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# *Human Rights: Substantive and Institutional Implications of the War Against Terrorism*

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## **Abstract**

*The September 11 attacks 'changed the world', but did they also change the human rights agenda? What role do human rights play in the context of terrorism? This article argues that violations of human rights are a major causal factor of terrorism. Consequently, the fight against terrorism should not only focus on military means, but should also address the worldwide lack of respect for human rights. A clear civil reaction (i.e. a prevention strategy) is needed. The article argues further that there is a direct link between terrorist attacks and human rights. Acts of terrorism aim at violating human rights. However, it is debatable whether human rights law could and should apply to acts of terrorists, as such acts are perpetrated mostly by non-state actors. It is therefore argued that one way to hold terrorists responsible is to qualify their acts as 'crimes against humanity'. Furthermore, the article shows that there is a dangerous tendency to legitimize human rights violations under the pretext of combating terrorism. Effective action against terrorism, it is said, must respect international human rights standards and make use of existing legal mechanisms if derogations are seen as indispensable. The existing body of international human rights law and the system of the United Nations establish clear boundaries for any legal action against terrorism.*

## **1 Introduction**

The issue of terrorism is not a new one on the human rights agenda. For many years, acts of terrorism in all forms have endangered and killed innocent people, jeopardized fundamental freedoms and seriously impaired the dignity of human beings. States have therefore long been under an obligation to take measures to protect the fundamental rights of everyone within their jurisdictions against terrorist acts.

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After September 11, 2001, however, this apparently straightforward picture became more complicated. The events of September 11 pose huge challenges to the agenda of human rights. As the German Federal Minister for Foreign Affairs underlined in his speech before the 58th session of the UN Commission on Human Rights, ‘the 11th September and its consequences have reoriented world politics and this is not without implications for human rights policy’.<sup>1</sup>

The call by the United States for a global campaign against terrorism provided the context for several initiatives by governments to tighten security legislation and to curb civil liberties. There is therefore a risk that the ‘war against terrorism’ will produce a significant shift in states’ obligations to respect human rights. However, the battle against terrorism itself is also understood as a fight *for* human rights. Clearly, states need to strike a balance in this new context between protecting the human rights of its citizens as potential victims of terrorism and protecting the human rights of alleged terrorists.

This article aims to shed some light on the relationship between human rights and terrorism, a relationship which has so far received little attention in scholarly writing.<sup>2</sup> The article gives a brief, general outline of human rights violations as a major causal factor of terrorism, followed by an analysis of human rights violations by acts of terrorism. Finally, and most importantly, the article considers human rights violations by counter-measures in the aftermath of September 11, and highlights the requirement for a balance between human rights and security.

## 2 Violations of Human Rights as a Major Causal Factor of Terrorism

The origins of terrorism are related to the infringement of human rights. As the Special Rapporteur of the UN Commission on Human Rights stated in her report on ‘Terrorism and Human Rights’, ‘[v]iolation of human rights, humanitarian law and basic principles of the [UN] Charter, are among the major causal factors of terrorism’.<sup>3</sup> It is clear therefore that a careful study of causal factors is an essential component of any strategy to reduce or eliminate terrorism.

In practice, the human rights dimension as a cause of terrorism tends to be neglected. Despite the fact that there were at the time about seven million Afghan

<sup>1</sup> Speech by Joschka Fischer, Federal Minister for Foreign Affairs, ‘Anti-Terrorism Measures Are No Excuse for Human Rights Violations’, 58th Session of the Commission on Human Rights, Geneva, 20 March 2002, [www.unhchr.ch](http://www.unhchr.ch) (accessed 20 August 2002).

<sup>2</sup> According to the Special Rapporteur of the UN Commission on Human Rights and Terrorism, ‘[I]ittle, if any, attention has been given to the link between terrorism and human rights’. See Preliminary Report, ‘Terrorism and Human Rights’, prepared by Ms K.K. Koufa, UN Doc. E/CN.4/Sub.2/1999/27, 7 June 1999, para. 16.

<sup>3</sup> *Ibid.*, at para. 130.

refugees<sup>4</sup> — the highest worldwide figure at that time — Security Council Resolution 1333 (2000) made no mention of this refugee problem as a threat to world peace: only ‘terrorism’ was characterized as a threat to peace. Furthermore, Security Council Resolution 1373 (2001) made reference only to the need to safeguard the system of international refugee protection from abuse by terrorists:<sup>5</sup> it did not mention the obligation of states to prevent refugee movements by respecting human rights.

Whether or not violations of human rights are recognized as a major causal factor of terrorism has a bearing on the strategy adopted for fighting terrorism. This became very clear in the light of September 11.

### A *The Civil Reaction: A Prevention Strategy*

The European states, which were not, of course, directly attacked on September 11, responded to September 11 in a manner which could be characterized principally as a *civil* reaction. Most European states opted for what may be called a ‘prevention strategy’, and underlined the importance of non-military measures to combat international terrorism, including an increase in development aid<sup>6</sup> and economic cooperation,<sup>7</sup> and greater cooperation in international fora to ensure the wider implementation of international human rights instruments.<sup>8</sup> Thus there is a strong belief, in Europe at least, that terrorism cannot be defeated purely by military means and that it is necessary also to confront the underlying causes:

Tough action and repression alone do not . . . constitute a satisfactory response to the threat posed by modern terrorism. We will only be able to curb it through a policy of prevention, if we manage to take a new joint approach to effectively fighting its many different causes. This includes new strategies against hunger, poverty and lack of opportunities as well as the socially just management of economic globalization. But this includes above all protection of human rights, civil, political as well as socio-economic and cultural rights.<sup>9</sup>

Human rights, along with democracy and social justice, are seen as a means to prevent terrorism. Thus, on this view, the key to enhancing security is the pursuit by all governments of a comprehensive human rights programme.

