

# ICT Paper

## **Legal and Policy Issues in Establishing an International Framework for Human Rights Compliance When Countering Terrorism**

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## Part I: Introduction

The relationship between terrorism and human rights is a matter that has been reflected upon by the United Nations General Assembly and Commission on Human Rights, and to a more limited extent by the UN Security Council, well before the events of September 11, 2001. Consideration had also been given to the potentially negative impact of counter-terrorism upon human rights. Since 9/11, with events such as the establishment of the detention camp in Guantanamo Bay and the proliferation of security and counter-terrorist legislation throughout the world, a considerable amount of attention has been paid to the issue of the extent to which counter-terrorism impacts upon human rights.

Four years on from 9/11, this paper seeks to take stock of international and regional commentary on the subject and the move from various quarters to establish an international framework for human rights compliance when countering terrorism. The first substantive part of this paper (Part II) considers the general issue of the interface between counter-terrorism and human rights: the relevance of human rights when countering terrorism; what human rights compliance demands (in either absolute or qualified terms); the general approaches to the latter question within various international and regional guidelines (which essentially advocate a qualified approach to human rights compliance when countering terrorism); whether the nature of terrorism justifies such a qualified methodology; and how treaty-monitoring bodies are likely to respond to this. To date little comparison of the guidelines mentioned has been undertaken, nor consideration of why the qualified approach called for within those guidelines is appropriate in the context of counter-terrorism.

More importantly, while the guidelines offer general advice on when limitations upon rights are justifiable (with some helpful rights-based analyses), they suffer from a lack of specific and practical advice on how the proper balance between counter-terrorism and human rights is to be struck. Part III of this paper gives careful consideration to the means by which counter-terrorist measures should be evaluated when such measures seek to impose rights limitations. Particular attention is paid to an issue that has lacked constructive deliberation: how to assess proportionality between the two objectives of countering terrorism and maintaining human rights standards. Against the background of that analysis, and the matters considered within Part II, Part IV of the paper offers legislators, policy-makers and judicial officers with a seven-step guide on assessing the legitimacy of counter-terrorist measures. The paper concludes with a case study on the controversial question of racial profiling, to illustrate the dynamics in the application of this guide.

## Part II: International Guidelines on Counter-Terrorism and Human Rights

Two general questions are considered within this part of the paper: first, are human rights relevant when countering terrorism; and, second, if human rights compliance is necessary, how is this to be effected? These questions in turn raise other issues, including the distinction between absolute and derogable rights, the nature of terrorism and, most importantly, the guidance offered on the subject from various international quarters.

### A. Are Human Rights Relevant When Countering Terrorism?

When one is considering counter-terrorism, as an aspect of the 'war on terror', is compliance with human rights relevant, let alone necessary? Or, given the war-like nature of terrorist conduct, should Cicero's statement, *inter arma silent leges* (in time of war laws are silent) be adopted?<sup>1</sup>

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<sup>1</sup> Marcus Cicero, *Oratio Pro Annio Milone*: see Anthony Everitt, *Cicero: The Life and Times of Rome's Greatest Politician*, (Random House Inc, 2001), 96. For further discussion, see also

While supporting the notion that countering terrorism is an objective of significant importance, the former United Nations Commissioner for Human Rights, Mary Robinson, has at the same time warned that the means of achieving counter-terrorist objectives must be measured:<sup>2</sup>

Terrorism is a threat to the most fundamental human rights. Finding common approaches to countering terrorism serves the cause of human rights. Some have suggested that it is not possible to effectively eliminate terrorism while respecting human rights. This suggestion is fundamentally flawed. The only long-term guarantor of security is through ensuring respect for human rights and humanitarian law. The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends.

Two years later the Executive Director of Human Rights Watch, Kenneth Roth, said this:<sup>3</sup>

...terrorists believe that the ends justify the means, that their political or social vision justifies the deliberate taking of civilian lives in violation of the most basic human rights norms. To fight terrorism without regard to the constraints of human rights is to endorse that warped logic.

These statements should not be dismissed as blindly optimistic since, as will be discussed, the human rights framework does accommodate the limitation of rights in the pursuit of national interests and other objectives. Nor should the sentiments be seen as representative of human rights advocates alone. They have in fact been echoed by both the UN Security Council and General Assembly. The United Nations Commission for Human Rights has similarly addressed the issue in its resolutions.

#### 1. *United Nations Security Council*

In general terms, Security Council resolutions concerning terrorism have confined their attention upon the threat of terrorism to international peace and security, reflecting the role of the Council as the organ of the United Nations charged with the maintenance of peace and security.<sup>4</sup> That role is reflected in the language and scope of Security Council resolutions on terrorism which, compared with General Assembly resolutions on the subject, are much narrower in focus. In general terms, Security Council resolutions concern themselves with the adverse impacts of terrorism upon the security of States and the maintenance of peaceful relations, while the General Assembly takes a much broader approach to the subject given its plenary role and wider mandate.

Apart from one notable exception, the only inference that might be taken from Security Council resolutions about counter-terrorism measures and their need to comply with human rights arises from general statements that counter-terrorism is an aim that should be achieved in accordance with the Charter of the United Nations and international law.<sup>5</sup> This implies that such measures must themselves be compliant with

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Daniel Torres, 'Inter Arma Silent Leges: An Examination of the Legal Rights of American Citizens Detained as Enemy Combatants in the War on Terror' (2003) 3 *The Journal of Philosophy, Science and Law*, online: <[www.psljournal.com/archives/papers/interarma.cfm](http://www.psljournal.com/archives/papers/interarma.cfm)> (last accessed 25 January 2005).

<sup>2</sup> Mary Robinson, 'Terrorism and Human Rights' (Press Release, *United Nations Office of the High Commissioner for Human Rights*, 20 March 2002).

<sup>3</sup> Kenneth Roth, 'Counterterrorism and Human Rights: An Essential Alliance' (Paper presented to the Princeton Project on National Security Conference *The Nexus of Terrorism and WMDs: Developing a Consensus*, 12-14 December 2004, Princeton University), 3.

<sup>4</sup> Under article 24 of the Charter of the United Nations, the Security Council is charged with the maintenance of international peace and security, paragraph 1 providing that: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf".

<sup>5</sup> See, for example, SC Res 1373, UN SCOR, 4385<sup>th</sup> Mtg, UN Doc S/Res/1373 (2001), preambular para 5; SC Res 1438, UN SCOR, 4624<sup>th</sup> Mtg, UN Doc S/Res/1438 (2002), preambular para 2; SC Res 1440, UN SCOR, 4632<sup>nd</sup> Mtg, UN Doc S/Res/1440 (2002),

the principles of the Charter and international human rights law.<sup>6</sup> In that regard, members of the United Nations have undertaken, under article 55(c) and through the preamble to the UN Charter, to observe human rights and fundamental freedoms for all without distinction as to race, language or religion.

The more express exception mentioned is the Declaration of the Security Council meeting with Ministers of Foreign Affairs on 20 January 2003, adopted under Resolution 1456.<sup>7</sup> The Resolution directs its attention to the question of compliance with human rights. Paragraph 6 of the Declaration provides that:

6. States must ensure that any measure [sic] 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; [...].

While persuasive in its wording in this regard, the status of the Declaration should be noted. Security Council resolutions, when couched in mandatory language, are binding upon members of the United Nations.<sup>8</sup> The Security Council has not, however, made any *binding* directions that counter-terrorism is to be effected in compliance with human rights. All that can be said to this point is that this is implicit within the broader framework of the United Nations Charter. In the context of the Declaration adopted under Resolution 1456, the text of the Declaration (including the mentioned paragraph 6) is preceded by the sentence: "The Security Council therefore calls for the following steps to be taken" [emphasis added]. Such an expression, although influential, is exhortatory and therefore not binding.<sup>9</sup>

## 2. United Nations General Assembly

Much more strongly phrased directions will be seen in the following discussion of General Assembly and Commission on Human Rights resolutions. These resolutions do not hold the same weight as international conventions or binding resolutions of the Security Council. Indeed, article 10 of the UN Charter specifically provides that resolutions and declarations of the General Assembly are recommendatory only.<sup>10</sup> This

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preambular para 2; SC Res 1450, UN SCOR, 4667<sup>th</sup> Mtg, UN Doc S/Res/1450 (2002), preambular para 4; SC Res 1455, UN SCOR, 4686<sup>th</sup> Mtg, UN Doc S/Res/1455 (2003), preambular para 3; SC Res 1456, UN SCOR, 4668<sup>th</sup> Mtg, UN Doc S/Res/1456 (2003), preambular para 8; SC Res 1535, UN SCOR, 4936<sup>th</sup> Mtg, UN Doc S/Res/1535 (2004), preambular para 4; SC Res 1540, UN SCOR, 4956<sup>th</sup> Mtg, UN Doc S/Res/1540 (2004), preambular para 14; SC Res 1566, UN SCOR, 5053<sup>rd</sup> Mtg, UN Doc S/Res/1566 (2004), preambular para 3; and SC Res 1611, UN SCOR, 5223<sup>rd</sup> Mtg, UN Doc S/Res/1611 (2005), preambular para 2.

<sup>6</sup> This is the argument, for example, of Treasa Dunworth, 'New Zealand's Legislative Responses to September 11' (Paper presented to the 10th Annual Meeting of the Australian and New Zealand Society of International Law, *New Challenges and New States: What Role for International Law?*, 16 June 2002, Australian National University, Canberra). See also Association for the Prevention of Torture, *APT Position Paper. Protection of the Human Rights and of Fundamental Freedoms in the Fight Against Terrorism*, online: <[http://www.appt.ch/pub/library/ppter\\_en.htm](http://www.appt.ch/pub/library/ppter_en.htm)> (last accessed 11 December 2003).

<sup>7</sup> Above, n 5.

<sup>8</sup> Member States of the United Nations have agreed to be bound by decisions of the Security Council: see Charter of the United Nations, art 25.

<sup>9</sup> In the *Namibia Advisory Opinion*, the International Court of Justice took the position that a resolution couched in non-mandatory language should not be taken as imposing a legal duty upon a member State: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1990)*, (1970-1971), Advisory Opinion of the International Court of Justice of 21 June 1971, 53.

<sup>10</sup> Article 10 provides that the: "General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters".

principle is equally applicable to resolutions of the Commission on Human Rights, a subsidiary organ of the Economic and Social Council (which is only empowered to make recommendations).<sup>11</sup> Thus, the resolutions to be discussed represent guiding principles and non-binding recommendations (what might be termed 'soft law'), rather than binding resolutions, treaty provisions or norms of customary international law ('hard law'). Notwithstanding this, the authors take the view that, having regard to their consistent approach, these resolutions are also influential and, importantly, representative of international comity.

Since December 1972, the UN General Assembly has adopted a series of resolutions concerning terrorism. Those resolutions have taken the form of the Assembly's measures to eliminate international terrorism<sup>12</sup> and resolutions addressing the topic of terrorism and human rights.<sup>13</sup> Within the first set of resolutions on terrorism, the last decade has seen the Assembly adopt and affirm a *Declaration on Measures to Eliminate International Terrorism*, first adopted in early December 1994 under its Resolution 49/60<sup>14</sup> Resolution 49/60 pronounced that terrorism constitutes a grave

<sup>11</sup> Charter of the United Nations, art 62(2).

<sup>12</sup> The first resolution of the General Assembly concerning itself solely with the issue of terrorism was adopted on 18 December 1972 against the background of the disruption of the 1972 Olympic Games at Munich: GA Res 3034 (XXVII), UN GAOR, 27<sup>th</sup> Sess, 2114<sup>th</sup> Plen Mtg, UN Doc A/Res/XXVII/3034 (1972). Its very title illustrates the view that terrorism is a matter affecting security and the enjoyment of rights: "Measures to prevent international terrorism which endangers or takes innocent lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice lives, including their own, in an attempt to effect radical changes". The same title was used to name eight subsequent resolutions of the General Assembly, from 1976 to 1989: GA Res 31/102, UN GAOR, 31<sup>st</sup> Sess, 99<sup>th</sup> Plen Mtg, UN Doc A/Res/31/102 (1976); GA Res 32/147, UN GAOR, 32<sup>nd</sup> Sess, 105<sup>th</sup> Plen Mtg, UN Doc A/Res/32/147 (1977); GA Res 34/145, UN GAOR, 34<sup>th</sup> Sess, 105<sup>th</sup> Plen Mtg, UN Doc A/Res/34/145 (1979); GA Res 36/109, UN GAOR, 36<sup>th</sup> Sess, 92<sup>nd</sup> Plen Mtg, UN Doc A/Res/36/109 (1981); GA Res 38/130, UN GAOR, 38<sup>th</sup> Sess, 101<sup>st</sup> Plen Mtg, A/Res/38/130 (1983); GA Res 40/61, UN GAOR, 40<sup>th</sup> Sess, 108<sup>th</sup> Plen Mtg, UN Doc A/Res/40/61 (1985); GA Res 42/159, UN GAOR, 42<sup>nd</sup> Sess, 94<sup>th</sup> Plen Mtg, UN Doc A/Res/42/159 (1987); and GA Res 44/29, UN GAOR, 44<sup>th</sup> Sess, 72<sup>nd</sup> Plen Mtg, UN Doc A/Res/44/29 (1989).

<sup>13</sup> The second series of General Assembly resolutions began in late December 1993, with the Assembly adopting resolution 48/122, entitled 'Terrorism and Human Rights': GA Res 48/122, UN GAOR, 48<sup>th</sup> Sess, 85<sup>th</sup> Plen Mtg, UN Doc A/Res/48/122 (1993). Echoing many of the expressions of concern contained in the declarations on measures to eliminate terrorism, the preamble to this later resolution spoke of the serious concern of the General Assembly at the gross violations of human rights perpetrated by terrorist groups. Resolutions between 1995 and 2005 did the same, adding that terrorism creates an environment that destroys the right of people to live in freedom from fear: GA Res 50/186, UN GAOR, 50<sup>th</sup> Sess, 99<sup>th</sup> Plen Mtg, UN Doc A/Res/50/186 (1995), preambular paras 3, 4, 5 and 11, and operative para 2; GA Res 52/133, UN GAOR, 52<sup>nd</sup> Sess, 70<sup>th</sup> Plen Mtg, UN Doc A/Res/52/133 (1997), preambular paras 6, 7, 8 and 10, and operative para 3; GA Res 54/164, UN GAOR, 54<sup>th</sup> Sess, 83<sup>rd</sup> Plen Mtg, UN Doc A/Res/54/164 (1999), preambular paras 7, 8, 9 and 12, and operative para 3; GA Res 56/160, UN GAOR, 56<sup>th</sup> Sess, 88<sup>th</sup> Plen Mtg, UN Doc A/Res/56/160 (2001), preambular paras 11, 12 and 13; GA Res 58/174, UN GAOR, 58<sup>th</sup> Sess, 77<sup>th</sup> Plen Mtg, UN Doc A/Res/58/174 (2003), preambular paras 12, 13 and 14; and GA Res 59/195, UN GAOR, 59<sup>th</sup> Sess, 74<sup>th</sup> Plen Mtg, UN Doc A/Res/59/195 (2004), preambular paras 12 and 13. The preamble to the Assembly's resolution 56/160 added (para 24): "Noting the growing consciousness within the international community of the negative effects of terrorism in all its forms and manifestations on the full enjoyment of human rights and fundamental freedoms and on the establishment of the rule of law and domestic freedoms as enshrined in the Charter of the United Nations and the International Covenants on Human Rights".

<sup>14</sup> GA Res 49/60, UN GAOR, 49<sup>th</sup> Sess, 84<sup>th</sup> Plen Mtg, UN Doc A/Res/49/60 (1994). The Declaration was based on the notion of peace and security and the principle of refraining from the threat or use of force in international relations (through its preamble). It called on States to refrain from organizing, instigating, assisting or participating in terrorist acts, and from acquiescing in or encouraging activities within their territories directed towards the commission of such acts (para 4).

violation of the purpose and principles of the United Nations.<sup>15</sup> The Declaration was reaffirmed in the following two years, with a Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism adopted in 1996.<sup>16</sup>

Both sets of resolutions contain various statements about the need, when implementing counter-terrorist measures, to comply with international human rights standards. A common phrasing of this idea was seen early on in Resolution 50/186 of 1995:<sup>17</sup>

*Mindful* of the need to protect human rights of and guarantees for the individual in accordance with the relevant international human rights principles and instruments, particularly the right to life,

*Reaffirming* that all measures to counter terrorism must be in strict conformity with international human rights standards,

3. *Calls upon* States to take all necessary and effective measures in accordance with international standards of human rights to prevent, combat and eliminate all acts of terrorism wherever and by whomever committed; [...].

A slightly less robust expression of these ideas was seen following the events of September 11, although still requiring measures to be taken consistently with human rights standards.<sup>18</sup> That should not, however, be taken as a signal that the General Assembly was minded to turn a blind eye to adverse impacts of counter-terrorism upon human rights. Indeed, the issue became the subject of annual resolutions on that subject alone, entitled "Protection of Human Rights and Fundamental Freedoms While Countering Terrorism".<sup>19</sup> The first operative paragraphs of these resolutions affirm:

...that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law; [...].

### 3. *United Nations Commission on Human Rights*

Not surprisingly, the United Nations Commission on Human Rights has paid considerable attention to the issue of the adverse consequences that counter-terrorism might have upon the maintenance and promotion of human rights. It did so even before

<sup>15</sup> *Ibid*, para 2.

