TERRORISM v HUMAN RIGHTS: Where should the line be drawn?

Two competing voices sound in the UK today. "Terrorism must be stopped", says one, "whatever it takes". "Human rights are sacrosanct", cries the other, "and nothing would justify their abrogation." Prime Minister Blair stands firmly in the former camp. "The rules of the game are changing", he declared recently, signalling his government's willingness to deport terror suspects to countries known to use torture.[1]

This essay will argue firstly that the 'rules' need not change. There is no necessary opposition between either terrorism or counter-terrorism and principles of fundamental human rights. Respect for the "inherent dignity and…equal and inalienable rights of all members of the human family" as enshrined in the Universal Declaration of Human Rights (UDHR) and the European Convention provides a moral framework for social and political life. 'Human rights' is not a body of absolute values, in this understanding, but rather a prism through which to make policy decisions that are humane, equitable and, most importantly, effective. Secondly, and as a result, there can be no hard and fast 'balance' between individual Convention rights and the collective needs of national security. The adjudication of competing rights claims in a context of terrorist threat is one that must be undertaken continually by national courts using the twin tests of necessity and proportionality.

The fact of a terrorist attack cannot place its perpetrator outside of the scope of human rights. Conor Gearty characterises terrorism as a particular combination of methodology and motivation, the deliberate or reckless killing of civilians or damage

[1] Prime Minister's Press Conference, August 5th 2005. www.number-10.gov.uk/output/Page8041.asp

to property in order to convey a political message to a third party.[2] Kofi Annan similarly emphasises political intent, the purpose of intimidating a population or compelling a government or international organisation to abstain or to act.[3] If terrorism is understood as a politically motivated crime, however, a terrorist will always be defined by and against the extant state. The discourse of human rights, in contrast, is deliberately supra-national, a post-Holocaust expression of inalienable humanity. To entitle politicians to place terrorists in a separate category of moral entitlement would deny such universality and so frustrate the very basis of the UDHR.

It is a misconstruction, moreover, to consider security policy as necessarily counter to human rights principles. Individual Convention rights cannot be understood as absolute and unconditional moral entitlements, for they are in constant competition. My rights to freedom of expression, assembly and association might conflict with my neighbour's to respect for private and family life. What is absolute, rather, is a fundamental principle of respect for human rights necessitating the considered adjudication of competing rights claims. Thus was the rationale of the UDHR drafters, to assert a minimal framework of respect in human relationships that must endure regardless of circumstance. The fact of terrorism does not invalidate that framework, any more than terrorists can place themselves outside it. Rather than wondering "where to draw the line", therefore, we should be demanding assessment of the competing claims of individual rights and collective security within a basic and unassailable matrix of respect for human dignity and rights.

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[2] 'Terrorism and Morality', lecture at the London School of Economics, 20 January 2003. Found at http://www.lse.ac.uk/Depts/human-rights/Lectures/Terrorism_morality_human_rights.htm

[3] http://www.guardian.co.uk/terrorism/story/0,12780,1435261,00.html

In finding a mechanism for such adjudication, *proportionality* is key. The concept of 'necessary and appropriate' limitations to individual rights permeates the European Convention and the UK Human Rights Act, and has been integral to the jurisprudence of the European Court of Human Rights. Thus articles 8 to 11 allow restrictions only as "necessary in a democratic society". Article 15, most explicitly, allows states to derogate from its Convention obligations "in time of war or other public emergency threatening the life of the nation…to the extent strictly required by the exigencies of the situation". Such derogation should not be seen as a rejection of human rights per se, but rather a changing assessment of the weighting of competing rights claims. Lord Woolf affirmed the principle recently in Gillan, a UK case in which a student and journalist were detained using police 'stop and search powers' under the Terrorism Act 2000. "The court will…place in the scales the authorities' evaluation of the action needed to avoid the terrorist incident", he held, "as against the court's assessment of the effect on the member of the public". If the action the authorities demand cannot be shown to be necessary and proportionate, it cannot be acceptable in a democratic society committed to respect for human rights.

Thus in A v Secretary of State for the Home Department, earlier this year, the House of Lords ruled that whilst derogation from article 5 of the Convention was a *necessary* response to the terrorist threat to the UK, the preventative detention of terror suspects was not *proportionate* to the exigencies of the situation and was thus unjustifiable. The same might be said of the proposed incitement to terrorism offence in the UK Prevention of Terrorism Bill 2005. Whilst some restriction on the individual right to freedom of expression might be necessary in order to further collective claims to security, an offence of "reckless" incitement to terrorist violence, potentially

criminalising journalists or political commentators, is far from proportionate. It is not the case that human rights considerations frustrate security measures, therefore, rather that using standards of proportionality such measures can be refined and developed.

In a 1999 ruling banning the torture of detained terror suspects, President Barak of the Israeli Supreme Court wrote that whilst "sometimes, democracy must fight with one hand tied behind its back…preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security."[4] It is not individual rights in isolation which are critical, Barak implies, but recognition of the role of 'human rights' as a defining principle. In such an understanding there is no opposition between terrorism and human rights. The latter provides the framework in which the former can be understood and dealt with. These "rules", themselves a remarkable response to human barbarity, must not be changed.

"Can Western society protect itself without abandoning the values which define its identity and so make it worth protecting?" asked David Pannick QC.[5] The answer is clear – it can, and it must.

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[4] Public Committee Against Torture v IsraeI, May 26, 1999, H.C. 5100/94.53(4) P.D. 817, 845. Discussed in Arden LJ, 'Human Rights in the Age of Terrorism' in *LQR* 121 (2005), pp.604-627.

[5] Quoted in Owen Lysak, 'Terrorism, Human Rights and the Criminal Law', found at www.spr-consilio.com/artlysak3.html