<sup>4</sup> Of which an estimated 3.7 million were abroad. Report of the Secretary-General, UN Doc. S/2001/695, 13 June 2001.

<sup>5</sup> See para. 3(f) of Security Council Resolution 1373 of 28 September 2001.

<sup>6</sup> See the UN Conference on the Future of Afghanistan, Bonn, December 2001.

<sup>7</sup> After September 11, the German Government, to give an example, increased the budget of not only the Ministry of Defence but also the Ministry for Economic Cooperation and Development (*Bundesministerium für Wirtschaftliche Zusammenarbeit und Entwicklung*). Also, the OECD viewed an open multilateral trade and investment system as a strong impulse to development, and thus as an important element in the fight against international terrorism: see Organization for Economic Cooperation and Development (OECD), Statement by the Honourable Donald J. Johnston, Secretary-General of the OECD, on Fighting International Terrorism, 1 October 2001, 40 ILM (2001) 1275.

<sup>8</sup> See the conclusions adopted by the Council of the European Union (Justice and Home Affairs), Brussels, 20 September 2001, 40 ILM (2001) 1257–1262; and the European Union, Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, 40 ILM (2001) 1264 *et seq.*

<sup>9</sup> Speech by J. Fischer, *supra* note 1.

## **B *The Military Reaction: A Repression Strategy***

The US Government, on the other hand, sees the United States as a military power and therefore by contrast opted for a clear ‘military reaction’ or ‘repression strategy’ to deal with terrorism. Faced with the revelation of the vulnerability of its homeland, the US counts on its military power. Commentators observe that the civilian and military mindsets have merged in the US, and this potentially has adverse consequences for maintaining strong civilian authority.<sup>10</sup>

Furthermore, US public opinion views measures such as the ‘dialogue between cultures’ or combating poverty (when such measures are done with the aim of discouraging terrorism) as ‘appeasement’ rather than as part of an effective strategy to combat terrorism.<sup>11</sup> This view ignores the strong indications that it is necessary to address the causal factors of dissatisfaction, such as discrimination and poverty, which lead to terrorism:

Lack of proper economic development, unequal distribution of material resources, failing states, the lack of respect for human rights and equal opportunities . . . if we want to free the world from terrorism and crime, we will have to strengthen our efforts to solve these problems as well. Preventing and combating terrorism is one side of the coin, eliminating its sources and root causes the other.<sup>12</sup>

Promoting human rights, democracy and the rule of law is in the long term the surest foundation for stability and peace. Thus, there is good reason to believe that greater respect for human rights, along with democracy and social justice, will in the long term prove to be the only true remedy for terrorism — even though there are undoubtedly some ‘hard core terrorists’ whose minds are beyond our reach.<sup>13</sup>

<sup>10</sup> Rosenwasser, ‘The Growing Divide’, 26 *Fletcher Forum of World Affairs* (2002) 246 at 247.

<sup>11</sup> See ‘American Alert’, Information Service of the Washington Office of the Friedrich Ebert Foundation, issue 7/2002, 13 March 2002, at 8.

<sup>12</sup> Report to the Security Council Committee established pursuant to Security Council Resolution 1373 (2001) concerning counter-terrorism (‘Counter-Terrorism Committee’), Germany, UN Doc. S/2002/11, 2 January 2002.

<sup>13</sup> Secretary-General of the Commission on Human Rights, ‘Human Rights Must Not Be Sacrificed to Counter-Terrorism’, Commission on Human Rights, 58th Session, 12 April 2002, [www.unhcr.ch](http://www.unhcr.ch) (accessed 20 August 2002); in this context, it is important to note that President Bush announced a 50 per cent increase in development assistance for states which undergo reform, i.e. ‘fight corruption, respect basic human rights, embrace the rule of law, invest in health care and education, follow responsible economic policies, and enable entrepreneurship’. See ‘The National Security Strategy of the United States of America’, September 2002, <http://whitehouse.gov/news/releases/2002/09/20020920-6.html> (17 September 2002), sections 21 *et seq.*

### 3 Violation of Human Rights by Acts of Terrorism

#### A General Remarks

Terrorist acts violate the human rights of the victims. The effects of terrorism are wide-ranging, and there is probably no single human right that is exempt from the impact of terrorism.<sup>14</sup>

The devastating effects of terrorism on the rights to life, liberty, security and the dignity of the individual have been clearly documented by the competent organs of the United Nations, in particular by resolutions of the Commission on Human Rights, its Sub-Commission and by the General Assembly. Also, regional intergovernmental organizations, such as the Parliamentary Assembly of the Council of Europe and the Islamic Summit Conference, have pronounced on terrorism and human rights. For example, on 16 March 2000, the European Parliament reiterated that 'terrorism is a violation of human rights'.<sup>15</sup>

The attacks of September 11 struck at the fundamental human rights of every person. The individual victims were deprived of the most fundamental of all human rights — the right to life. In addition, the right to liberty and the right to security were among the other human rights directly affected by the attacks of September 11. Terrorism on such a scale creates a climate of fear. By using violence and fear as a tool,

terrorism influences ideological and political factors in order to impose its own model of society; impedes citizens in their use of their rights to have a say in the decisions that affect their lives; subverts pluralism and democratic institutions through the creation of negative conditions for the functioning of the constitution; halts the democratic process and democratization; undermines free political, economic, social and cultural development; impairs the quality of democratic society for all ... [and] leads to more terrorism and militancy.<sup>16</sup>

The violation of human rights by acts of terrorism is not an incidental effect: acts of terrorism are *directed* at destroying human rights. A broad consensus has developed among the various human rights bodies to the effect that acts of terrorism *aim* at the denial of human rights. This view was confirmed by the Vienna Declaration and Programme of Action of June 1993, which stated that all acts of terrorism aim at the destruction of human rights and democracy.<sup>17</sup>

Thus, it is evident that there is a direct link between the terrorist attacks of September 11 and the enjoyment of human rights and freedoms.