<sup>16</sup> GA Res 51/210, UN GAOR, 51<sup>st</sup> Sess, 88<sup>th</sup> Plen Mtg, UN Doc A/Res/51/210 (1996), Annex. The Declaration and Supplement were reaffirmed within: GA Res 52/165, UN GAOR, 52<sup>nd</sup> Sess, 72<sup>nd</sup> Plen Mtg, UN Doc A/Res/52/165 (1997), para 7; GA Res 54/100, UN GAOR, 54<sup>th</sup> Sess, 75<sup>th</sup> Plen Mtg UN Doc A/Res/54/100 (1999), para 8; GA Res 55/158, UN GAOR, 55<sup>th</sup> Sess, 84<sup>th</sup> Plen Mtg, UN Doc A/Res/55/158 (2000), para 9; GA Res 56/88, UN GAOR, 56<sup>th</sup> Sess, 85<sup>th</sup> Plen Mtg, UN Doc A/Res/56/88 (2001), para 10; GA Res 57/27, UN GAOR, 57<sup>th</sup> Sess, 52<sup>nd</sup> Plen Mtg, UN Doc A/Res/57/27 (2002), para 10; GA Res 58/81, UN GAOR, 58<sup>th</sup> Sess, 72<sup>nd</sup> Plen Mtg, UN Doc A/Res/58/81 (2003), para 10; and GA Res 59/46, UN GAOR, 59<sup>th</sup> Sess, 65<sup>th</sup> Plen Mtg, UN Doc A/Res/59/46 (2004), para 12.

<sup>17</sup> See also GA Res 50/186, UN GAOR, 50<sup>th</sup> Sess, 99<sup>th</sup> Plen Mtg, UN Doc A/Res/50/186 (1995), preambular paras 13 and 14, and operative para 3. See also GA Res 52/133, *ibid*, preambular paras 12 and 13, and operative para 4; GA Res 54/164, *ibid*, preambular paras 15 and 16, and operative para 4; GA Res 56/160, *ibid*, preambular paras 22 and 23, and operative paras 5 and 6; and 58/174, *ibid*, preambular paras 20 and 21, and operative para 7.

<sup>18</sup> GA Res 56/88, above n 16, preambular para 9 and operative para 3. The preambular paragraph returned to the language of combating terrorism "in accordance with the principles of the Charter", and operative paragraph 4 talked of combating terrorism in accordance with international law "including international standards of human rights". See also similar statements within GA Res 57/27, above n 16, preambular para 8 and operative para 6; GA Res 58/81, above n 16, preambular para 9 and operative para 6; GA Res 58/136, UN GAOR, 58<sup>th</sup> Sess, 77<sup>th</sup> Plen Mtg, UN Doc A/Res 58/136 (2003), preambular para 10 and operative para 5; and GA Res 59/46, above n 16, preambular para 10 and operative para 3.

<sup>19</sup> GA Res 57/219, UN GAOR, 57<sup>th</sup> Sess, 77<sup>th</sup> Plen Mtg, UN Doc A/Res/57/219 (2002); GA Res 58/187, UN GAOR, 58<sup>th</sup> Sess, 77<sup>th</sup> Plen Mtg, UN Doc A/Res/8/187 (2003); and GA Res 59/191, UN GAOR, 59<sup>th</sup> Sess, 74<sup>th</sup> Plen Mtg, UN Doc A/Res/59/191 (2004).

the flurry of anti-terrorist legislation that followed Security Council Resolution 1373 of 2001. In the pre-9/11 resolutions of the Commission, and its Sub-Commission on the Protection and Promotion of Human Rights, it was affirmed that all States have an obligation to promote and protect human rights and fundamental freedoms, and that all measures to counter terrorism must be in strict conformity with international law, "including international human rights standards".<sup>20</sup> Post-September 11, particularly in recent months, resolutions of the Commission have been more strongly worded. Two resolutions on the subject were adopted in 2004 alone. First, the issue was addressed within the Commission's annual resolution on human rights and terrorism.<sup>21</sup> In a resolution later that month, the Commission again reaffirmed that States must comply with international human rights obligations when countering terrorism.<sup>22</sup>

The latest report of the Commission's Special Rapporteur on the Promotion and Protection of Human Rights in June 2005 also addressed the matter.<sup>23</sup> Although the original mandate of the Special Rapporteur was to consider the impact of terrorism on human rights,<sup>24</sup> she commented in her 2004 report that a State's over-reaction to terrorism can itself also impact upon human rights. Rapporteur Koufa's mandate was therefore extended to develop a draft of principles and guidelines concerning human rights and terrorism (which are to be discussed further in this part of the paper). Of note at this point, the first-stated principle under the heading "Duties of States Regarding Terrorist Acts and Human Rights" reads:<sup>25</sup>

All States have a duty to promote and protect human rights of all persons under their political or military control in accordance with all human rights and humanitarian law norms.

Also of relevance, a digest of jurisprudence on the protection of human rights while countering terrorism was prepared by the UN Office of the High Commissioner for Human Rights in September 2003.<sup>26</sup> Its stated aim was to assist policy makers and other concerned parties to develop counter-terrorist strategies that respect human rights.<sup>27</sup> The Digest considers decisions of UN treaty-monitoring bodies, such as the Human Rights Committee, and those of other regional bodies, including the European Court of Human Rights and the Inter-American Court of Human Rights. It addresses

<sup>20</sup> CHR Res 2001/37, UN ESCOR, 57<sup>th</sup> Sess, 72<sup>nd</sup> Mtg, UN Doc E/CN.4/Res/2001/37, preambular paras 18 and 19 and operative paras 7 and 8. Preambular para 19 was later reflected in Sub-Commission on Human Rights resolution 2001/18, 53<sup>rd</sup> Sess, 26<sup>th</sup> Mtg, UN Doc E/CN.4/Sub.2/2001/18, preambular para 13.

<sup>21</sup> CHR Res 2004/44, UN ESCOR, 60<sup>th</sup> Sess, 55<sup>th</sup> Mtg, UN Doc E/CN.4/Res/2004/44, preambular para 24 and operative paras 10, 11 and 12.

<sup>22</sup> CHR Res 2004/87, UN ESCOR, 60<sup>th</sup> Sess, 58<sup>th</sup> Mtg, UN Doc E/CN.4/Res/2004/87, paras 1 and 2.

<sup>23</sup> Kalliopi Koufa (as Special Rapporteur to the Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights), *Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism. A Preliminary Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism*, UN Doc E/CN.4/Sub.2/2005/39 (22 June 2005).

<sup>24</sup> This mandate was consequent to the request of the General Assembly for the Commission to do so (see GA Res 49/185, UN GAOR, 49<sup>th</sup> Sess, 94<sup>th</sup> Plen Mtg, UN Doc A/Res/49/185 (1994), para 6) and through the Commission's own decision to consider the issue: see C.H.R. Res. 1994/46, UN ESCOR, 50<sup>th</sup> Sess, 56<sup>th</sup> Mtg, UN Doc E/CN.4/Res/1994/46 (1994).

<sup>25</sup> Koufa, above n 23, para 25.

<sup>26</sup> United Nations Office of the High Commissioner for Human Rights, *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism*, September 2003, URL <<http://www.ohchr.org/english/about/publications/docs/digest.doc>> (last accessed 13 August 2004).

<sup>27</sup> *Ibid.* At page 3, the digest introduces the compilation by saying: "No one doubts that States have legitimate and urgent reasons to take all due measures to eliminate terrorism. Acts and strategies of terrorism aim at the destruction of human rights, democracy, and the rule of law. They destabilize [sic] governments and undermine civil society. Governments therefore have not only the right, but also the duty, to protect their nationals and others against terrorist attacks and to bring the perpetrators of such acts to justice. The manner in which counter-terrorism efforts are conducted, however, can have a far-reaching effect on overall respect for human rights."

general considerations, states of emergency and specific rights. Within the general considerations, two types of jurisprudence are relevant here. The first is that which emphasizes the duty of States to protect those within their territories from terrorism.<sup>28</sup> The second is the identification of jurisprudence observing that the lawfulness of counter-terrorism measures depends upon their conformity with international human rights law.<sup>29</sup>

#### 4. Conclusion

The discussion to this point leads to an unambiguous conclusion that States must comply with their human rights obligations when countering terrorism. The United Nations has made it clear, through resolutions of three of its principal bodies, that counter-terrorism is not a motive that justifies overriding those obligations. The combination and consistency of directions to this effect from different representative quarters of the international community represents (as posited earlier) international comity on this now very clear position.

### B. The Tension between Absolute and Qualified Approaches to Human Rights Compliance

The position arrived at through the immediately preceding discussion is that counter-terrorism must be implemented in a manner consistent with human rights. Generally speaking, individuals are guaranteed the enjoyment of certain rights and freedoms at international law, whether as a result of treaties to which their parent State is party or through the application of norms of customary international law.<sup>30</sup> The question to be considered next is how, in general terms, compliance with these rules is to be achieved. Does “compliance” with human rights mean absolute compliance? Or is a level of limitation upon rights acceptable?

<sup>28</sup> Ibid, 11-12. See, for example, *Delgado Paez v. Colombia*, Human Rights Committee communication 195/1985, views adopted 12 July 1990, para 5.5.

<sup>29</sup> Ibid, 13-15.

<sup>30</sup> Under the mantle of the United Nations, six principal international human rights conventions have been adopted by the international community: the Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 9464 UNTS 211 (entered into force 4 January 1969); the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); the International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); the Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 112 (entered into force 26 June 1987); and the Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 43 (entered into force 2 September 1990). Various of those codified rights are reflected within norms of customary international law: in particular, see the Universal Declaration of Human Rights, adopted by the United Nations in 1948 under GA Res 217(III), UN GAOR, 3<sup>rd</sup> Sess, 183<sup>rd</sup> Plen Mtg, UN Doc A/Res/217(III) (1948), and commonly referred to as being representative of rights at customary international law. The Declaration, together with the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, are often referred to as the “International Bill of Rights”. Significant regional human rights treaties are also of relevance, including the Charter of the Organization of American States, opened for signature in 1948, 119 UNTS 3 (entered into force 13 December 1951); the American Convention on Human Rights, 1144 UNTS 123 (entered into force 18 July 1978); the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953); the African Charter on Human and Peoples’ Rights, opened for signature 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, (1982) 21 ILM 58 (entered into force 21 October 1986); and the Arab Charter on Human Rights, adopted by the Arab League Council and opened for signature 15 September 1994 (the Charter remains unratified; its unofficial English translation can be found in the *ICJ Review* 56/1996).

### 1. *Derogable and Non-Derogable Rights*

The first point to be made when considering the issue of absolute versus qualified compliance with human rights standards is that there is a distinction to be made between rights that are capable of derogation and those that are not. This is an issue that the authors do not want to delve into too deeply, since the categorization of rights into each class can be a controversial issue and goes beyond the central theme of this paper.

The authors recognize, however, that certain rights are claimed to be absolute, in the sense that no derogation of them is permissible for any reason, even during times of emergency. In the case of the International Covenant on Civil and Political Rights (ICCPR), article 4(2) sets out a list of rights that may not be derogated from when a public emergency is declared by a State party to the Covenant.<sup>31</sup> Various problems exist with treating this list as an identification of rights in respect of which no derogation is permissible. Certainly, the prohibition against torture (the commission of which is also an international crime)<sup>32</sup> has come to be recognized as a universal right from which no derogation may occur in any circumstances.<sup>33</sup> The right to life, however (which many would regard as the most important right of all), cannot claim to hold the same status. For example, the Second Protocol to the ICCPR (abolishing the death penalty) is an optional one.<sup>34</sup> Likewise, many municipal jurisdictions contain a right of self-defence which, if exercised within the necessity and proportionality parameters of the plea, can act as a defence to homicide.<sup>35</sup>

For the purpose of this paper, then, the authors note that there are some rights in respect of which no derogation may be permitted, albeit that the identification of those rights is controversial. Notwithstanding the fact that there is an important need to safeguard such rights, the authors believe that the international community should closely examine the hierarchy of those rights and clearly define their scope. That current lack of certainty is part of the reason that this paper does not look to take this issue further. In the particular context of counter-terrorism, there may even be a need to examine whether rights advocated by some as being non-derogable do in fact hold that status. Where derogation is in principle permissible, the aim of this paper is to consider the mechanisms through which limitations may be achieved.

### 2. *Definitional and Ad Hoc (General) Approaches to the Limitation of Rights*

The common approach of international human rights treaties is to express rights, including any permissible limitations upon them, within the text of the treaty rather than

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<sup>31</sup> Being: the right to life (art 6); freedom from torture or cruel, inhuman or degrading treatment or punishment (art 7); the prohibition of slavery and servitude (art 8(1) and (2)); freedom from imprisonment for failure to fulfil a contract (art 11); freedom from retrospective penalties (art 15); the right to be recognised as a person before the law (art 16); and freedom of thought, conscience and religion (art 18).

<sup>32</sup> See, generally, *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [1999] 2 WLR 827.

<sup>33</sup> See, amongst others: Matthew Lippman, 'The Protection of Universal Human Rights: The Problem of Torture' (1979) 1(4) *Universal Human Rights* 25; Bruce Barenblat, 'Torture as a Violation of the Law of Nations: An Analysis of 28 U.S.C. 1350 *Filartiga v. Pena-Irala*' (1981) 16 *Texas International Law Journal* 117; Eyal Benvenisti, 'The Role of National Courts in Preventing Torture of Suspected Terrorists' (1997) 8 *European Journal of International Law* 596; Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford University Press, 2000) 381-382; and Erika de Wet, 'The Prohibition of torture as an International Norm of *Jus Cogens* and its Implications for National and Customary Law' (2004) 15(1) *European Journal of International Law* 97.

<sup>34</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

<sup>35</sup> Take, for example, the Crimes Act 1961 (New Zealand), s 48 which provides that: "Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use".

relying upon a generally-applicable limitations provision. This is sometimes referred to as a “definitional approach” to the limitation of rights.<sup>36</sup> The ICCPR, for example, expresses the content and permissible limitations upon rights within article 1 and Part III of that instrument.<sup>37</sup> By way of illustration, article 7 of the ICCPR provides that “no one shall be subjected without his free consent to medical or scientific experimentation”. Limitation of the freedom from being subjected to medical or scientific experimentation is possible, on a definitional basis, where a person gives their “free consent”. A more general example of the definitional limitation of rights can be seen in article 12 of the Covenant. Article 12(3) qualifies the stated aspects of the liberty of movement by providing that these features “...shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant”.

Compared to definitional approaches to the limitation of rights, general (sometimes called “ad hoc”) limitations call for consideration of justifiable limits upon rights as a separate, and consequent, issue. The ICCPR also contains an ad hoc limitations provision, in article 4, permitting certain rights within the Covenant to be limited on a temporary basis in times of emergency threatening the life of a nation. Although this is an ad hoc limiting provision, it is not truly “general” in nature due to its restricted application to times of emergency. Article 5(1) of the Covenant is also worth referring to in this context:

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 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.

Broadly speaking, then, the ICCPR adopts a reasonably absolute approach to rights limitations. Unless a limitation upon a particular right is expressly contained within the Covenant, then any limitation upon the right is not permissible outside a state of emergency.<sup>38</sup> The Inter-American Commission on Human Rights (IACHR) report on terrorism and human rights describes this common feature of international human rights treaties as follows:<sup>39</sup>

... through mechanisms such as derogations and restriction clauses, international human rights law recognizes and provides for means by which the restriction or suspension of certain rights may be necessary in exceptional circumstances to protect human rights and democracy.

Many domestic human rights instruments adopt a more general approach to the limitation of rights. Examples can be seen in the Canadian Charter of Rights and Freedoms 1982<sup>40</sup> and the New Zealand Bill of Rights Act 1990, both of which express that the rights and freedoms set out within those instruments may be “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.<sup>41</sup> Jurisprudence of the Supreme Court of Canada has held that expression to require that: (a) any limitation is in pursuit of a sufficiently important objective to warrant overriding a constitutionally protected right or freedom; and (b) the limitation is reasonable and proportional, having regard to the importance of the right and of the objective.<sup>42</sup>

<sup>36</sup> For a further discussion of the distinction between definitional and ad hoc approaches to the balancing of rights, see Andrew Butler, ‘Limiting Rights’ (2002) *Victoria University of Wellington Law Review* 537, 541-544.

<sup>37</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>38</sup> It should be noted here that consideration of the application and scope of states of emergency are outside the ambit of this paper.

<sup>39</sup> Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Doc OEA/Ser.L/V/II.116 (22 October 2002), online: <<http://www.cidh.org/Terrorism/Eng/toc.htm>> (last accessed 6 September 2005), preface.

<sup>40</sup> Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK).

<sup>41</sup> Sections 1 and 5 respectively.

Placing these observations in the context of the guidelines to be discussed, the guidelines of NGOs such as the International Commission of Jurists and the Advisory Council of Jurists in Asia Pacific *tend* to favour the more absolute approach of the International Covenant on Civil and Political Rights.<sup>43</sup> Guidelines of inter-governmental agencies tend to favour a more general ad hoc limitations approach.<sup>44</sup>

### 3. *Rights Limitations in the Abstract*

One of the problems with absolute approaches to any subject is that such approaches are unable to cope with change. Thus, absolute rules tend to be an exception rather than the norm. Although this can be problematic for those seeking certainty, the benefit of reasonably fluid rules is that they are able to react to the changing needs of society. The qualification to this is that where rules seek to be fluid, they must also achieve an appropriate level of certainty to enable society to regulate its conduct.<sup>45</sup>

On another level, one must recognize that the “social contract” imports both rights and responsibilities upon members of any society.<sup>46</sup> From a liberal democratic perspective, one’s rights are to be balanced against the rights of others and the needs of society as a whole.<sup>47</sup> The freedom of expression, for example, does not include the right to incite racial hatred,<sup>48</sup> nor the ability to defame others.<sup>49</sup> This is, in part, recognized within the preamble to the ICCPR.<sup>50</sup>

## C. International Guidelines on the Interface between Counter-Terrorism and Human Rights

Numerous international guidelines on the relationship between human rights and counter-terrorism have been issued since the advent of September 11 and the proliferation of counter-terrorist legislative action that followed.

