Joseph: *Australian counter-terrorism legislation and the international human rights framework*

Dr Jude McCulloch and Joo-Cheong Tham *Secret state, transparent subject: The Australian Security Intelligence Organisation in the age of terror*

Arie Freiburg Op Ed Piece in *The Age* 14th September 2005;

Daryl Melham – Op Ed Piece in *The Age* 15th September 2005.

39. In fact, there are a number of matters that can be stated about the current terrorism laws:
- a. Terrorist acts, such as bombing and hijacking, were already grave crimes before these laws came into effect.
 - b. So were conspiracies to commit such crimes.
 - c. These new laws focus on religious and political motivation, and make more serious acts done from such motivation than acts done for reasons of greed or vindictiveness.
 - d. Australia's terror laws now define as terrorism many things that most people would not understand as terrorist crimes.
 - i. Recklessly helping an organisation indirectly engage in fostering the doing of a terrorist act is now a crime. (publication of views that are favourable to a particular organization may well be enough)'
 - ii. Possession of a thing associated with terrorism is a crime – an incredibly vague provision.
 - iii. Reckless collection of documents likely to facilitate terrorist acts is a crime – how would one know if one was breaching this law?
 - iv. Deliberate assaults by politically motivated protesters in another country are now a terrorist crime under Australian terror laws.
 - v. Violent resistance to any foreign government, regardless of the oppressive nature of the regime, is now a crime in Australia. Under our present laws, the Kurds fighting Saddam Hussein would be guilty of terrorism, and so would anyone raising money to help them. The same may be said of Fretilin in East Timor. If resistance to Mugabe becomes violent in Zimbabwe, our law will

treat those opposing his regime as terrorists. Perhaps it is unlikely such people would be prosecuted, but it is contrary to the rule of law for enforcement of criminal offences to be dependent on the foreign policy of the government of the day.

- vi. Under our laws, a striking worker who assaults a scab while manning a picket line against a certain government policy would be guilty of terrorism.
 - vii. A person who is believed to have information relating to terrorism may be detained by ASIO for questioning for 7 days, and a further warrant may be obtained for further questioning if new information comes to light. Only Australia has authorized detention of non-suspects in this way.
 - viii. These laws make crimes committed from a religious or political motivation more serious than the same crimes committed for motives of greed or spite. No good reason for this difference has been provided.
40. No case has been made out for the far-reaching laws as they stand, let alone a case for further changes.
41. The Attorney-General is obliged, under s 4(1) of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), to ‘cause a review of the operation, effectiveness and implications’ of amendments made by:
- (a) the *Security Legislation Amendment (Terrorism) Act 2002*; and
 - (b) the *Suppression of the Financing of Terrorism Act 2002*; and
 - (c) the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*; and
 - (d) the *Border Security Legislation Amendment Act 2002*; and
 - (e) the *Telecommunications Interception Legislation Amendment Act 2002*; and
 - (f) the *Criminal Code Amendment (Terrorism) Act 2003*.

Subsection 4(2) requires that the review 'must be undertaken as soon as practicable after the third anniversary of the commencement of the amendments'. Apart from the *Criminal Code Amendment (Terrorism) Act 2003* (Cth), these laws commenced on 5 July 2002

42. Accordingly, the government is overdue with its review of existing laws, yet has already announced new proposals. This is poor administration.
43. The proposition that anti-terrorism measures promote civil liberties is spurious. It is based on the contention that the right to safety and security is a civil liberty. This is false. That right, important though it is, cannot be characterised as a civil liberty. Civil liberties are those things enjoyed by individuals which are no business of government and society: the right to free speech, to freedom of religion, freedom of association, privacy, sexual orientation etc.
44. Enjoyment of these rights depends on government **inaction** and **forbearance**. The right to safety and security, however, depends on societal or governmental action. Rules must be devised to protect safety and security and those rules must be enforced by organised police and defence forces.
45. Because the right to safety and security depends on extensive and far-reaching governmental intervention there is an inherent tension between it and civil liberties. Any debate on anti-terrorism measures should recognise this tension. To say there is no tension and that civil liberties are promoted by anti-terrorism measure is to avoid the essential issue.

46. A proper debate on anti-terrorism measures also recognises that life is inherently risky and that some danger and risk must be accepted. For example, people take risks every time they drive a car. Hundreds die every year on our roads yet no one suggests road traffic should be banned. Instead limited measures only are adopted to reduce the loss of life. This is because the social benefits of road traffic justify the loss of life.
47. Likewise, in considering anti-terrorism measures, there must be an evaluation of the social benefits from those activities proposed to be curtailed. Free speech, freedom of association, the right to liberty, the right to due process in a transparent legal system and their associated rights are all proposed to be curtailed in the name of anti-terrorism. Those rights and freedoms should be evaluated to determine whether the social benefits which accrue from them justify the risk of loss of life in a terrorist attack.

F. Terrorism and Human Rights

48. There can be no security without freedom. As Thomas Jefferson said: “Those who desire to give up freedom in order to gain security will not have, nor do they deserve, either one.”
49. The debate surrounding our response to terrorism, here are two important fallacies:
 - a. We can gain security by foregoing rights; as Thomas Jefferson said: “Those who desire to give up freedom in order to gain security will not have, nor do they deserve, either one.”
 - b. We need to “balance” the “competing” demands of different human rights – eg in order to ensure our right to life, we should be prepared to sacrifice every other right. In this regard, it is perfectly possible to have effective anti-terror laws without

compromising human rights. Human rights are our greatest source of security.

50. As the nations of the world expressly recognized in passing the Universal Declaration of Human Rights in 1948, in the aftermath of the conflagration of the Second World War, our security lies in comprehensive recognition of human rights, and our greatest peril lies in their abrogation. As the preamble states:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

51. As Lord Hoffmann said when the House of Lords found that legislation permitting the administrative detention of foreign terrorist suspects violated human rights:

Terrorist crime, serious as it is, does not threaten our institutions of government or our existence as a civil community.

The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.

That is the true measure of what terrorism may achieve. It is for parliament to decide whether to give the terrorists such a victory.