#### B Human Rights Violations by Non-state Actors

The September 11 attacks were seen as a war-like attack undertaken by individuals from other states operating through a non-state actor, i.e. an organization lacking

<sup>14</sup> Progress Report prepared by Ms K.K. Koufa, Special Rapporteur, UN Doc. E/CN.4/Sub.2/2001/31, 27 June 2001, para. 102.

<sup>15</sup> See European Parliament, Resolution A5-0050/2000 of 16 March 2000, European Parliament Resolution on Respect for Human Rights in the European Union (1998-1999), para. 41.

<sup>16</sup> Koufa, Preliminary Report, *supra* note 2, at para. 32.

<sup>17</sup> Vienna Declaration and Programme of Action of June 1993, para. 17.

formal or legal status as a state or as an agent of a state. There is a consensus that Osama bin Laden and Al Qaeda mark a new and more dangerous form of ‘sub-state terrorism’ than has been seen hitherto.

Nevertheless, it may be doubted whether certain acts committed by terrorists or members of armed groups acting outside a state’s control can properly be characterized as human rights violations. International human rights law was developed to protect persons against abuses by their own state. Thus, international law as presently constructed may not be capable of effectively coping with terrorist activities by non-state actors. Under existing human rights doctrine, non-state actors are not, strictly speaking, legally bound by the supervisory mechanisms of international law and human rights law. Consequently, some states have questioned whether the legal fight against terrorism can be accomplished through the application of international human rights law. Sweden, for example, expressed the view that ‘a terrorist act is a crime under the national criminal law of each country, and not a human rights violation’.<sup>18</sup> The European Union also underlined that ‘[a]cts of terrorism do not constitute human rights violations’.<sup>19</sup> And some commentators have seen the events of September 11 merely as crimes under the ordinary criminal law of the United States.<sup>20</sup>

However, this is merely the starting point for any analysis. The analysis may be carried forward by considering whether human rights law is now ‘moving beyond the traditional dichotomy of individual versus state and towards the creation of obligations applicable also to non-state entities’.<sup>21</sup> Almost all the principal human rights instruments contain language creating positive obligations on states to control certain activities of private individuals so as to protect against human rights abuses. The UN Commission on Human Rights, for example, has already determined that rape by non-state actors constitutes a violation of the rights of women.<sup>22</sup> The same body also reiterated that ‘the individual has the responsibility to strive for the promotion and observance of human rights’.<sup>23</sup> A similar line of reasoning is evident in the International Covenant on Civil and Political Rights. Article 5(1) of the Covenant stipulates that ‘nothing in the present Covenant may be interpreted as implying for any state, *group* or *person* any right to engage in any activity or perform any act aimed

<sup>18</sup> Reply from the Government of Sweden, quoted in Report of the Secretary-General, Human Rights and Terrorism, UN Doc. A/50/685, 26 October 1995, p. 5. Sweden underlined that an exception may be admitted ‘when terrorist acts are commissioned or condoned by the State’.

<sup>19</sup> Statement of the European Union at the 58th Session of the Commission on Human Rights, Geneva, 18 March–26 April 2002, agenda item 4, <http://europa-eu-un.org/article.asp?id=1294> (accessed 10 September 2002).

<sup>20</sup> For further detail, see Greenwood, ‘International Law and the “War Against Terrorism”’, 78 *International Affairs* (2002) 301 at 302; see also Dale Watson, Federal Bureau of Investigation (FBI), Statement Before the Senate Select Committee on Intelligence, 6 February 2002, [www.yale.edu/lawweb/avalon/sept\\_11/watson\\_001.htm](http://www.yale.edu/lawweb/avalon/sept_11/watson_001.htm) (accessed 10 July 2002).

<sup>21</sup> Koufa, Preliminary Report, *supra* note 2, at para. 17.

<sup>22</sup> See Commission on Human Rights, Resolution 2000/45 of 20 April 2000, paras 3 and 4.

<sup>23</sup> Commission on Human Rights, Resolution 1995/43 of 3 March 1995, ‘Human Rights and Terrorism’, preambular para. 6.

at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant'. This provision thus applies not only to states but also to groups and individuals, and is, therefore, relevant to the debate on the issue of human rights violations by non-state actors. Therefore there should be no doubt that terrorist acts, even when committed by non-state actors, are now the subject of international law.

In promoting what has been labelled the 'individualization' of international law, it is necessary to consider how international law imposes direct obligations on individuals who seek to commit terrorist attacks. As far as human rights are concerned, this could require that individual actors should now be held accountable for their acts towards other people. As Slaughter and Burke-White put it: 'Their acts are now subject to regulation under both domestic and international law.'<sup>24</sup>

### ***C The Relationship Between Terrorism and the Right to Self-determination***

Traditionally, national liberation movements claim an inalienable right to self-determination and the independence of all peoples under colonial and racist regimes or other forms of alien domination. The legitimacy of such a struggle has been upheld many times in international fora and tribunals.<sup>25</sup> General Assembly resolutions, in particular in the 1970s and 1980s, reflected a certain ambivalence: they condemned terrorist acts on the one hand, while accepting the use of armed force by freedom fighters on the other.

Similarly, some governments, mostly Islamic ones, emphasize the importance of distinguishing between terrorism and the struggle of peoples subjected to foreign occupation or domination. In its Final Communiqué of 10 October 2001 in Qatar, the Organization of the Islamic Conference stressed 'its rejection of any linkage between terrorism and the rights of the Islamic and Arab peoples ... to self-determination, sovereignty, resistance against Israel and foreign occupation'.<sup>26</sup>

Presumably due to the impact of mass terrorism, the right to self-determination has been gradually thrust into the background. There is a stronger will today than hitherto to make it clear that terrorist acts are unjustifiable in *any* circumstances, whatever political, philosophical, ideological, racial, ethnic, religious or other considerations may be invoked to justify them. For example, recent General Assembly resolutions on terrorism have made no mention of the right to self-determination in the context of combating terrorism.