### 1. *International Commission of Jurists*

Despite the earlier indications of a tension between non-governmental and inter-governmental approaches to this subject, it is worthy of note that the International Commission of Jurists (ICJ) applies the abstract notions just mentioned. As part of its series of occasional papers, the ICJ commissioned a paper on terrorism and human rights in 2002.<sup>51</sup> The paper concluded with a list of minimum criteria that States must observe in the administration of justice when countering terrorism, including: the observance of the primacy of the rule of law and of international human rights obligations; and maintaining and guaranteeing at all times rights and freedoms that are

<sup>42</sup> *R v Oakes* [1986] 1 SCR 103, 138-139. See also Peter Hogg, *Constitutional Law of Canada*, Student Edition (Thomson Carswell, 2005), 804-806.

<sup>43</sup> See: International Commission of Jurists, *Terrorism and Human Rights*, (International Commission of Jurists, 2002); and Advisory Council of Jurists, *Reference on the Rule of Law in Combating Terrorism. Final Report*, (The Asia Pacific Forum of National Human Rights Institutions, 2004.).

<sup>44</sup> *Infra*, Part II(C).

<sup>45</sup> Consider the notion of the rule of law: see Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, (London: MacMillan, 1885) at 175-184. Consider also the discussions of the European Court of Human Rights on the subject of prescriptions by law: *Sunday Times v United Kingdom* (1978) 58 ILR 491, 524-527; and *Silver v UK* [1983] 5 EHRR 347.

<sup>46</sup> See Jean Jacques Rousseau, *The Social Contract* (Wordsworth Editions, 1998) 14-17.

<sup>47</sup> Consider Susan Marks, ‘The End of History - Reflections on Some International Legal Theses’ (1997) 8 *European Journal of International Law* 449.

<sup>48</sup> A criminal offence in most common law countries.

<sup>49</sup> A civil tort in most common law countries.

<sup>50</sup> The penultimate paragraph of the preamble expresses that: “the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant”.

<sup>51</sup> International Commission of Jurists, *Terrorism and Human Rights*, (International Commission of Jurists, 2002).

non-derogable.<sup>52</sup> At its biennial conference in August 2004, the ICJ was also instrumental in the adoption of the Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism.<sup>53</sup> The Berlin Declaration recognizes the need to combat terrorism and the duty of States to protect those within their jurisdiction.<sup>54</sup> It also expresses that contemporary human rights law allows States a reasonably wide margin of flexibility to combat terrorism without contravening the essence of rights.<sup>55</sup>

## 2. Council of Europe

In July 2002, the Committee of Ministers to the Council of Europe adopted guidelines on human rights and the fight against terrorism.<sup>56</sup> In the preface to its guidelines, Secretary General Walter Schwimmer warned that although the suppression of terrorism is an important objective, States must not use indiscriminate measures to achieve that objective.<sup>57</sup> Drawing from the jurisprudence of the European Court of Human Rights,<sup>58</sup> and the UN Human Rights Committee, the Council's guidelines set out general rules on the interaction between counter-terrorism and human rights, as well as addressing specific rights and freedoms, with commentary on each stated guideline. Five of the more specific guidelines warrant mention. The first reflects the idea that counter-terrorism is an important objective in a free and democratic society. Article I accordingly talks of a positive obligation upon States to protect individuals within their territory from the scourges of terrorism.<sup>59</sup> The second and third articles are directly relevant to the question of compliance with human rights. Article II prohibits the arbitrary limitation of rights,<sup>60</sup> and Article III requires limiting measures to be lawful,

<sup>52</sup> Ibid, 248-251.

<sup>53</sup> International Commission of Jurists, *Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, adopted 28 August 2004, available online: <[http://www.icj.org/IMG/pdf/Berlin\\_Declaration.pdf](http://www.icj.org/IMG/pdf/Berlin_Declaration.pdf)> (last accessed 27 July 2005).

<sup>54</sup> Ibid, preambular para 2 and operative para 1.

<sup>55</sup> Ibid, preambular para 5.

<sup>56</sup> Council of Europe, *Guidelines on Human Rights and the Fight Against Terrorism*, (Council of Europe Publishing, 2002).

<sup>57</sup> Ibid, 5. The Secretary-General commented that: "For a State to react in such a way would be to fall into the trap set by terrorism for democracy and the rule of law. It is precisely in situations of crisis, such as those brought about by terrorism, that respect for human rights is even more important, and that even greater vigilance is called for."

<sup>58</sup> Which has compulsory jurisdiction over States parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 U.N.T.S. 222 (entered into force 3 September 1953), art 46.

<sup>59</sup> The Council's guidelines point to decisions of the European Court, in which it recognized this duty and the particular problems associated with the prevention and suppression of terrorism. See, for example, *Ireland v. the United Kingdom*, Eur. Ct. H.R., 18 January 1978, para 11; *Askoy v. Turkey*, Eur. Ct. H.R., 18 December 1996, paras 70 and 84; *Zana v. Turkey*, Eur. Ct. H.R., 25 November 1997, paras 59 and 60; *Incal v. Turkey*, Eur. Ct. H.R., 9 June 1998, para 58; *United Communist Party of Turkey and Others v. Turkey*, Eur. Ct. H.R., 20 November 1998, para 59; and *Brogan and Others v. the United Kingdom*, Eur. Ct. H.R., 29 November 1999, para 48. In *Klass and Others v. Germany*, Eur. Ct. H.R., 6 September 1978, para 59, for example, the Court said: "The Court agrees with the [European] Commission that some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention".

<sup>60</sup> Article II provides that: "All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision". Compare this with paras 3 and 4(i) and (j) of the Commissioner's Guidelines: Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, *Human Rights: A Uniting Framework*, UN ESCOR, 58<sup>th</sup> Sess, UN Doc E/CN.4/2002/18 (2002), Annex entitled *Proposals for "further guidance" for the submission of reports pursuant to paragraph 6 of Security Council resolution 1373 (2001). Compliance with international human rights standards*, I General Guidance: Criteria for the Balancing of Human Rights Protection and the Combating of Terrorism.

precise, necessary and proportional.<sup>61</sup> Further guidance on possible derogations is found in article XV, concerning derogations during situations of war or states of emergency threatening the life of a nation. Finally, article XVI underlines that States may never act in breach of peremptory norms of international law. In 2005, the Council issued additional guidelines on the protection of victims of terrorist attacks.<sup>62</sup>

### 3. *Inter-American Commission on Human Rights*

A report of the Inter-American Commission on Human Rights (IACHR) on terrorism and human rights was issued in late 2002, shortly after the adoption of the Inter-American Convention Against Terrorism.<sup>63</sup> Interestingly, article 15 of the latter Convention specifically requires all States parties to comply with human rights standards:<sup>64</sup>

The measures carried out by the states parties under this Convention shall take place with full respect for the rule of law, human rights, and fundamental freedoms.

The IACHR report undertakes a right-based approach, focussing upon the scope and potential limitation of particular rights.<sup>65</sup> It also emphasizes the general need for any limitation to comply with the doctrines of necessity, proportionality and non-discrimination.<sup>66</sup> As one of its annexes, the report recalls Resolution 1906 of the Organization of American States General Assembly, the first operative paragraphs resolving:<sup>67</sup>

1. To reiterate that the fight against terrorism must be waged with full respect for the law, human rights, and democratic institutions, so as to preserve the rule of law, freedoms, and democratic values in the Hemisphere.
2. To reaffirm the duty of the member states to ensure that all measures taken to combat terrorism are in keeping with obligations under international law.

### 4. *UN Commission on Human Rights*

As mentioned, the Sub-Commission on the Promotion and Protection of Human Rights has been working on its *Preliminary Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism*, the latest version of this issued in June 2005.<sup>68</sup> The document adopts both a rights-specific and more general approach. On the question of permissible limitations, the document adopts a more absolute approach than do the other guidelines, paragraph 34 providing that:

Any exceptions or derogations in human rights law in the context of counter-terrorism measures must be in strict conformity with the rules set out in the applicable international or regional instruments. A State may not institute exceptions or derogations unless that State

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<sup>61</sup> Article III provides that: 1. All measures taken by States to combat terrorism must be lawful; and 2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued. Compare this with the Commissioner's Guidelines, *ibid*, para 4(a), (b), (e), (f), and (g).

<sup>62</sup> Council of Europe, *Guidelines on the Protection of Victims of Terrorist Acts* (adopted by the Committee of Ministers at Strasbourg on 2 March 2005), DGII (2005) 6.

<sup>63</sup> Inter-American Commission on Human Rights report, above n 39.

<sup>64</sup> Inter-American Convention Against Terrorism, opened for signature 3 June 2002, OAS Treaty A-66 (2003) 42 ILM 19, art 15.

<sup>65</sup> The report considers the right to life (part III.A), the right to personal liberty and security (part III.B), the right to humane treatment (part III.C), rights to due process and a fair trial (part III.D), the freedom of expression (part III.E), non-discrimination (part III.F), refugee and asylum rights (part III.H), and other civil rights (part III.G): Inter-American Commission on Human Rights report, above n 39.

<sup>66</sup> *Ibid*, paras 51 and 55.

<sup>67</sup> OAS General Assembly Resolution 1906, *Human Rights and Terrorism*, 4<sup>th</sup> plen sess, 4 June 2002, OAS Doc AG/Res 1906 (XXXII-O/02).

<sup>68</sup> Koufa, above n 23.

has been subjected to terrorist acts that would justify such measures. States shall not invoke derogation clauses to justify taking hostages or to impose collective punishments.

- (a) Great care should be taken to ensure that exceptions and derogations that might have been justified because of an act of terrorism meet strict time limits and do not become perpetual features of national law or action.
- (b) Great care should be taken to ensure that measures taken are necessary to apprehend actual members of terrorist groups or perpetrators of terrorist acts in a way that does not unduly encroach on the lives and liberties of ordinary persons or on procedural rights of persons charged with non-terrorist crimes.
- (c) Exceptions and derogations undertaken following a terrorist incident should be carefully reviewed and monitored. Such measures should be subject to effective legal challenge in the State imposing exceptions or derogations.

Appointed as an independent expert, Dr Robert Goldman of the American University completed a very useful report to the Commission on Human Rights in February 2005.<sup>69</sup> This report also adopts a rights-based approach, but again emphasizes the need to uphold the rule of law while confronting terrorism, Dr Goldman stating that: "Properly viewed, the struggle against terrorism and the protection of human rights are not antithetical, but complementary responsibilities of States".<sup>70</sup> Consequent to the report, the Commission established a Special Rapporteur to monitor counter-terrorism measures worldwide that might threaten human rights.<sup>71</sup> In September 2005, the Special Rapporteur presented his first preliminary report to the General Assembly, setting out the conceptual framework for his work.<sup>72</sup>

These various and reasonably general statements are useful and support, in the writers' view, the notion that 'compliance' with human rights means that any limitations upon rights when countering terrorism are to be effected by necessary and proportional means. The difficulty, from a pragmatic perspective, is that they do not express *how* such limitations are to be formulated. A document which does identify specific requirements in achieving a proper balance between counter-terrorist objectives and human rights is a seemingly little-known one. In her report and follow-up to the 2001 World Conference on Human Rights, the then United Nations High Commissioner for Human Rights, Mary Robinson, prepared guidelines for the use of the Security Council Counter-Terrorism Committee (the Commissioner's Guidelines).<sup>73</sup> The Counter-Terrorism Committee, established under the Council's Resolution 1373 of 2001, was charged with receiving reports from UN member States on their compliance with the counter-terrorist obligations specified within that Resolution.<sup>74</sup> The Commissioner sought to have the Committee issue the Guidelines to States, so that they might be directed in specific and useful terms on *how* to counter-terrorism in a manner consistent with human rights.

<sup>69</sup> Robert Goldman (as independent expert to the Commission on Human Rights), *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, 61<sup>st</sup> sess, UN Doc E/CN.4/2005/103. Dr Goldman was appointed under CHR Res 2004/87, UN ESCOR, 60<sup>th</sup> sess, UN Doc E/CN.4/Res/2004/87 (2004).

<sup>70</sup> *Ibid*, para 7.

<sup>71</sup> CHR Res 2005/80, UN ESCOR, 61<sup>st</sup> Sess, 60<sup>th</sup> Mtg, UN Doc E/CN.4/Res/2005/80. Professor Martin Scheinin of Abo Akademi University in Finland was appointed to the role of Special Rapporteur by the Chairman of the Commission on Human Rights, pursuant to CHR Res 2005/80.

<sup>72</sup> Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, UN GAOR, 60<sup>th</sup> sess, UN Doc A/60/370 (2005).

<sup>73</sup> Above n 60.

<sup>74</sup> SC Res 1373, UN SCOR, 4385<sup>th</sup> Mtg, UN Doc S/Res/1373 (2001), para 6.

The Committee ultimately declined to issue the Commissioner's Guidelines,<sup>75</sup> although this does not do away with the utility of the content of the Guidelines for present purposes. The Guidelines are consistent with the premises of other guidelines mentioned, and with the notions of the rule of law and social contract already discussed. They emanate from the highest political office of the United Nations concerned with the issue of human rights. As will be seen in the discussion under Part III, the Guidelines also mirror many features of municipal mechanisms for the ad hoc limitation of rights. Their content, in the view of the authors, is influential.

The Commissioner's Guidelines begin by making statements that go to answering the principal ideological question posed in this paper: are the objectives of countering terrorism and maintaining human rights compatible? The Guidelines recognize the counter-terrorist obligations imposed upon States by the Security Council and reaffirms that such action must be in compliance with human rights principles contained in international law.<sup>76</sup> They confirm the notion that human rights law allows for a balance to be struck between the enjoyment of rights and freedoms and legitimate concerns for national security through the limitation of some rights in specific and defined circumstances.<sup>77</sup> Paragraphs 3 and 4 of the Guidelines then set out precise instructions on how to formulate counter-terrorist measures that might seek to limit human rights:

3. Where this is permitted, the laws authorizing restrictions:
  - (a) Should use precise criteria;
  - (b) May not confer an unfettered discretion on those charged with their execution.
4. For limitations of rights to be lawful they must:
  - (a) Be prescribed by law;
  - (b) Be necessary for public safety and public order, i.e. the protection of public health or morals and for the protection of the rights and freedoms of others, and serve a legitimate purpose;
  - (c) Not impair the essence of the right;
  - (d) Be interpreted strictly in favour of the rights at issue;
  - (e) Be necessary in a democratic society;
  - (f) Conform to the principle of proportionality;
  - (g) Be appropriate to achieve their protective function, and be the least intrusive instrument amongst those which might achieve that protective function;
  - (h) Be compatible with the object and purposes of human rights treaties;
  - (i) Respect the principle of non-discrimination;
  - (j) Not be arbitrarily applied.

Having regard to their substantive similarities with the other guidelines discussed, and the practical benefits of concrete factors against which counter-terrorist legislation and policies may be measured, the Commissioner's Guidelines form a very useful tool for decision-makers.

#### D. The Nature of Terrorism

To this point, this part of the paper has concluded that States must comply with human rights when countering terrorism, and drawn a distinction between absolute and qualified approaches to human rights compliance. International guidelines on the subject of counter-terrorism are characterized by a qualified approach, advocating the

<sup>75</sup> This refusal was anticipated in the remarks of the then Chair of the Counter-Terrorism Committee in his briefing of the Security Council: Sir Jeremy Greenstock, *Threats to International Peace and Security Posed by Terrorism*, 18 January 2002, UN Doc S/PV.4453. At page 5 of his briefing, he stated that: "The Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate. But we will remain aware of the interaction with human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organizations to study States' reports and take up their content in other forums."

<sup>76</sup> Commissioner's Guidelines, above n 60, para 1.

<sup>77</sup> *Ibid*, para 2.

limitation of rights only when necessary and proportional. In the context of counter-terrorism, this qualified approach is appropriate in the view of the authors. Such an approach is required having regard not only to the general position on human rights limitations, but also due to the distinct nature of terrorist acts and their consequences.

### 1. *Terrorism and Crime*

The word “terrorism” has come to be used to describe a wide range of violent, and sometimes not-so violent, conduct (especially in the hands of the media since September 11). This opens the door to an even more fundamental question: *why talk about terrorism at all?* An act of “terrorism”, after all, will comprise a series of acts that, in and of themselves, constitute various criminal offences. To take an example, a bombing of an Embassy will likely involve the unlawful possession of explosives, the wilful destruction of property and the wilful injury to or killing of persons. Each element is a criminal offence in most jurisdictions and, as such, is capable of being dealt with by the relevant municipal jurisdiction. Some have therefore argued that there are no good policy grounds to justify a separate, parallel regime of counter-terrorism law to that already existing under criminal law.<sup>78</sup> Having regard to the composite nature of terrorist conduct, there is some initial attraction to that argument. Why then add to the extant law and why adopt different standards? On the other hand, some experts insist that the political nature of terrorist acts and the high level of threat that terrorism poses to public safety and public order demand a distinction to be made between terrorism and other criminal acts.<sup>79</sup> There are, for example, crimes that cannot be prosecuted without defining terrorist acts or membership in a terrorist organisation. At a further end of the scale, should terrorism instead be judged as an act of warfare and the struggle against it conducted according to the norms and rules of war?

### 2. *Terrorism and Warfare*

Researchers are divided in their opinions on whether terrorism should be considered a criminal act or a political-military act. Brian Jenkins (former head of the Terrorism Project at the Rand Institute) has observed that if one looks at terrorism as a crime, there will be a need to gather evidence, arrest perpetrators and put them on trial. This approach provokes problems of international cooperation, he argues, and is not a suitable response for acts of terrorism perpetrated by a distant organization or a country involved in terrorism.<sup>80</sup> Approaching terrorism as warfare, however, one can be less concerned with the aspect of individual guilt, and an approximate assessment of guilt and intelligence are sufficient. The focus is not on a single perpetrator, but rather on proper identification of the enemy. Contrary to Jenkins, Gad Barzilai argues that terrorists are, in effect, criminals, and if terrorism-related crimes are treated differently than ordinary crimes, municipal authorities may employ tougher, more stringent tools to gain illegitimate political advantage.<sup>81</sup>

### 3. *The Ideological Nature of Terrorism*

The most important feature of terrorism, distinguishing it from other criminal acts, is the motivation of terrorists and the codex against which terrorists measure their conduct.

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<sup>78</sup> For example, in submissions before the New Zealand Foreign Affairs, Defence and Trade Committee on the Counter-Terrorism Bill, Professor Matthew Palmer argued this very point. See New Zealand, *Counter-Terrorism Bill. Government Bill. Commentary*, as reported from the Foreign Affairs, Defence and Trade Committee (2003) 2. See also Professor Palmer's article 'Counter-Terrorism Law', (2002) *New Zealand Law Journal* 456.

<sup>79</sup> Boaz Ganor, *The Counter-Terrorism Puzzle. A Guide for Decision Makers*, (Transaction Publishers, 2005), 8-9.

<sup>80</sup> Brian Jenkins, 'Foreword', in Ian Lesser, Bruce Hoffman, et al, *Countering the New Terrorism* (RAND Project Air Force, 1999) xii.

<sup>81</sup> Gad Barzilai, 'Center vs Periphery: Rules for "Preventing Terrorism" as Politics' (2000) 8 *Criminal Cases (Pelilim)* 247.

Generally speaking, those perpetrating 'normal' criminal offences do so out of some personal, hedonistic motivation - whether that be the material rewards of a burglary, the thrill and high of challenging 'the system' or using drugs, or the desperation of stealing necessities where no alternatives appear to be available. Personal gain is the common feature of criminal conduct, setting aside crimes of passion and those of the mentally incapable or insane. In contrast, the primary motivation of terrorists is altruistic. A terrorist is motivated by a higher cause or ideology that is greater than his or her personal motivations or gains. He or she acts for the furtherance of that external cause (whether it be a localized secessionist movement or global jihad) and the benefit this has to both the cause and the people of it.<sup>82</sup> Combined with the honour derived from such conduct in this life, and the rewards in the next, the motivations of a terrorist are far beyond those of an 'ordinary' criminal offender.

Added to the distinct motivations of terrorists are the standards against which they measure their conduct. The fact that a terrorist act might be unlawful according to the law of the State in which the act is perpetrated, or at international law, is irrelevant to a terrorist. Terrorists measure their conduct against the codex of the ideology they are pursuing.<sup>83</sup> If the ideology mandates the killing of Jews or Christians, then that killing is not murder but, instead, a legitimate and appropriate act.

The consequence of these features is significant. Standard criminology does not apply. The notion of personal deterrence is largely irrelevant. The language of terrorists is often entirely divorced from that of a criminal offender. A different approach is consequently warranted.

#### 4. *Islam and the Global Jihad*

Linked with the ideological nature of terrorism is the question of Islam and terrorism. An all-too-common and unfortunate expression is that not all Muslims are terrorists, but all international terrorists are Muslim. While that is not entirely correct,<sup>84</sup> it is true that the modern phenomenon of international terrorism (in the form of what has come to be known as the 'Global Jihad') is perpetrated by radical Muslims. The adoption of terrorism by radical Islamic movements as their modus operandi stems, in part, from the historical development and manipulation of Islam.<sup>85</sup>

<sup>82</sup> Mr Ehud Ilan, former Head of the investigation Division, Israeli Security Agency (Shin Bet) in Israel (from a paper presented at the 'Intelligence Challenges in Counter-Terrorism' workshop at the *Terrorism's Global Impact Conference*, Interdisciplinary Center Herzlyia, 13 September 2005).

<sup>83</sup> Ibid.

<sup>84</sup> Secessionist-motivated terrorist organizations, for example, are local to a particular State and often bear the racial and religious characteristics of that State. Such organizations are capable of undertaking, and have undertaken, transnational acts of terrorism.

<sup>85</sup> Islam began as a faith of a small community of believers during the seventh century in what is now Saudi Arabia. It is based upon the belief that Muhammad, a respected businessman in Mecca in around 600AD, received revelations from *Allah* (God) that were later written down in the *Qur'an* - see: Robert Wuthnow (ed), *Encyclopedia of Politics and Religion* (Congressional Quarterly Inc, 1998), 383-393; and Ibrahim Abu-Rabi, *Intellectual Origins of Islamic Resurgence in the Modern Arab World* (New York Press, 1995). A period of divisions followed the death of the prophet Muhammad, leading to the characterization of two Muslim loyalties today. The Sunni represents the vast majority of Muslims today under the *Sunnah* Islamic faith. The Shi'ite is the second loyalty, followers having declared Ali to be their caliph and subsequently elevated him to the status of prophet (Ali was a cousin of Muhammad who was an early convert to Islam at the age of 10, and became the husband of Muhammad's daughter Fatimah - Sunni Muslims consider Ali to be a companion of Muhammad only and therefore consider Shi'ite Muslims to be following a false prophet). Within what is now the main-stream *Sunnah* faith, four schools of thought (from liberal to radical) came to be accepted as legitimate - the *Hanafi*, *Maliki*, *Shafi'i*, and *Hanbali*. These schools were named after their four founders Abu Hanifa, Abu Abdullah, Mohammad bin Idris, Ahmad bin Hanbal respectively: see Palbir Punj, 'Root of Islamic Radicalism' (The Pioneer, 31 August 2005), online: <[http://dailypioneer.com/columnist1.asp?main\\_variable=Columnist&file\\_name=punj%2Fpunj66.txt&writer=punj](http://dailypioneer.com/columnist1.asp?main_variable=Columnist&file_name=punj%2Fpunj66.txt&writer=punj)> (last accessed 31 August 2005). The greater majority of

Calling for the killing of Jews and the Crusaders by the likes of Usama bin Laden, Salem Almakhi and Al-Qaida is based upon the radical, conservative school of *Sunnah* interpretation (*Hanbali*). The motivation of Al-Qaida, for example, is the spreading of the Muslim faith and the elimination of what such groups see as the evil of modernity.<sup>86</sup> The advancement of religious beliefs is not, in and of itself, problematic and is in fact a common tenet of almost all religions. Viewing modernity (democracy, capitalism, Statehood) as an evil that must be eliminated is, however, an extreme view and one that poses a threat to all western nations. The World Islamic Front Statement of 1998, entitled *Jihad Against Jews and Crusaders*, purports to be a *fatwa* (religious ruling) requiring the killing of Americans, and claims to base itself upon a call by *Allah* to “slay the pagans wherever ye find them, seize them, beleaguer them, and lie in wait for them in every stratagem (of war)”.<sup>87</sup> The Statement concludes with the following direction:<sup>88</sup>

We - with Allah's help - call on every Muslim who believes in Allah and wishes to be rewarded to comply with Allah's order to kill the Americans and plunder their money wherever and whenever they find it. We also call on Muslim ulema, leaders, youths, and soldiers to launch the raid on Satan's US troops and the devil's supporters allying with them, and to displace those who are behind them so that they may learn a lesson.

While this fatwa is particularly directed towards Americans, due to the purported occupation and plundering of the Arabian Peninsula by the United States,<sup>89</sup> the sentiment of the *jihad* (war) is one that is opposed to modernity in general. Its desire is to eliminate modernity and return to the era when Islam formed a prosperous *ummah* (community of Islamic believers) in the Middle East (and possibly beyond) without restriction by State borders – an era in which modernity was absent in the region.

Following the commencement of the multi-national *Operation Enduring Freedom* in Afghanistan a further manifesto, issued by Salem Almakhi and first aired on Aljazeera in October 2002,<sup>90</sup> announced a warning to Christians and members of the alliance waging war against Afghanistan and Al-Qaida.<sup>91</sup> This most palpably applies to States participating in *Operation Enduring Freedom*, but is also of much broader application. It

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Muslims advocate and practice the more moderate (and even liberal) interpretations of the *Sunnah* revelations of the *Qur'an*. For such Muslims, their faith advocates tolerance of others and their religious choices and customs – see *Surah* (chapter) 110, *Al-Kafirun* (The Disbelievers), *Ayat* (verses) 4-6, which dictate the following: “4. And I shall not worship that which you are worshipping. 5. Nor will you worship that which I worship. 6. To you be your religion, and to me my religion”: *The Noble Qur'an in the English Language* (Saudia Arabia, Darussalam, 1996) 788. The core of Islamic life is usually said to be the “five pillars of Islam”: publicly bearing witness to the basic affirmation of faith; saying prescribed prayers five times a day; fasting during the month of Ramadan; giving a tithe or alms for support of the poor; and making a pilgrimage to Mecca at least once during the believer's lifetime, if this is possible: Wuthnow.

<sup>86</sup> The International Policy Institute for Counter-Terrorism has written much on this subject. See, for example (all available online: <<http://www.ict.org.il>>): Yoni Figchel and Yael Shahaar, ‘The Al-Qaida-Hizballah Connection’ (26 February 2002); Yael Shahaar, ‘Al-Qaida's Asian Web’ (15 October 2002); Yoram Kahati, ‘The Continuing Al-Qaida Threat’ (10 May 2003); and Yoram Kahati and Yoni Figchel, ‘Osama bin Ladin as the New Prophet of Islam’ (15 July 2003).

<sup>87</sup> World Islamic Front, *Jihad Against Jews and Crusaders*, 23 February 1998 (signed, amongst others, by Usama bin Laden), online: <<http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>> (last accessed 23 January 2005), un-numbered para 1. The phrase is taken from *The Holy Qura'an*, 9:5.

<sup>88</sup> *Ibid*, un-numbered para 8.

<sup>89</sup> *Ibid*, un-numbered para 3.

<sup>90</sup> Salem Almakhi, *Mending the Hearts of the Believers*, online: <<http://www.jihadonline.bravepages.com/mending.htm>> (last accessed 22 August 2005). Salem Almakhi is said to be one of Usama bin Laden's supporters and admirers, and personally knowledgeable of Al-Qaida operations: see Yoni Figchel and Yoram Kehati, ‘Analysis of Recent Al-Qaida Documents, Part 1’, Paper of the International Policy Institute (28 November 2002), online: <<http://www.ict.org.il/articles/articledet.cfm?articleid+453>> (last accessed 1 July 2004).

<sup>91</sup> *Ibid*, un-numbered para 23.

conceivably attaches to all members of the United Nations taking action against Usama bin Laden, the Taliban and Al-Qaida pursuant to various Security Council resolutions and the directions of the Council's 1267 Sanctions Committee.<sup>92</sup> The manifesto finally instructs:<sup>93</sup>

Anyone who possesses an arrow in his quiver, make haste and [shoot] it for the sake of Allah, and aim it at the enemies of religion – the Jews and the Christians [...].

In an audio tape aired by Aljazeera in 2003, a senior aide to Usama bin Laden, Ayman Zawahri, exhorted his audience with the following words:<sup>94</sup>

Oh Muslims! Carry out attacks against the embassies, companies, interests and officials of the US, Britain, Australia and Norway. Burn the ground under their feet.

A very recent video found in the hideout of Malaysian terrorist Noordin Mohamad Top contained the following threats:<sup>95</sup>

As long as you keep your troops in Iraq and Afghanistan and intimidate Muslim people, you will feel our intimidation... You will be the target of our next attack... Our enemy is America, Australia, England and Italy... We especially remind Australia that you, Downer and Howard, are killing Australia, leading it into darkness and misfortune and mujahdeen terror....

Opposed to this, writers such as Al-Muhajabah condemn the use of terrorism and point to the following Qur'anic versus as those legitimizing *jihad*, pointing to their restriction to situations responding to aggression against the Muslim people and faith:<sup>96</sup>

Permission to fight (against disbelievers) is given to those (believers) who are fought against, because they have been wronged [...].<sup>97</sup>

And what is wrong with you that you fight not in the Cause of Allah, and for those weak, ill-treated and oppressed among men, women and children [...].<sup>98</sup>

Allah does not forbid that you to deal justly and kindly with those who fought not against you on account of religion nor drove you out from your homes. Verily, Allah loves those who deal with equity... It is only as regards those who fought against you on account of your religion, and have driven you out of your homes, and helped to drive you out, that Allah forbids you to befriend them.<sup>99</sup>

<sup>92</sup> The Taliban/Al-Qaida Sanctions Committee, established under Security Council Resolution 1267 (UN SCOR, 54<sup>th</sup> Sess, 4051<sup>st</sup> Mtg, UN Doc S/Res/1267 (1999), para 6), has described itself as "a key instrument in the fight against terrorism": see Security Council Committee Established Pursuant to Resolution 1267 (1999), *Guidance for Reports Required of all States pursuant to paragraphs 6 and 12 of Resolution 1455 (2003)*, online: <[http://www.un.org/Docs/sc/committees/1267/guidanc\\_en.pdf](http://www.un.org/Docs/sc/committees/1267/guidanc_en.pdf)> (last accessed 15 August 2005). The Sanctions Committee maintains a list of individuals and entities that are part of, or associated with, the Taliban, Al-Qaida and Usama bin Laden. UN member States are required to freeze funds and other financial resources, and ensure that their nationals do not make funds or financial resources available to such listed entities: see SC Res 1267, UN SCOR, 54<sup>th</sup> Sess, 4051<sup>st</sup> Mtg, UN Doc S/Res/1267 (1999), para 4(b); SC Res 1333, UN SCOR, 55<sup>th</sup> Sess, 4251<sup>st</sup> Mtg, UN Doc S/Res/1333 (2000), para 8(c); SC Res 1390, UN SCOR, 56<sup>th</sup> Sess, 4452<sup>nd</sup> Mtg, UN Doc S/Res/1390 (2002), para 2(a) in particular; and SC Res 1617, UN SCOR, 59<sup>th</sup> Sess, 5244<sup>th</sup> Mtg, UN Doc S/Res/1617 (2005).

<sup>93</sup> Salem Almakhi, above n 89, penultimate paragraph.

<sup>94</sup> Aljazeera, 'New Al-Qaeda Tape Calls for Attacks' (Aljazeera.net, 21 May 2003), online: <<http://english.aljazeera.net/NR/exeres/293D19D4-CBB9-4296-B158-D54246F6259E.htm>> (last accessed 22 November 2005).

<sup>95</sup> Associated Press, 'Indonesia Video Warning on Terror' (CNN.com International, 17 November 2005), online: <<http://edition.cnn.com/2005/WORLD/asiapcf/11/16/indonesia.terror.ap/>> (last accessed 22 November 2005).

<sup>96</sup> Al-Muhajabah, Some Quranic Versus on Jihad, online: <<http://www.muhammad.com/quran-jihad.htm>> (last accessed 31 August 2005).

<sup>97</sup> *Surah* (chapter) 22, *Al-Hajj* (The Pilgrimage), *Ayat* (verse) 39: *The Qur'an: The Noble Qur'an in the English Language* (Saudi Arabia, Darussalam, 1996), 426.

<sup>98</sup> *Surah* (chapter) 4, *An-Nisa* (The Women), *Ayat* (verse) 75: *The Qur'an*, *ibid*, 124.

So it is that the one text of a relatively young religion has given rise to two Muslim loyalties, with four schools of thought arising from the principal *Sunnah* loyalty of Islam. Of those four schools, the minority conservative school of *Hanbali*<sup>100</sup> has been adopted by some to advocate *jihad*, through terrorist means, against modernity.<sup>101</sup>

##### 5. *The Consequences of Terrorism*

As trite as it may be to say so, it is also important to remember that the consequences of terrorism tend to impact severely upon both individuals and society as a whole. The fear-inducing nature of terrorist acts has far-reaching consequences. Likewise, the means through which terrorist activities are facilitated have links to other negative conduct and impacts upon the individual, municipal societies, and international security. Resolutions of the Security Council, General Assembly and Commission on Human Rights all recognize that terrorism has these adverse impacts. Observations made within resolutions of those bodies can be summarized by saying that terrorism is seen by them as something that:

- has links with transnational organized crime, drug trafficking, money-laundering, and trafficking in arms as well as the illegal transfer of nuclear, chemical and biological materials;<sup>102</sup>
- is linked to the consequent commission of serious crimes such as murder, extortion, kidnapping, assault, the taking of hostages, and robbery;<sup>103</sup>
- endangers or takes innocent lives;<sup>104</sup>
- creates an environment that destroys the freedom from fear of the people;<sup>105</sup>

<sup>99</sup> *Surah* (chapter) 60, *Al-Mumtahinah* (The Woman to be Examined), *Ayat* (verses) 8-9: *The Qur'an*, *ibid*, 700.

<sup>100</sup> Contrary to the more moderate schools of Islam, the *Hanbali* school of Sunni Islam prohibits all forms of public religious expression other than that of those who follow the *Hanbali* school. The government of Saudi Arabia vigorously enforces this school of Islam, for example, and allows judges to discount the testimony of people who are not practicing Muslims or who do not have the correct faith: see GlobalSecurity.org, 'Hanbali Islam', online: <<http://www.globalsecurity.org/military/intro/islam-hanbali.htm>> (last accessed 5 September 2005).

<sup>101</sup> Interview with Yoni Fighel, Researcher at the International Policy Institute for Counter-Terrorism, 31 August 2005, Herzlyia, Israel.

<sup>102</sup> For resolutions of the Security Council, see: SC Res 1373, above n 5, para 4; SC Res 1456, above n 5, preambular paras 3 and 6; and SC Res 1540, above n 5, preambular para 8. By the General Assembly, see: GA Res 58/136, above n 18, preambular para 8. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37, above n 20, preambular para 16; and CHR Res 2004/44, above n 21, preambular para 7. See also Koufa, above n 23, paras 104 and 105.

<sup>103</sup> For resolutions of the General Assembly, see: GA Res 48/122, above n 13, preambular para 7; GA Res 49/185, above n 24, preambular para 9; GA Res 50/186, above n 17, preambular para 12 and operative para 2; GA Res 52/133, above n 17, preambular para 11; GA Res 54/164, above n 17, preambular para 13; GA Res 56/160, above n 17, preambular para 18; and GA Res 58/174, above n 17, para 12. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37, above n 20, preambular para 16; and CHR Res 2004/44, above n 21, preambular para 7. See also Koufa, above n 23, paras 104 and 105.