It is interesting to note that the long-standing conflict between those (mostly Western scholars) who do not accept the exercise of the right to self-determination as

<sup>24</sup> Slaughter and Burke-White, 'An International Constitutional Moment', 43 *Harvard International Law Journal* (2002) 1 at 14 and 15.

<sup>25</sup> With further reference, see von Schorlemer, 'Liberation Movements', in R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, vol. 2 (1995) 858 *et seq.*

<sup>26</sup> Final Communiqué of the Ninth Extraordinary Session of the Islamic Conference of Foreign Ministers, Qatar, 10 October 2001, para. 6, cited in *Foreign Policy* January/February 2002, at 71.

a 'dividing line' between 'freedom fighters' and 'terrorists', and those (mostly Islamic actors) who do, resurfaced in the context of the drafting of a new comprehensive counter-terrorism convention. The Organization of the Islamic Conference tabled a text proposing that the activities of the parties during an armed conflict, *including in situations of foreign occupation*, should not be governed by the convention.<sup>27</sup> This may be interpreted as an effort to legitimize violent acts done in the context of liberation from foreign occupation and the exercise of the right to self-determination. As of November 2001, the UN was deadlocked over the text of the new counter-terrorism convention because Islamic governments, led by Syria and Egypt, were demanding exemption for organizations such as the PLO. As a result, the position of states who argue that terrorist methods should be tolerated as part of a struggle for self-determination became the major obstacle to agreeing on the text of the new convention.

Thus it seems clear that the issue of the relationship between terrorism and national liberation in the exercise of the right to self-determination will remain on the international agenda for the foreseeable future.

### ***D Characterization of the Terrorist Attacks of September 11 as Crimes Against Humanity***

In view of the deliberate targeting of civilians, the attacks of September 11 may be characterized as crimes against humanity. As such, they may evoke a legal response from all states to address the situation. Characterizing the attacks of September 11 as crimes against humanity results in a stronger protection of the human rights of civilians. Terrorists may be held accountable on the basis of a crime against humanity even in peacetime, when humanitarian law and the law of warfare do not automatically apply. Given the absence of certainty that an attack like September 11 legally constitutes an armed attack, the fact that crimes against humanity can be committed outside of armed conflict is relevant to the prosecution of this sort of attack.<sup>28</sup>

But can it truly be said that the attacks of September 11 were crimes against humanity? There is no agreement on the definition of terrorism as an 'international crime'; this holds true under customary international law and under treaty law. Proposals to consider terrorism as one of the international crimes under the jurisdiction of the International Criminal Court (ICC) failed. Consequently, it is necessary to examine carefully whether a terrorist attack fulfils the requirements of a 'crime against humanity'.

Under the doctrine of the Nuremberg International Military Tribunal, a connection

<sup>27</sup> Report of the Ad Hoc Committee Established by General Assembly Resolution 52/210 of 17 December 1996, Sixth Session (28 January–1 February 2002), GAOR, Fifty-Seventh Session, Supplement No. 37 (A/57/37), Annex IV, Texts Related to Article 18 of the draft Comprehensive Convention, 'Text Proposed by the Member States of the Organization of the Islamic Conference', para. 2.

<sup>28</sup> As the ICC deals with cases only prospectively, the ICC has no jurisdiction over the September 11 attacks. However, there may be other jurisdictions to prosecute terrorists under the head of 'crimes against humanity': see Vagts, 'What Courts Should Try Persons Accused of Terrorism?', 14 *EJIL* (2003) 313.



between an armed conflict and the acts constituting crimes was necessary in order to meet the requirements of a crime against humanity. However, later developments in international law show that no nexus between an armed conflict and an act constituting a crime is necessary in order to qualify the act as a crime against humanity. Neither the Statute of the International Criminal Tribunal for Rwanda (ICTR) nor the ICC Statute contains any requirement for a connection between the crime and an armed conflict. Only the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) maintains the nexus to an armed conflict (Article 5); however, even here, the Secretary-General's commentary defined the crimes in this respect as unrelated to armed conflict.<sup>29</sup> Also, recent decisions by the International Criminal Tribunal for the former Yugoslavia have reaffirmed that crimes against humanity can be committed outside of an armed conflict.<sup>30</sup> As a result, it can be concluded that, under current international law, there is no requirement for the terrorist attacks of September 11 to be related to an armed conflict in order to be characterized as crimes against humanity.

A further issue is whether the attacks of September 11, even considered as a whole, were on a sufficiently large scale to be considered as part of a *widespread* or *systematic* attack against a civilian population. In order to be characterized as crimes against humanity, the terrorist acts of September 11 must not have been merely *isolated* acts. In the *Akayesu* judgment, the ICTR interpreted the requirement for a 'widespread' or 'systematic' attack as having a high threshold.<sup>31</sup> However, by contrast, the *Tadic* judgment of the ICTY has acknowledged that 'even a single act might qualify as a crime against humanity if it were part of such an attack'.<sup>32</sup> Also, it may be argued that the systematic or widespread nature of the September 11 attacks can be established by linking together a number of terrorist acts in which Al Qaeda had previously been implicated, including the 1993 World Trade Center bombing, the bombings in Saudi Arabia, the 1998 US embassy bombings in Kenya and Tanzania, and the attack on the *USS Cole*.<sup>33</sup> As investigations showed, the terrorist attacks of September 11 formed part of a preconceived policy, including the establishment of networks and the dedication of resources to the terrorist acts. This evidence demonstrates that the September 11 attacks were committed not only as part of a widespread attack, but also in a systematic manner.

However, the status of the perpetrators of the September 11 attacks could theoretically become an issue, especially for those actors who are not agents of

<sup>29</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, 3 May 1993, UN Doc. S/25704, at 13.