<sup>104</sup> For resolutions of the Security Council, see: SC Res 1269, UN SCOR, 54<sup>th</sup> Sess, 4053<sup>rd</sup> Mtg, UN Doc S/Res/1269 (1999), preambular para 1; and SC Res 1377, UN SCOR, 55<sup>th</sup> Sess, 4413<sup>rd</sup> Mtg, UN Doc S/Res/1377 (2001), Annex (Declaration), para 6. See also the title to General Assembly resolutions 27/3034 to 44/29, as listed above n 12, and the first operative provisions of the following General Assembly resolutions: GA Res 3034 (XXVII), above n 12; GA Res 31/102, above n 12; GA Res 32/147, above n 12; GA Res 34/145, above n 12; and GA Res 36/109, above n 12. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37, above n 20, para 2; and CHR Res 2004/44, above n 44, preambular para 7. See also Koufa, above n 23, para 109.

<sup>105</sup> For resolutions of the General Assembly, see: GA Res 50/186, above n 17, preambular para 5; GA Res 52/133, above n 17, preambular para 8; and GA Res 54/164, above n 17, preambular

- threatens the dignity and security of human beings everywhere;<sup>106</sup>
- has an adverse effect upon the establishment and maintenance of the rule of law;<sup>107</sup>
- jeopardizes fundamental freedoms;<sup>108</sup>
- aims at the destruction of human rights;<sup>109</sup>
- undermines pluralistic civil society;<sup>110</sup>
- aims at the destruction of the democratic bases of society;<sup>111</sup>
- destabilizes legitimately constituted governments;<sup>112</sup>

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para 9. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37, above n 20, preambular para 12, and operative para 2; and CHR Res 2004/44, above n 21, preambular para 12. See also Sub-Commission on Human Rights Resolution 2001/18, above n 20, preambular para 8.

<sup>106</sup> See SC Res 1377, above n 103, Annex (Declaration), para 6. See also CHR Res 2001/37, above n 20, para 2; and Koufa, above n 23, para 107.

<sup>107</sup> See GA Res 56/160, above n 17, preambular para 24. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37, above n 20, preambular para 13, and operative para 1; and CHR Res 2004/44, above n 21, preambular para 13. See also Sub-Commission on Human Rights Resolution 2001/18, above n 20, preambular para 9.

<sup>108</sup> See the title to United Nations General Assembly resolutions 27/3034 to 44/29, as listed above n 12. See also the following resolutions of the General Assembly: GA Res 48/122, above n 13, para 1; GA Res 49/185, above n 24, para 1; GA Res 50/186, above n 17, para 2; GA Res 52/133, above n 17, para 3; GA Res 56/160, above n 17, preambular para 24 and para 3; and GA Res 58/174, above n 17, para 1. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37, above n 20, preambular para 23, and operative para 1; and CHR Res 2004/44, above n 21, preambular para 12, and operative para 1.

<sup>109</sup> As recognised in the first-stated Declaration on Measures to Eliminate International Terrorism, above n 14, operative para 2. For resolutions of the General Assembly, see also: GA Res 48/122, above n 13, para 1; GA Res 49/185, above n 24, para 1; GA Res 50/186, above n 17, para 2; GA Res 52/133, above n 17, para 3; GA Res 56/160, above n 17, preambular para 24 and operative para 3; and GA Res 58/174, above n 17, para 1. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37, above n 20, preambular para 23, and operative para 1; and CHR Res 2004/44, above n 21, preambular para 12 and 23, and operative para 1. See also Report of the High-level Panel on Threats, Challenges and Change, Annex to the United Nations General Assembly's Fifty-ninth Session, Agenda item 55 of 2 December 2004, UN Doc A/59/656, para 145.

<sup>110</sup> As recognised in the first-stated Declaration on Measures to Eliminate International Terrorism, above n 14, operative para 2. For resolutions of the General Assembly, see also: GA Res 48/122, above n 13, para 1; GA Res 49/185, above n 24, para 1; GA Res 50/186, above n 17, para 2; GA Res 52/133, above n 17, para 3; GA Res 56/160, above n 17, preambular para 24 and operative para 3; and GA Res 58/174, above n 17, para 1. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37, above n 20 para 1; and CHR Res 2004/44, above n 21, para 1. See also Report of the High-Level Panel, *ibid*, para 145.

<sup>111</sup> As recognised in the first-stated Declaration on Measures to Eliminate International Terrorism, above n 14, operative para 2. For resolutions of the General Assembly, see also: GA Res 48/122, above n 13, para 1; GA Res 49/185, above n 24, para 1; GA Res 50/186, above n 17, para 2; GA Res 52/133, above n 17, para 3; GA Res 56/160, above n 17, para 3; and GA Res 58/174, above n 17, para 1. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37, above n 20, preambular para 13; and CHR Res 2004/44, above n 21, preambular para 13, and operative para 1. See also Sub-Commission on Human Rights Resolution 2001/18, above n 20, preambular para 9.

<sup>112</sup> For resolutions of the General Assembly, see: GA Res 48/122, above n 13, para 1; GA Res 49/185, above n 24, para 1; GA Res 50/186, above n 17, para 2; GA Res 52/133, above n 17, para 3; GA Res 56/160, above n 17, para 3; and GA Res 58/174, above n 17, para 1. For resolutions of the Commission on Human Rights, see also: CHR Res 2001/37, above n 20, para 1; and CHR Res 2004/44, above n 21, para 1.

- has adverse consequences upon the economic and social development of States;<sup>113</sup>
- constitutes a grave violation of the purpose and principles of the United Nations;<sup>114</sup>
- jeopardizes friendly relations among States;<sup>115</sup>
- has a pernicious impact upon relations of co-operation among States, including co-operation for development;<sup>116</sup>
- threatens the territorial integrity and security of States;<sup>117</sup>
- is a threat to international peace and security;<sup>118</sup> and
- must be suppressed for the maintenance of international peace and security.<sup>119</sup>

## 6. *The Distinct Nature of Terrorism*

Having regard to the nature of terrorism - its parallels with warfare, its distinctions from ordinary criminal offending, its ideology, and its consequences - it is safe to conclude that there are sound policy reasons in support of: (1) the establishment of a separate and parallel regime of counter-terrorist law; and (2) the qualified approaches to human rights compliance discussed earlier.<sup>120</sup>

<sup>113</sup> See SC Res 1377, above n 103, Annex (Declaration), para 6. For resolutions of the General Assembly, see: GA Res 48/122, above n 13, para 1; GA Res 49/185, above n 24, para 1; GA Res 50/186, above n 17, para 2; GA Res 52/133, above n 17, para 3; GA Res 56/160, above n 17, para 3; and GA Res 58/174, above n 17, para 1. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37, above n 20, para 1; and CHR Res 2004/44, above n 21, para 1.

<sup>114</sup> For resolutions of the Security Council, see: SC Res 1189 UN SCOR, 3915<sup>th</sup> Mtg, UN Doc S/Res/1189 (1998), preambular para 2; SC Res 1373, above n 103, para 5; and SC Res 1377, above n 103, Annex (Declaration), para 5. See also the title to United Nations General Assembly resolutions 27/3034 to 44/29, as listed above n 12, operative para 2; and GA Res 51/210, above n 16, para 2. See also Report of the High-level Panel on Threats, above n 108, para 145.

<sup>115</sup> See the first operative paras of the following resolutions of the General Assembly: GA Res 38/130, above n 12; GA Res 40/61, above n 12; GA Res 42/159, above n 12; GA Res 44/29, above n 12; and GA Res 51/210, above n 16. See also Report of the High-level Panel on Threats, above n 108, para 145.

<sup>116</sup> See GA Res 38/130, above n 12, para 1. See also the third operative paras of the following resolutions of the General Assembly: GA Res 40/61, above n 12; GA Res 42/159, above n 12; and GA Res 44/29, above n 12.

<sup>117</sup> For resolutions of the Security Council, see: SC Res 1189, above n 113, preambular para 2; and SC Res 1377, above n 103, Annex (Declaration), para 3. See also the first-stated Declaration on Measures to Eliminate International Terrorism, above n 14, preambular para 3 and operative para 1. For resolutions of the General Assembly, see also: GA Res 48/122, above n 13, para 1; and GA Res 49/185, above n 13, para 1. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37, above n 20, para 1; and CHR Res 2004/44, above n 21, para 1.

and 51/210 of 17 December 1996, A/RES/51/210, para 1.

<sup>118</sup> See: SC Res 1566, above n 5, preambular para 7; SC Res 1535, above n 5, preambular para 2; SC Res 1530 UN SCOR, 4923<sup>rd</sup> Mtg, UN Doc S/Res/1530 (2004), preambular para 2; SC Res 1526 UN SCOR, 4908<sup>th</sup> Mtg, UN Doc S/Res/1526 (2004), preambular para 3; SC Res 1456, above n 5, preambular para 1; SC Res 1455, above n 5, preambular para 7; SC Res 1450, above n 5, preambular para 4; SC Res 1440, above n 5, preambular para 2; SC Res 1438, above n 5, preambular para 2; SC Res 1390, above n 91, preambular para 9; SC Res 1377, above n 103, preambular para 2; SC Res 1373, above n 103, preambular para 3; SC Res 1368, above n 103, operative para 1; SC Res 1269, above n 103, preambular para 1; and SC Res 1189, above n 113, preambular para 2.

<sup>119</sup> For resolutions of the Security Council, see: SC Res 1189, above n 113, preambular para 3; and SC Res 1269, above n 103, preambular para 8. See also General Assembly resolutions 27/3034 to 44/29, as listed above n 12, preambular para 8.

<sup>120</sup> *Infra*, Part II(D).

### E. Attitudes of Treaty-Monitoring Bodies

One final issue requires consideration before leaving the general subject of compliance with international human rights. The matter concerns consistency between particular international human rights treaties and the outcome of applying the various international guidelines discussed. As already alluded to, tension exists between each set of documents. Treaties tend to take a more absolute approach, while the guidelines adopt a qualified methodology (to the extent necessary and proportional). The authors have concluded that the latter approach is supported by sound policy reasons and is representative of comity on the subject. What, however, will be the attitude of human rights treaty-monitoring bodies, given the more absolute nature of the treaties they monitor?

Such conflicts have not yet been tested, although it is notable that the Human Rights Committee (in monitoring the ICCPR) has expressly directed a number of States to ensure that measures taken to implement Security Council Resolution 1373 be in full conformity with the Covenant.<sup>121</sup> How, then, would the Committee react to an argument that a breach of a Covenant right was nevertheless consistent with the qualified approach advocated in this paper and the various international guidelines discussed?<sup>122</sup>

This is a difficult question to answer in unqualified terms. For its part, the Human Rights Committee has never formally applied the 'margin of appreciation doctrine',<sup>123</sup> a doctrine which is utilized by the European Court of Human Rights and defined as the notion that each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests, or among different moral convictions.<sup>124</sup> Despite this, commentators have identified "incipient elements of the doctrine in some of the [Committee's] jurisprudence".<sup>125</sup> The approach advocated by the authors in the Part IV Guide that follows therefore seeks to accommodate and avoid these potential conflicts, while retaining some margin of discretion.<sup>126</sup>

<sup>121</sup> See, for example: Human Rights Committee, *Concluding Observations of the Human Rights Committee: New Zealand*, 17 July 2002, UN Doc CCPR/CO/75/NZL para 11; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Yemen*, 26 July 2002, UN Doc CCPR/CO/75/YEM, para 18; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Moldova*, 26 July 2002, UN Doc CCPR/CO/75/MDA, para 8; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, 21 August 2003, UN Doc CCPR/CO/78/ISR, para 14; and Human Rights Committee, *Concluding Observations of the Human Rights Committee: Lithuania*, 4 May 2004, UN Doc CCPR/CO/80/LTU, para 7.

<sup>122</sup> It is perhaps relevant to note here that there are concerns about the ability of treaty-monitoring bodies to effectively undertake that role: see the Dr Goldman's report to the Commission on Human Rights, above n 69, paras 78-84.

<sup>123</sup> Former Judge Rosalyn Higgins, for example, is said to have rejected its application: see P.R. Ghandi, *The Human Rights Committee and the Right of Individual Communication* (Ashgate Dartmouth Publishing Ltd, 1998), 14.

<sup>124</sup> Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *International Law and Politics* 843, 843-844. For a comprehensive discussion of the doctrine, see Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002).

<sup>125</sup> Professor Scott Davidson in Alex Conte, Scott Davidson and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee*, (Ashgate Publishing, 2004), 11. See also David Harris and Sarah Joseph (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press, 1995), 629.

<sup>126</sup> See, in particular, step 1 of the Part IV Guide.

### Part III: Limiting Rights and the Problem of Assessing Proportionality

Part II of this paper considered the requirements of international treaties, and resolutions of the United Nations, concerning compliance with human rights and the various guidelines on the means by which such compliance is to be achieved. It was concluded that, due to the distinct nature of terrorism, a qualified approach to human rights compliance (one which permits necessary and proportional limits upon derogable rights to be imposed, as advocated by various international guidelines) was appropriate. Of the guidelines referred to, those of the former High Commissioner for Human Rights were viewed by the authors as not only reflecting the substance of other guidelines, but also as presenting some practical and readily identifiable factors against which counter-terrorist legislation and policies can be measured.

Notwithstanding the substantive and practical benefits of the Commissioner's Guidelines, they do not address the question of *how* to assess proportionality in the context of counter-terrorism. This is a fault of all the international guidelines considered. Accordingly, this part of the paper undertakes an examination of legal and policy issues on the subject of the limitation of rights in the context of counter-terrorism. Following from the discussion in Part II of the paper, the conclusion drawn will be that counter-terrorism is an objective that can justify, in principle, the limitation of rights by proportional means. The parameters of necessity and proportionality will be examined in detail, leading to the identification (in Part IV) of considerations and questions to assist legislators, policy makers and the judiciary to determine whether counter-terrorist measures fit within the ambit of the international guidelines on counter-terrorism and human rights and achieve a proper balance between these objectives.

#### A. Limiting Rights for the Purpose of Countering Terrorism

The various international guidelines mentioned all talk of permissible limitations upon human rights, and their need to be both necessary and proportional. Article III(2) of the Council of Europe's *Guidelines on Human Rights and the Fight Against Terrorism* directs that when a counter-terrorist measure restricts human rights it must be "necessary and proportionate to the aim pursued". The most recent draft guidelines of the Special Rapporteur to the Sub-Commission on the Promotion and Protection of Human Rights warns that "great care should be taken to ensure that measures taken are necessary to apprehend actual members of terrorist groups or perpetrators of terrorist acts in a way that does not unduly encroach on the lives and liberties of ordinary persons or on procedural rights of persons charged with non-terrorist crimes".<sup>127</sup> The report of the Inter-American Commission on Human Rights also speaks of necessity and proportionality.<sup>128</sup> The Commissioner's Guidelines contain the following instructive provisions for determining the legality of limitations upon human rights when countering terrorism:

4. For limitations of rights to be lawful they must:
  - (b) Be necessary for public safety and public order, i.e. the protection of public health or morals and for the protection of the rights and freedoms of others, and serve a legitimate purpose;
  - (e) Be necessary in a democratic society;
  - (f) Conform to the principle of proportionality;
  - (g) Be appropriate to achieve their protective function, and be the least intrusive instrument amongst those which might achieve that protective function; [emphasis added].

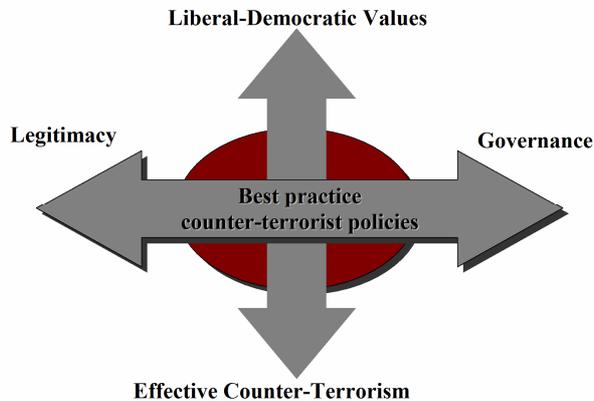
It cannot be doubted that counter-terrorism is a sufficiently important objective in a free and democratic society to warrant, in principle, measures to be taken which might place limits upon rights and freedoms. At the international level, reference was made in Part II of this paper to express evidence in support of that notion within resolutions of

<sup>127</sup> Ibid, para 34(b).

<sup>128</sup> Inter-American Commission on Human Rights report, above n 39, paras 51 and 55.

the UN Security Council, General Assembly and Commission on Human Rights<sup>129</sup> If counter-terrorism counters those adverse effects, then it is logical to conclude that counter-terrorism is an important objective in and of itself.

Care should be taken, however, not to over-simplify the position that counter-terrorism can justify the limitation of rights. Paragraph 4 of the Commissioner’s Guidelines advocates that limits: must be necessary for public safety and public order (limiting this to the protection of public health or morals and for the protection of the rights and freedoms of others); that they serve a legitimate purpose; and be necessary in a democratic society. These are matters that go to both (a) the objective of countering terrorism in the abstract, and (b) the means by which that objective is put into effect. The latter aspect demands that the means are proportional to the objective. One should also bear in mind that this position only applies to rights that are derogable and capable of limitation in the first place.<sup>130</sup> The resolution of this democratic dilemma requires a careful balancing of not only liberal values for the purpose of achieving effective counter-terrorist measures, but also involves an executive government balance between pursuing national security to achieve proper governance and doing so in a measured way so as to retain legitimacy in the eyes of the voting public.



**B. The Means of Effecting Rights Limitations**

Before considering the substantive elements of necessity and proportionality, attention must be paid to the procedural question of the means by which any limitation upon rights may be implemented. The Commissioner’s guidelines are quite clear on this question, demanding that limiting measures must be prescribed by law, or undertaken under the authority of such a prescription, and must effect a “limitation” upon the right or freedom rather than an entire exclusion of the right.

<sup>129</sup> In which terrorism was identified as something that: has links with transnational organized crime, drug trafficking, money-laundering, and trafficking in arms as well as illegal transfers of nuclear, chemical and biological materials; is linked to the consequent commission of serious crimes such as murder, extortion, kidnapping, assault, the taking of hostages and robbery; endangers or takes innocent lives; creates an environment that destroys the freedom from fear of the people; threatens the dignity and security of human beings everywhere; has an adverse effect on the establishment of the rule of law; jeopardizes fundamental freedoms; aims at the destruction of human rights; undermines pluralistic civil society; aims at the destruction of the democratic bases of society; destabilizes legitimately constituted governments; has adverse consequences on the economic and social development of States; constitutes a grave violation of the purpose and principles of the United Nations; jeopardizes friendly relations among States; has a pernicious impact upon relations of co-operation among States, including co-operation for development; threatens the territorial integrity and security of States; is a threat to international peace and security; and must be suppressed as an essential element for the maintenance of international peace and security.

<sup>130</sup> See *infra* Part II(B)(1).

On the first issue, it is no accident that the Guidelines adopted the term “prescribed by law”, this having been subject to examination by both domestic and international courts and tribunals with clear pronouncements on its meaning. The expression “prescribed by law” was considered by the European Court of Human Rights in the *Sunday Times* case of 1978, where the Court concluded that two requirements flowed from the expression: (a) the law must be adequately accessible so that the citizen has an adequate indication of how “the law” limits his or her rights; and (b) the law must be formulated with sufficient precision so that the citizen can regulate his or her conduct.<sup>131</sup> This test was later reaffirmed by the European Court in the case of *Silver v UK*.<sup>132</sup> The same language is found in the Commissioner’s Guidelines, the guidelines of the Council of Europe and the report of the Inter-American Commission on Human Rights.<sup>133</sup> The Commissioner’s Guidelines also require that any law authorizing a restriction upon rights and freedoms may not confer an unfettered discretion on those charged with their execution, and must not be arbitrarily applied.<sup>134</sup>

Although not expressly dealt with by the European Court of Human Rights in determining what is “prescribed by law” it should be remembered that any legal prescription, to comply with the rule of law, must also respect the principle of non-discrimination and equality before the law.<sup>135</sup> Similarly, paragraph 4(i) of the Commissioner’s Guidelines demand that any limitation respect the principle of non-discrimination. The further point to note about the means of prescribing limitations, demanded of paragraph 4(c) of the Guidelines, is that limitations imposed by counter-terrorist measures must not impair the *essence* of the right being limited.<sup>136</sup>

The latter rules are sensible and impose, we believe, appropriate restrictions upon the means by which counter-terrorist laws and policies are to be adopted and implemented. One dilemma is exposed within these prescriptions, however: does, and should, the principle of non-discrimination and equality before the law prohibit racial profiling in the war on terrorism? This is a question considered later within this paper, as a case study in the application of the guidelines on counter-terrorism.<sup>137</sup>

<sup>131</sup> *Sunday Times v United Kingdom* (1978) 58 ILR 491, 524-527.

<sup>132</sup> *Silver v UK* [1983] 5 EHRR 347.

<sup>133</sup> See: the Commissioner’s Guidelines, above 60, paras 3(a) and 4(a); the Council of Europe guidelines, above n 56, article III; and the Inter-American Commission on Human Rights report, above n 39, para 53.

<sup>134</sup> See: the Commissioner’s Guidelines, above 60, paras 3(b) and (j); and the Council of Europe guidelines, above n 56, article II.

<sup>135</sup> Consider Albert Venn Dicey’s notion of the rule of law, requiring: (1) the regulation of government action, so that the government can only act as authorized by the law, having the consequence that one can only be punished or interfered with pursuant to the law; (2) the equality of all persons before the law (which is the context in which the rule of law is referred to in this article); and (3) the requirement of procedural and formal justice. See Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, (London: MacMillan, 1885) at 175-184.

<sup>136</sup> Although decided only once by the Supreme Court of Canada, and controversially so, a similar position was arrived at under the Canadian Charter of Rights and Freedoms. In *Attorney General for Quebec v Quebec Protestant School Boards*, [1984] 2 SCR 66, the Supreme Court had to consider the validity of the “Quebec clause” of the *Charter of the French Language* (Quebec Bill 101), which limited admission to English-language schools to children of persons who themselves had been educated in English in Quebec. In accepting that the Quebec clause was inconsistent with s 23(1)(b) of the *Charter*, the Court held that it amounted to a denial of the *Charter* right and therefore refused to be drawn into the question of any justification under the general limitations provision. Professor Peter Hogg criticizes the distinction between “limits” and “denials” due to the fact that there is no legal standard by which *Charter* infringements can be sorted into the two categories: see Peter W Hogg, above n 42, 799. In a later Canadian case, *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, at 773, the Supreme Court described the *Quebec School Boards* case as a “rare case of a truly complete denial of a guaranteed right or freedom” and, in doing so, recognized that most (if not all) legislative qualifications of a right or freedom will amount to a denial of the right or freedom to that limited extent. On the other hand, it observed, a limit that permits *no* exercise of a guaranteed right or freedom in a limited area of its potential exercise is not justifiable (733-734).

<sup>137</sup> *Infra* Part IV.

Finally, a matter expressly dealt with in the latest report of Kalliopi Koufa to the Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights concerns the scope of counter-terrorist measures. In what is clearly an initiative to ensure that States do not use the important objective of countering terrorism as an excuse to extend State powers beyond this objective, Koufa's draft principles provide that:<sup>138</sup>

Counter-terrorism measures should directly relate to terrorism and terrorist acts, not actions undertaken in armed conflict situations or acts that are ordinary crimes.

This is reflected within the guidelines advocated by both the Committee of Ministers to the Council of Europe and the Inter-American Commission on Human Rights, which direct that where measures taken by States to combat terrorism restrict human rights, those restrictions must be defined as precisely as possible and be necessary for the objective of countering terrorism.<sup>139</sup>

### C. Proportionality

The issue of proportionality is not easy to consider in general terms, outside the application of specific measures or legislative provisions and their impact upon particular rights and freedoms. By trying to adopt a top-down approach, however, this paper seeks to do just that. The aim in doing so is two-fold. First, we seek to bolster the notion of establishing a workable international framework but at the same time seek to avoid being so broad in our language and analysis that decision-makers are left more confused than assisted. Stemming from this, our second aim is provide a series of concrete considerations against which legislators, policy makers and judges can themselves measure whether any given counter-terrorist measure limits rights in a proportional manner.

To recap, it was concluded in the preceding section that counter-terrorism is a sufficiently important objective to warrant, in principle, measures to be taken which might place limits upon rights and freedoms (so long as the means by which such measures are implemented are appropriate).<sup>140</sup> This is a position that can be arrived at without too much difficulty. Proportionality calls for a more detailed approach. Most importantly, it ultimately requires a balancing exercise, on a case-by-case basis. Recognizing these difficulties, this paper offers an understanding on the manner in which this balancing exercise is to be undertaken.

Returning to the example of the limitations provision within the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada has identified that, in establishing that the means of achieving an important objective are reasonable and demonstrably justified, this involves a form of proportionality test involving three components.<sup>141</sup> To begin, it said, the measures must be carefully designed to achieve the objective and rationally connected to that objective. Next, the means should impair the right in question as little as reasonably possible.<sup>142</sup> Lastly, there must be proportionality between the effects of the limiting measure and the importance of the objective. There is a good deal of Canadian case law on the subject of proportionality, most of which turns on the particular legislative provisions being examined and the importance of the right being limited. This analysis accordingly considers the three proportionality components in vary basic terms and to the extent relevant to the Commissioner's Guidelines, and the objective of counter-terrorism.

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<sup>138</sup> Koufa, above n 23, para 33.

<sup>139</sup> See: the Council of Europe guidelines, above n 56, article III(2); and the Inter-American Commission on Human Rights report, above n 39, paras 51 and 55.

<sup>140</sup> On the latter aspect, see *infra* Part III(B).

<sup>141</sup> *R v Oakes* [1986] 1 SCR 103, 106.

<sup>142</sup> *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 772-773.

### 1. *A Rational and Effective Connection between Objective and Means*

The first component, requiring limiting measures to be rationally connected to the achievement of the objective being pursued, is relatively simple in its application. It will require that the counter-terrorist measure being scrutinized logically furthers the objective of countering terrorism.<sup>143</sup> Evidence of this connection might be necessary where such a link is not plainly evident.<sup>144</sup> This first requirement links with the necessity elements of paragraphs 4(b) and (d) of the Commissioner's Guidelines.<sup>145</sup>

Also of great importance, having regard to the repeated reference to necessity, proportionality and appropriateness, will be the question of effectiveness.<sup>146</sup> Not only is the nature of the objective being pursued by the counter-terrorist measure important, so is the effectiveness of the counter-terrorist measure in achieving that objective. To be proportional, not only must a counter-terrorist measure be rationally connected to a legitimate objective but it must also – to warrant the limitation of rights – be effective. To impose a limitation on rights for the purpose of countering terrorism, but by ineffective means, is unlikely to be justifiable. Such means would in all probability be neither necessary, proportional, nor appropriate.

### 2. *Impairing Rights as Little as Reasonably Possible*

The second proportionality requirement under the Canadian Charter and Commissioner's Guidelines is that the limiting measures must impair the right or freedom as little as reasonably possible.<sup>147</sup> The Supreme Court of Canada has at times displayed a degree of deference here, reluctant to examine the availability of alternative means of achieving an objective where the impairment upon the right is not serious. If the particular human rights limitation is trivial, then the availability of alternatives that might lessen that impact have tended to be seen as falling within the appropriate exercise of legislative choice, rather than one demanding intervention by the judiciary.<sup>148</sup>

<sup>143</sup> See *Lavigne v Ontario Public Service Employees Union* [1991] SCR 211, 219, where the Supreme Court said that: "The *Oakes* inquiry into "rational connection" between objectives and means to attain them requires nothing more than a showing that the legitimate and important goals of the legislature are logically furthered by the means the government has chosen to adopt". The Supreme Court Directions on the Charter of Rights notes that the Court has seldom found that legislation fails this part of the test, although there are instances where this has occurred: David Stratas *et al*, *The Charter of Rights in Litigation. Directions from the Supreme Court of Canada* (Canada Law Book Inc, 1990-), 6:06. In *R v Oakes*, for example, section 8 of the Narcotic Control Act 1970 was found to lack rational connection. Section 8 (which had certain criminal process implications and thereby impacted upon criminal process rights) contained a statutory presumption that possession of even small amounts of narcotics meant that the offender was deemed to be trafficking in narcotics. There was no rational connection, said the Court, between the possession of small amounts of narcotics and the countering of trafficking.

<sup>144</sup> *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912. The Court was critical of aspects of the Canada Elections Act 1985 concerning the registration of political parties and the tax benefits that flow from such registration. The Act required that a political party nominate candidates in at least 50 electoral districts to qualify for registration. While the Court held that it was a pressing objective to ensure that the tax credit scheme was cost-efficient, it found that there was no rational connection between that objective and the 50-candidate threshold requirement. Iacobucci J for the majority was particularly critical of the fact that the government had provided no evidence that the threshold actually improved the cost-efficiency of the tax credit scheme.

<sup>145</sup> Requiring limitations to be necessary for public safety and public order, and necessary in a democratic society. See also: the Inter-American Commission on Human Rights report, above n 39, paras 51 and 55; and the Council of Europe guidelines, above n 56, article III(2).

<sup>146</sup> See, for example, paragraphs 4(b), 4(e), 4(f) and 4(g) of the Commissioner's Guidelines, above n 60.

<sup>147</sup> See: *R v Oakes*, above n 42, 106; and *R v Edwards Books*, above n 141, 772-773.

<sup>148</sup> In *R v Schwartz* [1988] 2 SCR 443, for example, it was suggested that the statutory provision (which provided for a presumption that a person did not have a firearms licence if s/he failed to produce one upon request) unnecessarily infringed the presumption of innocence. Counsel for

Other than this understandable and reasonably minor degree of deference, this second proportionality requirement fits with paragraphs 4(d) (interpreting limiting measures in favour of rights) and 4(g) (being the least intrusive means of achieving the protective function of the limitation) of the Guidelines. In doing so, this also appears to fit with the reasonably broad requirement in paragraph 4(h) that any limitation must be compatible with the objects and purposes of human rights treaties. Indeed, this latter part of the Guidelines goes to the overall question of compliance and proportionality.

### 3. *Proportionality between the Effects of the Limitation and the Importance of the Objective*

The final proportionality requirement demands that the effects of any limitation must be proportionate to the importance of the objective.<sup>149</sup> This lies at the heart of the test and is possibly one of the most difficult issues involved in assessing the validity of counter-terrorist measures and legislative provisions that limit human rights. “Objective” versus “means and effect” are, in a figurative sense, different sides of the same coin. The larger the head of the coin (the importance of the objective), the more room there is on the tail of the coin (the means and effect of the limitation). Thus, a more severe threat will, by logical implication, justify the implementation of a more severe level of limitation of rights and freedoms.

Much will depend on the specific limitation in question and how it impacts upon rights and freedoms. An examination of the relevant Canadian Supreme Court judgments reveals that the Court has provided little general guidance. Its approach has been to consider the particular legislative provision on the facts and such a line is the only reasonable one to take. The only truly ‘guiding’ principles are those set out by the Court in *R v Oakes* and *R v Lucas*.<sup>150</sup> The Court in *Oakes* spoke of the need to ensure that the law which restricts the right is not so severe or so broad in application as to outweigh the objective, adding in *Lucas* that this requires consideration of the importance and degree of protection offered by the human right being limited.

This final step therefore requires careful consideration of the effects of the limitation, the importance of the objective, its effectiveness, and the importance of the right being affected. It ensures that the limitation conforms to the Commissioner’s advocated principle of proportionality<sup>151</sup> and the appropriateness of the measures to achieve their protective function.<sup>152</sup>

In an attempt to formulate a process by which this complex issue might be considered, and against the background of the discussion to this point, the authors offer the following set of questions involving two scales. The first scale involves an assessment of the importance of the counter-terrorist objective being pursued and the effectiveness of it, recognising that different counter-terrorist measures will not just impact on rights in a different way, but will also have different levels of effectiveness. The second scale involves the impact of measures upon human rights, bearing in mind not just the level to which the measure limits a right but also what level of importance the right itself holds. Thus, one should identify the following factors that will be determinative in the balancing exercise:

As to the counter-terrorist measure:

- (a) What is the importance of the objective being pursued by the counter-terrorist provision or measure?

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Schwartz argued that police could simply check their computerised records to ascertain whether a licence had indeed been obtained. McIntyre J stated that: “Even if there is merit in the suggestion... Parliament has made a reasonable choice in the matter and, in my view, it is not for the Court, in circumstances where the impugned provision clearly involves, at most, minimal - or even trivial - interference with the right guaranteed in the Charter, to postulate some alternative which in its view would offer a better solution to the problem...” (pp 492-493).

<sup>149</sup> See: *R v Oakes*, above n 42, 106; and *R v Lucas* [1998] 1 SCR 439, para 118.

<sup>150</sup> *Ibid.*

<sup>151</sup> See the Commissioner’s Guidelines, above n 60, para 4(f).

(b) How effective is the counter-terrorist measure in achieving its objective?

As to the human rights impact of the counter-terrorist measure:

(c) What is the importance of, or the degree of protection provided by, the right or freedom affected?

(b) What are the effects of the limiting provision (or measure) upon the right or freedom?

From this, one can then look to balance the two objectives (countering terrorism and maintaining human rights) by answering the following question:

*Having regard to the importance of the right or freedom [factor (c)], is the effect of the measure or provision [factor (d)] proportional to the importance of the objective [factor (a)] and the effectiveness of the legislative provision or measure [factor (b)]?*

The final two factors (importance of the right and impact upon the right) should be reasonably unproblematic when considering the relevant legislative provision or measure and the particular right being affected. The second factor (the effectiveness of the measure) will be something to be assessed according to the particular provision. It is the first factor (the importance of the objective) that poses difficulty: how does one determine the importance of the objective of countering terrorism? This is the subject of the following discussion.

#### **D. Measuring the Importance of the Counter-Terrorist Objective**

This paper proposes that, for the purpose of applying the proportionality principle, there are two essential considerations in determining the importance of the objective being pursued by any particular counter-terrorist measure or legislative provision.

##### *1. What is the Threat of Terrorism Against the State?*

Of the two considerations, the most difficult to assess is the existence and level of the threat of terrorism sought to be assuaged by the provision or measure. Assessing the threat of terrorism is an imprecise science. If it was not so, countering terrorism would not be as great a concern as it is to the international community. Two things need to be taken into account: the actual threat of immediate acts of terrorism against the State; and the potential threat of such acts.

The *actual* threat of terrorist acts against the State is a natural starting point for determining the threat of terrorism to the State and the importance of the objective of countering terrorism. Albeit the obvious place to begin, evidence of actual threats is not so obvious. Establishing the existence of actual threats relies upon intelligence which, while very important, has its own set of complications.<sup>153</sup> Intelligence is not always available, said to be the case in the Bali bombings of October 2002 and 2005, and the London bombings in July 2005.<sup>154</sup> It is not always reliable, as was the case with the

<sup>152</sup> See the Commissioner's Guidelines, above n 60, para 4(g).