<sup>30</sup> See Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', 43 *Harvard International Law Journal* (2002) 237; R. Ratner and S. Abrams, *Accountability for Human Rights Atrocities in International Law* (2nd ed., 2001) 55 and 56.

<sup>31</sup> See the commentary of Ratner and Abrams, *supra* note 30, at 60, with reference to the *Akayesu* judgment, paras 579–581.

<sup>32</sup> *Tadic* judgment, paras 645–649, [www.un.org/icty/tadic/trialc2/judgement/tad-tj970507e.htm](http://www.un.org/icty/tadic/trialc2/judgement/tad-tj970507e.htm); see also the *Tadic* appeal, para. 248, [www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.htm](http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.htm), citing *Prosecutor v. Mile Mrksic et al.*, Trial Chamber I, 3 April 1996, para. 30.

<sup>33</sup> Drumbl, 'Judging the 11 September Terrorist Attack', 24 *Human Rights Quarterly* (2002) 337.

governments. Under the doctrine of the Nuremberg International Military Tribunal, an issue to be considered is whether direction by some entity other than a state will suffice to establish a crime against humanity. The UN International Law Commission's 1954 Draft Code of Offences Against the Peace and Security of Mankind required that the acts be committed 'by the authorities of a state or by private individuals acting at the instigation or with the toleration of such authorities'.<sup>34</sup> Thus the position was that terrorist acts by purely private individuals would not constitute a crime against humanity. However, neither the ICTY nor the ICTR Statutes make any such reference to the effect that there has to be state involvement. The ICC Statute, for its part, refers in Article 7 to 'a state or organizational policy'. It defines an attack directed against any civilian population as a 'course of conduct involving the multiple commissions of acts . . . pursuant to or in furtherance of a state or organizational policy to commit such attack' — a definition broad enough to include private entities. Scholarship also argues in favour of the recognition of non-state actors as instigators of crimes against humanity. As Drumbl put it: 'the requirement of a state connection is not absolute, so long as an "organizational policy" can be established.'<sup>35</sup> And it can be safely assumed that the sophisticated Al Qaeda has such an 'organizational policy'. Consequently, non-state actors, such as Al Qaeda fighters, who follow a clear organizational policy, can incur individual responsibility for crimes against humanity under international law.

Thus, as crimes against humanity may be committed even in peacetime and because the purpose of outlawing crimes against humanity is to protect civilians from human rights violations, their application constitutes a potentially important issue for the prosecution of future terrorist attacks.

## 4 Violation of Human Rights by Counter-measures: The War on Terrorism

### *A General Remarks*

Terrorists often aim to provoke an oppressive reaction by state authorities that will involve the latter in human rights violations, in order to create fear and dissatisfaction among the general public. This can create a spiral of terrorist acts and counter-measures.

There is an indirect link between terrorism and the enjoyment of human rights and freedoms: a state's response to terrorism may lead to the adoption of policies and practices that exceed the bounds of what is permissible under international law and result in human rights violations. Counter-terrorism measures may affect in particular: the presumption of innocence; the right to a fair trial; freedom from torture; freedom of thought; privacy rights; freedom of expression and peaceful

<sup>34</sup> 1954 ILC Report, at 140 and 150, [www.un.org/law/ilc/texts/offences.htm](http://www.un.org/law/ilc/texts/offences.htm).

<sup>35</sup> Drumbl, *supra* note 33, at 337.

assembly; and the right to seek asylum. Counter-terrorism measures addressing specific ethnic or religious groups would also be contrary to human rights law.

There is no 'universally applicable counter-terrorism policy'.<sup>36</sup> However, if the 'war on terrorism' is to be effective, it will have to include various controls and restrict certain rights and freedoms. As a rule, all measures to counter terrorism must be in strict conformity with international law, including international human rights law. Any curtailment of freedoms should be proportionate to the dimension of the terrorist threat.

## **B Human Rights Violations in the Aftermath of September 11**

Developments in the human rights situation since September 11 have been well documented. Around the world, the September 11 attacks were followed by a wave of racist attacks directed against Muslims, Arabs and Sikhs based on their appearance. Some governments arrested hundreds of people for political reasons, thus using the war on terror as an instrument to combat political opponents. Governments also responded with a wide range of legislative measures. Many states adopted laws formulating new crimes, banning certain organizations, freezing assets, restraining civil liberties and reducing the safeguards against human rights violations. As Catherine Kessedijan wrote:

On peut encore noter un effet majeure des événements du 11 septembre sur la législation pénale de certains Etats qui, depuis longtemps, cherchaient à lutter contre ce qu'ils considèrent comme des dérives des sociétés contemporaines. Or, ces Etats ont fait voter par leur Parlement des législations sécuritaires et liberticides sous prétexte de lutte contre le 'terrorism' qu'ils n'auraient jamais pu faire voter avant cette date.<sup>37</sup>

The September 11 attacks were used as a pretext for political campaigns by some governments. Russia has always defined the Chechnya conflict as an 'anti-terrorist operation'<sup>38</sup> and as a domestic matter.<sup>39</sup> However, after September 11, Russia called for the recognition of the appropriateness of the Russian action in Chechnya, given the alleged links between Chechen rebels and the Taliban and Osama bin Laden. China reacted similarly to defend its response to political agitation in Xinjiang province. The Egyptian Prime Minister suggested that Western countries should 'think of Egypt's own fight against terror', and Israeli Prime Minister Ariel Sharon repeatedly referred to Palestinian Authority President Yasir Arafat as 'our bin Laden'.<sup>40</sup> Other examples may be given.

<sup>36</sup> Wilkens, 'Editorial', 13(4) *Terrorism and Political Violence* (2001) x.

<sup>37</sup> Kessedijan, 'The Aftermath of 11 September/Les conséquences du 11 septembre 2001', 4(2) *International Law Forum du droit international* (2002) 57.