<sup>153</sup> As acknowledged by John Lewis, Deputy Director of the FBI Counter-Terrorism Division: "Intelligence is an imperfect business at best" (from a paper presented at the 'Intelligence Challenges in Counter-Terrorism' workshop at the *Terrorism's Global Impact Conference*, Interdisciplinary Center Herzlyia, 13 September 2005).

<sup>154</sup> Concerning the 2002 Bali Bombings, see Mark Forbes, 'No Warning of Bali Bombing' (The Age, 11 December 2002), online: <<http://www.theage.com.au/articles/2002/12/10/1039379835160.html>> (last accessed 21 August 2005). Compare this with assertions that intelligence agencies did indeed have information pointing to such an event: see, for example, Laura Tiernan, 'Australian Intelligence Inquiry into Bali Warnings "a Whitewash"' (World Socialist Web Site, 7 January 2003), online: <<http://www.wsws.org/articles/2003/jan2003/igis-j07.shtml>> (last accessed 21 August 2005). Concerning the London Bombings on 7 July 2005, compare: Wikipedia, '7 July 2005 London Bombings', online: <[http://en.wikipedia.org/wiki/7\\_July\\_2005\\_London\\_bombings](http://en.wikipedia.org/wiki/7_July_2005_London_bombings)> (last accessed 21 August 2005); and Wikinews, 'Coordinated

intelligence failures concerning the presence of weapons of mass destruction in Iraq in the lead-up to the 2003 invasion of Iraq.<sup>155</sup> Finally, intelligence information may not always be properly assessed, as is alleged to be the case prior to the September 11, 2001 attacks in the United States of America.<sup>156</sup> Further complicating matters, it should also be remembered that the absence of intelligence does not mean an absence of threat.

Assessing the *potential* threat of terrorist acts against the State, which is to be measured against both the probability of that potential being actualized and the probable consequences of such acts, also relies upon intelligence, but to a lesser extent.<sup>157</sup> Potential threats are to be assessed by having regard to the motivation and operational capacity of terrorist networks. Operational capacity refers to the ability of terrorist networks to gain access to the territory or facilities of the State and perpetrate terrorist acts therein. While border security is a matter that almost all States have paid increased attention to in the new millennium, it must be acknowledged that trans-boundary activity and the relatively simple and inexpensive means of perpetrating terrorist acts<sup>158</sup> means that the operational capacity of most terrorist entities should be viewed as being reasonably high.

Concerning the second factor in assessing the potential threat of terrorism, motivation refers, in simple terms, to the question of whether the State is a likely or possible target of terrorist networks. As already discussed, for example, the motivation of Al-Qaida and many Islamic radicals is not just the spreading of the Muslim faith, but also the elimination of what such groups see as the evil of modernity.<sup>159</sup> To such groups, all modern, non-Muslim, States are a potential target.

## 2. *How does the Counter-Terrorist Measure Otherwise Contribute to the State's National Security or National Interest?*

This second consideration can bring a number of factors into play. One substantial factor, common to all States we posit, is the question of the State's contribution to the international framework to counter terrorism. Former US Ambassador to the United Nations, John Danworth, made this point in an address to the Security Council's Counter-Terrorism Committee in 2004:<sup>160</sup>

[The Committee] must never forget that so long as a few States are not acting quickly enough to raise their capacity to fight terrorism or are not meeting their international counterterrorism obligations, all of us remain vulnerable.

The point is well-made. The international legal framework on counter-terrorism, through its interaction of international conventions, Security Council resolutions and international institutional monitoring and conduct, depends for its effectiveness upon the participation of the entire international community. A considerable measure of its

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Terrorist Attack Hits London' (7 July 2005), online: <[http://en.wikinews.org/wiki/Explosions,\\_serious\\_incidents\\_occurring\\_across\\_London](http://en.wikinews.org/wiki/Explosions,_serious_incidents_occurring_across_London)> (last accessed 21 August 2005).

<sup>155</sup> See, for example, CNN.com, 'Report: Iraq intelligence "dead wrong"' (1 April 2005), online: <<http://www.cnn.com/2005/POLITICS/03/31/intel.report>> (last accessed 21 August 2005).

<sup>156</sup> Subcommittee on Terrorism and Homeland Security, House Permanent Select Committee on Intelligence, *Counterterrorism Intelligence Capabilities and Performance Prior to 9-11*, July 2002, online: <[http://www.fas.org/irp/congress/2002\\_rpt/hpsci\\_ths0702.html](http://www.fas.org/irp/congress/2002_rpt/hpsci_ths0702.html)> (last accessed 21 August 2005).

<sup>157</sup> On the issue of assessing potential threats of terrorism see, for example: University of Arizona, Eller College of Management, and Artificial Intelligence Lab, *Terrorism Knowledge Discovery Project. A Knowledge Discovery Project to Addressing the Threats of Terrorism* (September 2004).

<sup>158</sup> See, for example, Marc Nicholson, 'An Essay on Terrorism', 2003 *AmericanDiplomacy.org*, online: <[http://www.unc.edu/depts/diplomat/archives\\_roll/2003\\_0709/nicholson\\_terr\\_nicholson\\_terr.html](http://www.unc.edu/depts/diplomat/archives_roll/2003_0709/nicholson_terr_nicholson_terr.html)> (last accessed 10 August 2005).

<sup>159</sup> *Infra* Part II(D)(3) and (4).

<sup>160</sup> United Nations Foundation, 'Counterterrorism Cooperation Improving, Security Council Told', *UN Wire*, 20 July 2004, online: <<http://www.unwire.org/UNWire>> (last accessed 20 July 2004).

success lies in the universal adoption and implementation of the obligations under that framework in order to prevent *any* State being either targeted by terrorists or used by them as a base of operations (whether that be the establishment of physical training camps or the laundering of money to fund the activities of terrorist organizations).

The relevance of countering terrorism has been challenged within more “remote” States such as those in the South Pacific, where public submissions on counter-terrorist legislation within the region have frequently questioned the need for action against international terrorism.<sup>161</sup> Despite its geographical isolation, however, the reality of the contemporary world is that globalization has dissolved distances that might have once protected the Pacific Islands. Transport and communications systems, access to the internet, and more efficient means of moving people and money mean that it is easier for the world to interact with more remote areas such as the Pacific.<sup>162</sup> Individuals thought to be connected with Al-Qaida have been reported as having been present in New Zealand, Australia and Fiji.<sup>163</sup> Pacific Forum Secretary General, Greg Urwin, has added that while terrorists may not seek to attack citizens and institutions of Pacific countries, the region might prove to be a tempting target, either for sensational attacks like the ones in Bali, or as a base or staging point from which terrorist cells might undertake planning for an attack elsewhere.<sup>164</sup>

There may also be further national security issues, outside that of countering actual or potential threats of terrorism, which are furthered by selected counter-terrorist measures. This is particularly relevant to the risk of non-conventional terrorist attacks (those employing biological and nuclear weapons in particular), where the threat of a terrorist act against a State’s neighbour can be as important as one to the State itself.

Equally, certain measures may contribute to the promotion of other national interests. Broadly speaking, it is safe to assume that it will be in the national interest of most responsible international actors to contribute to the international framework on counter-terrorism and thereby contribute to the maintenance of a peaceful, secure, and free-functioning international society. On a more specific level, border security, for example, is not just relevant to counter-terrorism, but also to the maintenance of import and export trades, the thwarting of drug-trafficking, and illegal migration. Anti-money laundering practices contribute to the suppression of organized crime of all types, not just the financing of terrorism. The protection of nuclear material is relevant not only to preventing terrorist organizations from gaining access to and using nuclear weapons as tools of terrorism, but also to the objective of disarmament and non-proliferation.

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<sup>161</sup> This was a common theme, for example, in the submissions made to the New Zealand Foreign Affairs, Defence and Trade Committee on the Terrorism Suppression Bill (as redrafted and contained within the Committee’s interim report: Foreign Affairs, Defence and Trade Committee, *Interim Report on the Terrorism (Bombings and Financing) Bill*, 8 November 2001).

<sup>162</sup> Greg Urwin, ‘The Need for Anti-Terrorism Legislation in Fiji’ (Paper presented at the public workshop *How Should Fiji Respond to the Threat of Terrorism?*, Suva, Fiji, 17 July 2004, copy on file with author), para 8.

<sup>163</sup> *Ibid*, para 9. Anecdotal reports are that one of the September 11 hijackers spent a considerable time living in Fiji up until six months prior to the World Trade Centre attacks.

<sup>164</sup> *Ibid*, para 10. The New Zealand Security Intelligence Service reported in 2004, for example, that Islamic extremists with links to international terrorist organizations were likely to be operating in New Zealand: see New Zealand Security Intelligence Service, *Report to the House of Representatives for the year ended 30 June 2004*, presented to the House of Representatives pursuant to section 4J of the New Zealand Security Intelligence Service Act 1969, 11. The Report stated that: “From the Service’s own investigations we assess that there are individuals in or from New Zealand who support Islamic extremist causes. The Service views these developments, most of which have come to attention within 2003/04, with considerable concern. They indicate attempts to use New Zealand as a safe haven from which activities of security concern elsewhere can be facilitated and/or the involvement of people from New Zealand in such activities”.

## Part IV: A Guide to Legislators, Policy-Makers and Judges

Legislators and policy-makers are faced with difficult choices in determining the proper boundary between the two pressing public objectives of countering terrorism and maintaining human rights. At the international level, States are told that they must do both and, domestically, the public demands no less. Decision-makers will be easily criticized in adopting legislative or other action that fails to find a proportional balance between the two aspirations. When called to rule upon the legality of counter-terrorist measures, judges are similarly placed in a position of balancing due deference to national interest decisions and considerations of the State against their role to uphold constitutionally protected rights and applicable standards of international human rights.

Against the background of the international guidelines considered and the analysis of the necessity and proportionality requirements, the following assistance is offered to legislators, the executive, and the judiciary.<sup>165</sup>

*The interface between counter-terrorism and human rights (the balance between counter-terrorism and the unlimited enjoyment of human rights in particular) is capable of determination by application of the following steps in the examination of (existing or proposed) provisions of counter-terrorist laws, or counter-terrorist measures.*

### 1. Counter-Terrorist Measures Must Comply with Human Rights Standards

1.1 Measures implemented to counter terrorism must comply with applicable international human rights treaties and with relevant customary law norms of international human rights law.

1.2 It must at this stage be determined whether:

- (a) The counter-terrorist measure impacts upon a right that is a peremptory norm of customary international law. If so, the counter-terrorist measure cannot impose a limitation upon it.
- (b) The counter-terrorist measure impacts upon a right that is not derogable under an applicable human rights treaty. This will normally mean that the counter-terrorist measure cannot impose any limitations upon the right, although this depends upon the particular expression of the right.
- (c) The counter-terrorist measure impacts upon a right that is only derogable during a state of emergency threatening the life of the nation. In that case, the State must determine whether such an emergency exists, within the meaning of the applicable human rights treaty. If so, the State must:
  - (i) lodge a proclamation of derogation (in accordance with the requirements of the particular treaty);
  - (ii) continually review its circumstances to ensure that the derogation lasts only as long as the state of emergency exists; and
  - (iii) ensure that the derogation is proportionate (by application of the balance of this Guide).
- (d) The counter-terrorist measure impacts upon a right that is neither peremptory nor derogable only in states of emergency. If so, the State must ensure that:
  - (i) the limitation is within the permissible range of limits provided within the treaty or customary definition of the right; and
  - (ii) the limitation is proportionate (by application of the balance of this Guide).

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<sup>165</sup> For a step-by-step explanation and analysis of the Guide, see Alex Conte, 'The ICT Project on Human Rights Compliance When Countering Terrorism: A Guide to Legislators, Policy-Makers and Judges' \*\*

2. *The Objective of the Counter-Terrorist Measure Must Be Sufficiently Important*
  - 2.1 *In principle, the objective of counter-terrorism is one that is pressing and substantial in a free and democratic society and one that may therefore justify the limitation of derogable human rights.*
  - 2.2 *Notwithstanding the importance of counter-terrorism per se, it is the particular objective of the legislative provision or counter-terrorist policy/measure in question that must be assessed.*
  - 2.3 *It will be instructive in this regard to identify how the measure or provision links with:*
    - (a) *The countering of an actual threat of terrorism against the State;*
    - (b) *The countering of a potential threat of terrorism against the State;*
    - (c) *Its contribution to the international framework on counter-terrorism; and*
    - (d) *Its contribution to other national interests.*
3. *The Counter-Terrorist Measure Must Be Established by Proper Means*

*From a procedural perspective, a number of rules are applicable:*

  - 3.1 *Counter-terrorist measures seeking to impose limitations upon rights and freedoms must be prescribed by law, requiring such prescriptions to be adequately accessible and formulated with sufficient precision so that citizens may regulate their conduct.*
  - 3.2 *Prescriptions may not confer an unfettered discretion, they must not be arbitrarily applied, and they must be confined to counter-terrorism in their application.*
  - 3.3 *Linked to the latter notion, any prescription must also respect the principle of non-discrimination and equality before the law.*
  - 3.4 *Finally, the prescription must seek to effect a "limitation" upon rights, rather than an exclusion of them, which would impair the essence of the right or freedom being affected.*
4. *The Counter-Terrorist Measure Must Be Rationally Connected to its Objective*
  - 4.1 *Any legislative or other counter-terrorist measure must be drafted and implemented in such a way that it is rationally connected to the achievement of the objective being pursued, requiring the counter-terrorist measure being examined to logically further the objective of countering terrorism.*
  - 4.2 *It will also be relevant to identify the effectiveness of the counter-terrorist measure.*
5. *The Impairment of Rights Must Be as Little as Reasonably Possible*
  - 5.1 *The limiting measure must impair the right or freedom as little as reasonably possible, and thereby be compatible with the objective of maintaining and promoting human rights. A degree of judicial deference might be appropriate, such that if the particular human rights limitation is trivial, then an examination of available alternatives might not be warranted.*
  - 5.2 *One must otherwise ensure that:*
    - (a) *The legislation or measure is the least intrusive means of achieving the counter-terrorist objective; and*
    - (b) *The legislation is interpreted (or policy/discretion applied) in favour of rights.*

## 6. *The Factors to be Balanced Must Be Properly Identified*

*Prior to determining the substantive issue of proportionality, the following factors must be clearly identified:*

### 6.1 *As to the counter-terrorist measure:*

- (a) *What is the importance of the objective being pursued by the counter-terrorist provision or measure?*
- (b) *How effective is the counter-terrorist measure in achieving its objective?*

### 6.2 *As to the human rights impact of the counter-terrorist measure:*

- (a) *What is the importance of, or the degree of protection provided by, the right or freedom affected?*
- (b) *What are the effects of the limiting provision (or measure) upon the right or freedom?*

## 7. *The Factors Must Be Balanced to Achieve Proportionality*

### 7.1 *Assuming that:*

- (a) *Limitation of the right is permissible in the abstract [step 1]; and*
- (b) *The counter-terrorism measure has been established by proper means [step 3]; and*
- (c) *The proposed impairment of the right is as little as reasonably possible [step 5];*

### 7.2 *Then the substantive issue of proportionality between counter-terrorism and the unlimited enjoyment of human rights can be determined by answering the following question:*

Having regard to the importance of the right or freedom [6.2(a)], is the effect of the measure or provision upon the right [6.2(b)] proportional to the importance of the objective, and the effectiveness, of the legislative provision or measure [6.1]?

## **Part V: Case Study – Racial Profiling in the War on Terror**

Having examined the question of human rights compliance and the means by which this can be considered when countering terrorism, this final part of the paper looks to undertake a case study on the question of racial profiling. This topic has been deliberately chosen by the authors due to the fact that, although they agree on the process by which the balance between counter-terrorism and human rights is to be struck (and the factors to be considered in doing so), the authors disagree on the outcome of its application to the question of racial profiling. One might see this as undermining the utility of the guide just advocated. On the other hand, the authors see this debate as one of interest and as illustrating that, even with a thorough set of guidelines and questions to address, assessing proportionality when countering terrorism is very difficult and is an imprecise science. What the authors agree on, however, is that the guide advocated in this paper ensures that the right questions are asked and that all relevant factors are therefore considered when seeking to strike a balance.

The analysis that follows also tends to highlight the fact that social, cultural and professional factors can play a role in the weight attached to certain values. This can in turn directly impact upon the outcome of the proportionality analysis. In the case of the authors, various factors come into play: their respective disciplines (international law versus policy); their professional affiliations (criminal law advocate versus political scientist); their professional experiences (one author from New Zealand with little

exposure to terrorist incidents versus one in Israel); and perhaps even idealism versus scepticism.

### A. Racial Profiling

Dr Robert Goldman's recent report to the UN Commission on Human Rights noted that a number of investigatory techniques have been utilized by law enforcement agencies since 9/11 to identify terrorist suspects.<sup>166</sup> These reportedly include the use of profiling based upon characteristics such as race, national origin and religion.

Public opinion on the subject of racial profiling seems divided. The use of racial profiling by law enforcement agencies in the context of "normal" criminal offending has been almost unanimously admonished, even if it might be true that members of certain racial groups are more likely than others to commit certain criminal offending.<sup>167</sup> Post 9/11, however, public attitudes in North America towards the profiling of Arab and Muslim men, particularly in subjecting such men to extra scrutiny at airports, was quite the opposite.<sup>168</sup> Following an event such as the 9/11 attack, it is perhaps not surprising that public opinion should sway such. Positions taken in circumstances of extreme emotion and psychological trauma, however, are not always the most sound. With the benefit of hindsight and the cooling of reactions, how should the question of racial profiling be resolved? In the context of this paper, is the profiling of young Arab men a legitimate counter-terrorist practice when measured against the guide advocated in Part IV of this paper?

Before considering the analysis of each of the authors, the position of other documents and bodies is worth noting. First, it should be noted that the UN Committee on the Elimination of Racial Discrimination (CERD) has directed a number of States that the use of racial profiling when seeking to counter terrorism is not permissible.<sup>169</sup> At the conclusion of its 61<sup>st</sup> Session in August 2003, the CERD issued its annual report in which it included a statement on racial discrimination and measures to combat terrorism.<sup>170</sup> Paragraph 5 of the Statement demands:

...that States and international organizations 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; [...].