<sup>38</sup> The Statement by the Government of the Russian Federation, 21 October 1999, 11(1/2) *Foreign Policy Bulletin* (2000) 40, underlined that '[t]he anti-terrorist operation in Chechnya has become a logical response of the state'.

<sup>39</sup> See the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Strasbourg, 'Policy Statement Concerning the Chechen Republic of the Russian Federation', 22 *Human Rights Law Journal* (2001) 338 at 339.

<sup>40</sup> 'Human Rights Watch World Report 2002', [www.hrw.org/wr2k2/print.cgi?intro.html](http://www.hrw.org/wr2k2/print.cgi?intro.html) (accessed 12 June 2002).

One of the greatest risks to human rights protection arising out of counter-measures is the growing inconsistency of human rights policies. This is an old phenomena,<sup>41</sup> but September 11 has highlighted the fact that troubling asymmetries occur when Westerners are victims.<sup>42</sup> In particular, the US military commissions were viewed as a profoundly damaging message that human rights are mere standards of convenience, to be applied when other countries face security threats, but not when the United States is at risk.<sup>43</sup> Unless the rules of international human rights clearly govern *all* counter-terrorism measures, the battle against terrorism is likely merely to reaffirm the instrumentality of terrorism.

### ***C Reactions by International Bodies to Human Rights Violations Through Counter-Measures***

As was noted above, there has been a dangerous tendency to legitimize human rights violations in the aftermath of September 11 under the pretext of combating terrorism. States which 'overreact' to the threat of terrorism will risk violating the human rights not only of the terrorists but also of the rest of society whose rights and liberties may therefore be diminished.

After September 11, there was a clear call by several United Nations human rights bodies and by non-governmental human rights organizations to respect human rights when taking measures to prevent and suppress terrorism. Astonishingly, however, there was no clear signal by the body principally responsible for counter-measures on the international level: the Security Council identified the need to combat terrorism by all means in accordance with the UN Charter, and in its Resolution 1373 (2001) the Council set out a range of legislative and other measures for states to employ to prevent and suppress terrorism. However, neither the Security Council nor the newly established Counter-Terrorism Committee referred to the obligations of states to comply with international human rights when fighting terrorism. The Counter-Terrorism Committee even claimed that the protection of human rights was a matter for other bodies.<sup>44</sup>

By contrast, the former UN High Commissioner for Human Rights, Mary Robinson, has suggested to the Counter-Terrorism Committee that it issue guidance to states to assist them in complying with Resolution 1373 and their international human rights

<sup>41</sup> Donohue has shown that US counter-terrorism measures traditionally affected ethnic minorities, especially in the immigration realm: see Donohue, 'In the Name of National Security: US Counterterrorist Measures, 1960–2000', 13(3) *Terrorism and Political Violence* (2001) 15.

<sup>42</sup> Drumbl, *supra* note 33, at 353.

<sup>43</sup> 'Human Rights Watch World Report 2002', *supra* note 40.

<sup>44</sup> For criticism of this stance, see International Commission of Jurists, Press Release, 'UN Commission Fails to Uphold Human Rights in Fight Against Terror', [www.icj.org/article.php?sid=177](http://www.icj.org/article.php?sid=177) (accessed 11 July 2002); see also the Joint Statement by Mary Robinson, UN High Commissioner for Human Rights, Walter Schwimmer, Secretary-General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the OSCE Office for Democratic Institutions and Human Rights, 29 November 2001, [www.unhchr.ch](http://www.unhchr.ch) (accessed 20 August 2002).

obligations.<sup>45</sup> She also solicited the views of the Committee Against Torture on the matter of ensuring that the human rights covered by its mandate are maintained with a high visibility in the light of various state responses to the events of September 11. In a subsequent statement, the Committee Against Torture reminded states parties to the Torture Convention 'of the non-derogable nature of the obligations undertaken by them in ratifying the Convention'.<sup>46</sup>

Similarly, the Committee of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), in its statement adopted on 8 March 2002, called on states and organizations to ensure that 'measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin'.<sup>47</sup> In this context, CERD intended to monitor, in accordance with the Convention on the Elimination of All Forms of Racial Discrimination, the potentially discriminatory effects of legislation and practices in the framework of the fight against terrorism. Furthermore, UN Secretary-General Kofi Annan and the UN High Commissioner for Human Rights called on the Commission on Human Rights to ensure that counter-terrorism measures were not used as a pretext for suppression. On 'Human Rights Day', 10 December 2001, 17 independent experts of the Commission on Human Rights issued a statement calling on states to limit the measures taken 'to the extent strictly required by the exigencies of the situation'.<sup>48</sup>

The UN Commission on Human Rights itself had been criticized because of its failure in July 2002 to adopt measures to protect human rights in the fight against terrorism. A draft resolution presented by Mexico during the 2002 session of the Commission called for counter-terrorism measures to be compatible with international human rights law, 'taking into consideration relevant comments, concluding observations and views of the human rights treaty bodies and recommendations of the relevant special procedures and mechanisms of the Commission on Human Rights'.<sup>49</sup> The resolution would have requested the UN High Commissioner for Human Rights to monitor and analyze counter-terrorism laws and measures and make recommendations to governments and UN bodies, including on their implementation of Security Council resolutions on counter-terrorism. Furthermore, the High Commissioner would have been asked to submit an interim report to the General Assembly at its 57th

<sup>45</sup> Introductory Statement by Mary Robinson, United Nations High Commissioner for Human Rights, Commission on Human Rights, 58th Session, 20 March 2002, <http://www.unhchr.ch> (accessed 20 August 2002).

<sup>46</sup> Statement of the Committee Against Torture, 22 November 2001, CAT/C/XXVII/Misc.7, Committee Against Torture, 27th Session, 12–23 November 2001, [www.unhchr.ch](http://www.unhchr.ch) (accessed 20 August 2002).

<sup>47</sup> See Statement of the Committee of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 8 March 2002, [www.unhchr.ch](http://www.unhchr.ch) (accessed 20 August 2002).

<sup>48</sup> Statement of Independent Experts, 'Human Rights Day: Independent Experts Remind States of Obligation to Uphold Fundamental Freedoms', 10 December 2001, [www.unhchr.ch/huricane/hurricane.nsf/view01/B6A4C75366A3B305C1256B1E0037F9B1?opendocument](http://www.unhchr.ch/huricane/hurricane.nsf/view01/B6A4C75366A3B305C1256B1E0037F9B1?opendocument) (accessed 13 September 2002).

<sup>49</sup> Para. 1.

session and a full analytical report to the Commission at its 59th session. However, after lengthy debate, the draft resolution was rejected.<sup>50</sup>

On the regional level, too, there were reactions to human rights violations by counter-terrorism measures. Both the Organization of American States<sup>51</sup> and the European Union<sup>52</sup> affirmed that actions to combat terrorism must be undertaken with ‘full respect for human rights’. The Organization for Security and Cooperation in Europe (OSCE) Parliamentary Assembly Declaration, adopted on 10 July 2002 in Berlin, called on parliaments actively to promote human rights during states of emergency.<sup>53</sup> Council of Europe Guidelines<sup>54</sup> have been drawn up to assist states in combating terrorism, while observing the core principles of the Organization, i.e. human rights, democracy and the rule of law. The Guidelines underline that it is essential that ‘any form of arbitrariness’ as well as ‘any discriminatory or racist treatment’ is excluded (Article 2). When a measure restricts human rights, the restrictions must be defined as precisely as possible and must be proportionate to the aim pursued. Measures taken by states to fight terrorism should be subject to appropriate supervision. In addition, the use of torture or of inhuman or degrading treatment or punishment is prohibited in all circumstances, in particular during the arrest, questioning and detention of persons suspected of terrorist activities. There should be regular supervision by a court of pre-trial detention, and the death penalty is excluded. Other regional organizations would be well advised to examine the Guidelines with a view to adopting similar provisions in the context of implementing Resolution 1373 and upholding their human rights obligations.

#### ***D The Possibility of Derogations from the Relevant Human Rights Provisions***

Respect for human rights and fundamental freedoms is the rule; derogations are an exception to the rule. Some rights, for example the right to life, freedom of thought, conscience and religion, and freedom from torture or cruel, inhuman or degrading treatment, and the principles of the precision and non-retroactivity of criminal law, may not be derogated from at all. Also, the right to a fair trial and the rule of law

<sup>50</sup> The proposed resolution was opposed by governments such as Algeria, Egypt, India, Pakistan and Saudi Arabia which have used counter-measures to suppress dissidents. Also, the United States strongly resisted the resolution. On 11 July 2002, Mexico withdrew the proposed resolution in the face of concerted opposition.

<sup>51</sup> Organization of American States (OAS), Resolution on Strengthening Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism, 40 ILM (2001) 1270, para. 5.

<sup>52</sup> Statement of Ambassador J. Pérez-Villanueva y Tovar on behalf of the European Union at the Commission on Human Rights, Violations Worldwide, April 2002, <http://europa-eu-un.org/article.asp?id=1295> (accessed 10 September 2002); see also the Extraordinary Council of 21 September 2001 and the European Council of Laeken on 15 December 2001, which reaffirmed that the fight against terrorism must be carried out with full respect for individual rights and freedoms.

<sup>53</sup> [www.osce.org/press\\_rel/documents/2002-354-pc.pdf](http://www.osce.org/press_rel/documents/2002-354-pc.pdf).

<sup>54</sup> The full text of the Guidelines of the Council of Europe may be found at [http://press.coe.int/cp/2002/369a\(2002\).htm](http://press.coe.int/cp/2002/369a(2002).htm) (accessed 5 September 2002).

require that the fundamental principles of a fair trial must be respected even in an emergency situation.

As the purpose of counter-terrorism measures is to protect human rights and democracy, the nature and manner of the implementation of such measures must be fully consistent with international procedures. International human rights law contains mechanisms which are specifically tailored to address situations of public emergency and challenges to national security. As has been shown by Joan Fitzpatrick, the attacks of September 11 created an 'emergency' and the US was afraid of imminent additional attacks.<sup>55</sup> The International Covenant on Civil and Political Rights recognizes that states may take measures to derogate from certain rights 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'.<sup>56</sup> Even during an armed conflict, measures derogating from the Covenant are allowed if and to the extent that the situation constitutes a threat to the life of the nation.

There are specific conditions, however, which aim to ensure the transparency, proportionality and necessity of the measures taken:

- States that resort to emergency measures have to notify other states parties through the Secretary-General of the existence of an emergency and of its official proclamation, specifying any of the provisions in the Covenant that have been derogated from.<sup>57</sup>
- Measures taken may not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin; thus there are elements of the right to non-discrimination that cannot be derogated from in any circumstance.
- Measures derogating from the provisions of the Covenant must be of 'an exceptional and temporary nature', and it is the task of the Human Rights Committee to monitor the constitutional and other provisions of law that govern such proclamations of public emergency.<sup>58</sup>
- A fundamental requirement for any measures derogating from the Covenant is that such measures are limited to the extent strictly 'required' by the exigencies of the situation; this requirement 'relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency'.<sup>59</sup>

<sup>55</sup> Fitzpatrick, 'Jurisdiction of Military Commissions and the Ambiguous War on Terrorism', 96 *AJIL* (2002) 350.

<sup>56</sup> Article 4 of the ICCPR; for detail, see the commentary of M. Nowak (ed.), *UN Covenant on Civil and Political Rights* (1993) 72 *et seq*; with regard to derogations from the European Convention on Human Rights in the context of combating terrorism, see Tanca, 'Human Rights, Terrorism and Police Custody: The Brogan Case', 1 *EJIL* (1990) 269.

<sup>57</sup> ICCPR, Article 4(3).

<sup>58</sup> The Committee required States parties to include in their reports submitted under Article 4 'sufficient and precise information about their law and practice in the field of emergency powers': see CCPR, General Comment No. 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 2.

<sup>59</sup> *Ibid.*, at para. 3.

- There is a clear limit to any derogation, as ‘no provision of the Covenant, however validly derogated from, will be entirely inapplicable to the behaviour of a state party’.<sup>60</sup>

The United States, a party to the Covenant, has taken several exceptional measures since September 11. Some of these measures may be justified in principle in international law, but they require — at least — notice of derogation under the Covenant. However, the United States has to date not notified the Secretary-General of any resort by it to emergency measures and has not formally announced the intention to derogate from the terms of the Covenant. Other measures, as the operations of military commissions (which would violate several human rights, for example the right to life, the prohibition on cruel, inhuman and degrading treatment or punishment, the prohibition on retroactive criminal penalties, the right to recognition as a person before law, and freedom of thought, conscience and religion) would amount to a violation of Article 4(2) of the Covenant which forbids derogations from these rights.

The United Kingdom, to give another example, has passed counter-terrorism legislation that provides *inter alia* for detention without trial for foreign nationals who cannot be deported. In contrast to the US, however, it has given notice of derogation from Article 9 of the Covenant, the Article that protects the right to freedom from arbitrary detention and security of the person.<sup>61</sup>

Thus, in view of the events of September 11, it was and is possible to take effective action against terrorism and at the same time to uphold domestic and international standards of human rights protection. Derogations from human rights obligations are permissible. Nevertheless, the resort by states to emergency measures is subject to external accountability for conformity with treaty obligations.

## 5 Conclusion: The Necessity for a Balance Between Human Rights and Security

As Joan Fitzpatrick put it: ‘Terrorist crimes arguably differ from other transnational crimes, in that they are politically motivated and pose a threat to national security.’<sup>62</sup> The war on terrorism is a security concern, but is also a human rights concern. Consequently, it ought to be pursued with full respect for international law and human rights.

All member states of the United Nations have a dual obligation: to maintain (and restore) international security *and* to promote international human rights. Freedom, human rights and security have to be realized simultaneously, and basic human rights may not be watered-down under the pretext of combating terrorism. The

<sup>60</sup> *Ibid.*, at para. 4.

<sup>61</sup> See speech by Mary Robinson, UN High Commissioner for Human Rights, ‘Protecting Human Rights: The United States, the United Nations, and the World’, Boston, 6 January 2002, [www.unhchr.ch](http://www.unhchr.ch) (accessed 20 August 2002).

<sup>62</sup> Fitzpatrick, *supra* note 55, at 347.



Secretary-General of the United Nations rightly emphasized that 'we cannot achieve security by sacrificing human rights. To try and do so would hand the terrorists a victory beyond their dreams.'<sup>63</sup>

As the only long-term guarantor of security is respect for human rights and humanitarian law, it is necessary to strike a balance between legitimate national security concerns and fundamental freedoms. The substantive and institutional implications for human rights of the war against terrorism are two-fold.

First, as regards the *substantive implications*, the existing *corpus juris* clearly defines the boundaries of permissible counter-terrorism measures in cases of emergency or armed conflict. Here the existing body of human rights law acts as a stable normative framework, which governments are obliged to apply.

Governments must respect this normative framework. When dealing with those suspected of involvement in terrorist acts, the internationally agreed norms governing the protection of human rights must apply. Thus:

- governments should, in line with their obligation to protect the human rights of *all* their citizens, bring to justice those responsible for the September 11 attacks;
- governments should ensure that presumed terrorists are tried in accordance with international human rights standards; and
- governments should ensure that presumed terrorists bear no risk of being sentenced to death.

Secondly, as regards the *institutional implications*, the situation is more complex. There are unresolved issues. For example:

- What strategies may be employed to combat terrorism and which institutions (civil or military) should take the lead?
- What measures may be justified as necessary by a state to combat terrorism in violation of human rights, and which international institutions should assess the legitimacy of these measures?
- Which bodies will ensure the compatibility of various counter-measures adopted at the national, regional and international level?
- What methods will be used for the settlement of disputes?

There is currently no international institution with a clear mandate to assess whether counter-measures to combat terrorism are in violation of human rights standards, or to assess whether a derogation must be made. Obviously, there is a lacuna on the institutional level with regard to monitoring the use of counter-terrorism measures.

The UN High Commissioner for Human Rights is certainly competent to deal with these questions. However, he needs strong backing by the international community. Additionally, the establishment of a new focal point, for instance the appointment of

<sup>63</sup> Secretary-General to Commission on Human Rights, 'Human Rights Must Not Be Sacrificed to Counter-Terrorism', Commission on Human Rights, 58th Session, 12 April 2002, [www.unhchr.ch](http://www.unhchr.ch) (accessed 20 August 2002).

an independent expert on human rights to the Counter-Terrorism Committee of the Security Council (as was suggested recently by the UN Sub-Commission on the Promotion and Protection of Human Rights<sup>64</sup>) or a new UN committee with a special mandate on counter-terrorism and human rights, could help to monitor the impact on human rights of counter-terrorism measures. However, as long as ideological divisions in the attitudes of member states of the United Nations concerning the issue of terrorism and its implications for the full enjoyment of human rights and fundamental freedoms linger, this will remain a difficult task.

<sup>64</sup> Economic and Social Council, Sub-Commission on the Promotion and Protection of Human Rights, 54th Session, 'Question of the Violation of Human Rights and Fundamental Freedoms, Including Policies of Racial Discrimination and Segregation, in All Countries, with Particular Reference to Colonial and Other Dependent Countries and Territories', Report of the Sub-Commission under Commission of Human Rights Resolution 8 (XXIII), UN Doc. E/CN.4/Sub.2/2002/L.2, 6 August 2002, para. 8.