In its 2004 General Recommendation, the Committee directed that States must ensure "that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping".<sup>171</sup> The Inter-American Commission on Human Rights has taken a less absolute approach to the question:<sup>172</sup>

...the Commission considers that any use of profiling or similar devices by a state must comply strictly with international principles governing necessity,

<sup>166</sup> Goldman, above n 69, para 71.

<sup>167</sup> See; Samuel R. Gross and Debra Livingston, 'Racial Profiling Under Attack' (2002) 102 *Columbia Law Review* 1413; and Samuel R. Gross and Katherine Y. Barnes, 'Road Work: Racial Profiling and Drug Interdiction on the Highway' (2002-2003) 101 *Michigan Law Review* 651.

<sup>168</sup> Gross and Livingston, *ibid*, 1413-1414.

<sup>169</sup> See, for example: Committee on the Elimination of Racial Discrimination, *Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination: Republic of Moldova*, 19 March 2002, UN Doc CERD/C/60/CO/9 (2002), para 15; and Committee on the Elimination of Racial Discrimination, *Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination: Canada*, 23 August 2002, UN Doc CERD/C/61/CO/3 (2002), para 24.

<sup>170</sup> Committee on the Elimination of Racial Discrimination, "Statement on Racial Discrimination and Measures to Combat Terrorism", in *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 57<sup>th</sup> Sess of the UNGA, Supplement 18, 61<sup>st</sup> Sess of the CERD, UN Doc A/57/18, 107.

proportionality and non-discrimination and must be subject to close judicial scrutiny.

Dr Goldman's report to the UNCHR similarly does not rule out the possibility of racial profiling, but warns that any such measures should be periodically reviewed.<sup>173</sup> The question of racial profiling is not specifically addressed within the guidelines of the Council of Europe, the former Human Rights Commissioner, nor the Sub-Commission Special Rapporteur.

## B. An International Lawyer's Analysis

The following analysis and application of the Part IV Guide is undertaken by Dr Alex Conte.

### 1. Counter-Terrorist Measures Must Comply with Human Rights Standards

For the sake of analysis, let us consider that the counter-terrorist measure being examined is one of profiling young Arab men at Canadian airports for the purpose of detecting terrorist suspects. This adopts an investigative technique which distinguishes between the potential targets of search and questioning on the basis of race, sex and age. Acknowledging that compliance with human rights standards is required (Guide, 1.1), the first question to be resolved is whether the latter measure impacts upon a non-derogable right (Guide, 1.2). If so, then the measure is unlawful at international law. If not, the measure might be permissible if it capable of satisfying the balance of enquiries below.

As evidenced from the earlier discussion, the Committee on the Elimination of Racial Discrimination takes an absolute position on the question.<sup>174</sup> Indeed, the CERD has declared that the prohibition against racial discrimination is a peremptory norm of international law from which no derogation is permitted.<sup>175</sup> Likewise, article 4 of the ICCPR provides that any derogation of rights in times of emergency may not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.<sup>176</sup> It is not entirely clear whether the former Commissioner's Guidelines envisage the accommodation of racial profiling. The subject is not specifically addressed, although paragraph 4(i) provides that, to be justifiable, any rights limitation must respect the principle of non-discrimination. The draft framework of the Sub-Commission for the Protection and Promotion of Human Rights instructs that no person may be detained solely on the basis of race, colour, national origin, ethnicity or religion.<sup>177</sup> It is also relevant that all members of the United Nations have undertaken, under article 55(c) and through the preamble to the UN Charter, to observe human rights and fundamental freedoms for all without distinction as to race, language or religion.

Opposed to that, the Inter-American Commission on Human Rights (as well as the independent report to the UN Commission on Human Rights) does not rule out the possibility of racial profiling.<sup>178</sup> An interesting problem is thus already exposed, since there is disagreement on whether the principle of non-discrimination on the basis of race is a derogable one.

<sup>171</sup> Committee on the Elimination of Racial Discrimination, General Recommendation 30, *Discrimination Against Non-Citizens*, UN Doc CERD/C/64/Misc.11/rev.3 (2004), para 10.

<sup>172</sup> Inter-American Commission on Human Rights Report, above n 39, para 353.

<sup>173</sup> Goldman, above n 69, para 76.

<sup>174</sup> *Infra* Part V(A).

<sup>175</sup> CERD Statement on Racial Discrimination and Measures to Combat Terrorism, above n 188, para 4.

<sup>176</sup> International Covenant on Civil and Political Rights, above n 30, art 4(1). See also art 26.

<sup>177</sup> Koufa, above n 23, para 35.

<sup>178</sup> *Infra*, Part V(A).

## 2. The Objective of the Counter-Terrorist Measure Must Be Sufficiently Important

The objective of the measure being examined is to detect terrorist suspects at international airports. As a matter of border security, this is clearly something that can promote the countering of both actual and potential threats of terrorism against the State, aimed at preventing the operational capacity of groups or individuals to undertake terrorist acts within the State's borders (Guide, 2.3(a) and (b)). The measure might also result in the apprehension of those suspected to have undertaken, or assisted in the commission of, terrorist acts elsewhere – thus contributing to the international framework on counter-terrorism (Guide, 2.3(c)). The measure does not appear to have any valid link to the pursuit of other national interests (Guide, 2.3(d)).

## 3. The Counter-Terrorist Measure Must Be Established by Proper Means

To be lawful:

- The measure must be prescribed by law (Guide, 3.1). This might take the form of either legislation authorizing customs officers to employ racial profiling in the effort to detect terrorist suspects. It might alternatively take the form of an official policy to that effect, so long as the prescription is adequately accessible and formulated with sufficient precision.
- The prescription must avoid the creation of an unfettered discretion, so that the profiling is made subject to safeguards against abuse (Guide, 3.2). It is difficult, in the author's view, to see how this can be achieved, although the CHR independent expert and the Inter-American Commission on Human Rights have advocated the periodic review of such measures and the scrutiny of them by competent domestic and international tribunals.<sup>179</sup>
- The prescription must seek to effect a "limitation" upon rights, rather than an exclusion of them (Guide, 3.4). Any prescription must also respect the principle of non-discrimination and equality (Guide, 3.3). It is here that a racial profiling measure would come into direct conflict with the former High Commissioner's guidelines and the rule of law.

## 4. The Counter-Terrorist Measure Must Be Rationally Connected to its Objective

There does appear to be a level of rational connection between the profiling of young Arab men and the objective of identifying terrorist suspects, although the author sees this as rather limited (Guide, 4.1). It is here that the national context within which such a measure is contemplated might have an effect on the justifiability or otherwise of such a measure. The level of rational connection might be higher in Israel (when seeking to counter terrorist attacks by Hamas and Hezbollah from neighbouring Arab States) than it would be in Canada (when seeking to counter terrorist threats under the Global Jihad).

Linked to this, one must have regard to the question of effectiveness (Guide, 4.2). In the context of the Global Jihad, Muslim extremists have called upon all Muslims to wage war against modernity and those that seek to oppose Al-Qaida.<sup>180</sup> Given the breadth of nationalities within which Islam is practiced, however, racial profiling is not an entirely effective means of detecting potential Global Jihadists. Some therefore argue that racial profiling is both over-inclusive of members of a particular racial group, and under-inclusive of potential perpetrators of terrorist acts, such that it generates false positives and negatives.<sup>181</sup>

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<sup>179</sup> *Infra*, Part V(A).

<sup>180</sup> *Infra*, Part II(D)(4).

<sup>181</sup> Bahdi, *ibid*, 309-314.

## 5. The Impairment of Rights Must Be as Little as Reasonably Possible

In view of the strong statements against the use of racial profiling,<sup>182</sup> it is anticipated that there will be little if any degree of judicial deference in the examination of a racial profiling measure (Guide, 5.1). The author takes the view that such a measure fails to satisfy the requirements under this fifth step:

- Such a measure would not be the least intrusive means of achieving the objective of detecting terrorist suspects (Guide, 5.2(a)), although it must be acknowledged that the means by which a racial profiling measure is implemented may well impact upon this. Might, for example, an efficient, courteous and respectful implementation of the policy amount to no more than an inconvenience?
- Because such a measure creates a discretion (concerning whether or not to stop, search or question any person), an interpretation of the discretion in favour of rights - but at the same time consistent with the policy of racial profiling - would be problematic (Guide, 5.2(b)).

## 6. The Factors to be Balanced Must Be Properly Identified

Step six requires the clear identification of various factors:

### 6.1 On the counter-terrorism scale:

- *The Importance of the Objective of the Measure* (Guide, 6.1(a) and 2)  
The detection of terrorist suspects at international airports is clearly something that can promote the countering of both actual and potential threats of terrorism against the State, as well as contributing to the international framework on counter-terrorism (by seeking to apprehend those suspected to have undertaken, or assisted in the commission of, terrorist acts elsewhere).
- *The Effectiveness of the Measure* (Guide, 6.1(b) and 4)  
However, the link with, and effectiveness of racial profiling to the detection of terrorist suspects is questionable.

### 6.2 On the human rights scale:

- *Importance of the Right* (Guide, 6.2(a))  
Disclosed within Step One was the fact that the principle of non-discrimination on the basis of race is argued to be a peremptory norm of international law from which no derogation is permitted (even in times of emergency). Even if the position of the CERD is incorrect in that regard, the principle is clearly one of great importance.
- *Impact Upon the Right* (Guide, 6.2(b))  
The impact of racial profiling as a tool to combat terrorism, whether intended or not, is likely to be adverse. The profiling of young Arab men will invariably lead to the association (in the public's eyes) of such men with terrorism, and thereby stigmatize them.<sup>183</sup> Professor Nelson Lund argues that the adoption of racial profiling as an instrument of State policy undermines the long-fought for principle of non-discrimination and equality, and creates a susceptibility to government abuse, even when seeking to counter terrorism.<sup>184</sup> He and others speak of racial profiling as something capable of having a poisonous effect upon pluralistic civil society<sup>185</sup> and, for that reason, counter-productive.<sup>186</sup>

<sup>182</sup> *Infra* Part V(A) and (B)(1).

<sup>183</sup> As acknowledged by Dr Robert Goldman in his report, above n 69, para 71.

<sup>184</sup> Nelson Lund, 'The Conservative Case Against Racial Profiling' (2002-2003) 66 *Albany Law Review* 329, 331 and 338.

<sup>185</sup> *Ibid*, 338-339. Reem Bahdi, in 'No Exit: Racial Profiling and Canada's War Against Terrorism' (2003) 41 *Osgood Hall Law Journal* 293, 304, similarly argues that racial profiling "will generate high costs to both society and the individuals who are profiled". She also draws direct links between racial profiling and hate or harassment (314-316).

Interestingly, terrorism is itself identified as something that undermines pluralistic civil society, so that one might argue that racial profiling buys into the same adverse effects sought to be countered in the struggle against terrorism.<sup>187</sup>

#### 7. The Factors Must Be Balanced to Achieve Proportionality

Assuming satisfaction of the means by which the measure is created (Guide, 7.1), the substantive issue of proportionality is to be determined by answering the following question (Guide, 7.2):

*Having regard to the importance of the principle of non-discrimination on the basis of race [6.2(a)], would the effects of racial profiling [step 6.2(b)] be proportional to the importance of the objective, and the effectiveness, of racial profiling [step 6.1]?*

For the reasons discussed, even taking the principle of non-discrimination as derogable, the author concludes that racial profiling as a measure to detect terrorist suspects would be a disproportionate measure and thus inconsistent with the Part IV Guide advocated.

#### C. A Policy Analyst's Response

The following analysis and application of the Part IV Guide is undertaken by Dr Boaz Ganor.

As clearly described in this paper, when calculating the possible use of any counter-terrorism measure, many factors have to be considered in order to find the right balance between effectiveness in counter-terrorism and guarding liberal-democratic values. It has to be clear that the puzzle of counter-terrorism policies is not being painted only in black and white, but with shades of grey as well. The question therefore remains, is the use of ethnic profiling legitimate? Hence, one should take all possible factors into consideration and follow the guidelines suggested in this paper.

##### 1. Counter-Terrorist Measures Must Comply with Human Rights Standards.

Since counter-terrorism defends the ultimate rights of many people to live, counter-terrorism measures should be regarded as ones that are taken to fulfill human rights. As mentioned by Dr. Conte, there are different views whether the principle of non-discrimination, upon which this measure impacts, is a non-derogable right. This controversy leaves enough room for calculating the legitimacy to use this measure.

##### 2. The Objective of the Counter-Terrorist Measure Must Be Sufficiently Important.

The importance of the use of ethnic profiling as a counter-terrorism measure should be discussed in reference to the nature and the level of the threat of international terrorism. During the years, many terrorist groups have been involved in international terrorism. In recent years, however, there is a clear threat of global jihadi terrorism which is being planned, prepared and executed mainly by Islamic radical activists. The question is, can this fact contribute significantly to countering this phenomenon? Is the use of ethnic profiling helpful in identifying terrorists, exposing terrorist plots, and

<sup>186</sup> Professor Abraham Wagner (from a paper presented at the 'Intelligence Challenges in Counter-Terrorism' workshop at the *Terrorism's Global Impact Conference*, Interdisciplinary Center Herzliya, 13 September 2005).

<sup>187</sup> As recognised in the first-stated Declaration on Measures to Eliminate International Terrorism, above n 14, operative para 2. For resolutions of the General Assembly, see also: GA Res 48/122, above n 13, para 1; GA Res 49/185, above n 13, para 1; GA Res 50/186, above n 17, para 2; GA Res 52/133, above n 17, para 3; GA Res 56/160, above n 17, preambular para 24 and operative para 3; and GA Res 58/174, above n 17, para 1. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37, above n 20, para 1; and CHR Res 2004/44, above n 21, para 1. See also Report of the High-Level Panel, above n 108, para 145.

thwarting possible attacks? If the answer to these questions is positive, then there is no doubt that this is a sufficiently important measure.

### 3. The Counter-Terrorist Measure Must Be Established by Proper Means.

Following the conclusions of the article, the right to question or to re-check suspects based on their ethnic profile should be described by law, with concrete instructions on what is permitted and what is forbidden, in order to limit the possible negative consequences upon a specific ethnic group. The aim would be to ensure an exercise of the measure in such a way that it is an inconvenience at most, and not subject to abuse.

### 4. The Counter-Terrorist Measure Must Be Rationally Connected to its Objective.

As Conte suggests, there does appear to be a level of rational connection between the profiling of young Arab men and the objective of identifying terrorist suspects, but it is not an entirely effective means of detecting potential global jihadists since it is over inclusive and under inclusive at the same time. The whole purpose of ethnic profiling is to reduce the number of potential suspects from the whole society to a much more limited group or even a part of an ethnic group (i.e. young Arab males). It is true that ethnic profiling might be under inclusive if the perpetrators don't necessarily fit the profile. The fact that Islamic radical terrorists might use for their operation someone that does not fit the profile, however, does not reduce the rationality of using ethnic profiling as one layer within the overall counter-terrorism policy. This measure cannot stand alone (just as any other counter-measures will not be sufficiently effective if utilised on their own). However, if ethnic profiling can be used effectively for identifying and thwarting terrorist plots, it is rational to use this measure.

### 5. The Impairment of Rights Must Be as Little as Reasonably Possible.

In using ethnic profiling for stopping, questioning or searching terrorist suspects, it is crucial to follow elementary methods that will not be intrusive, humiliating, insulting, etc. This can be done by providing very clear instructions to the security personnel – that they should be respectful and polite. This can limit the consequence of using ethnic profiling to no more than a slight inconvenience to the suspects.

### 6. The Factors to be Balanced Must Be Properly Identified.

Since it is questionable if the principle of non-discrimination should be regarded as a non-derogable right, and since it is clear that using this measure can contribute to the safety of the civil society and protect innocent lives, there is a balance here in the importance of, or the degree of protection provided by this measure, and the right or freedom affected. Furthermore, the argument that using this measure might lead to the association of such men with terrorism, and thereby stigmatize them is a reasonable argument, but it is a known fact that today global jihadi terrorism has an ethnic common denominator. Turning a blind eye to this will not change this fact, which is known to the public with or without the use of ethnic profiling. In contrast, it can be argued that, as a side effect, the inconvenience that might be caused for an innocent person whose ethnic profile matches that of the suspected terrorists might drive them to condemn the terrorists, contribute to the efforts to identify the terrorists, and attempt to thwart their attacks. This of course does not justify the use of such a measure by itself, but its side-effect should be noted.

### 7. The Factors Must Be Balanced to Achieve Proportionality.

The argument that the use of ethnic profiling is disproportionate to the damage that it might cause is, at the very least, questionable. Actually, one can argue that without the use of this measure it is almost impossible and most certainly not practical to identify suspects within a range of potential targets of questioning in an open Western society,

and especially in airports. Using the same procedures, searches and questions on every passenger in the airport will practically paralyze the travel industry. The queues that will emerge will make it impossible to maintain a reasonable timetable for departures and people will refrain from flying or will prefer to use other means of transportation if possible.

In order to decide what counter-terrorism measures should be taken and be legitimized, even if a certain measure limits some liberal-democratic values, there is a need as described in the article to use two reference scales – the level of necessity to use this specific measure and the level of limitation to liberal-democratic values that might be caused by using this specific measure.

Defining the relative position of the discussed measure in those two scales should refer to the following considerations: With respect to the level of necessity scale, it should be defined what is the level of necessity to use this measure in the specific circumstances – is there a crucial need to use it, is it necessary, or is it negligible. The scale of necessity should simultaneously refer to another question – is there an alternative to this specific measure or this is the only measure that can be used at this point in time to achieve the desired outcome? The scale of the limitation of liberal-democratic values should start from the inconvenience that might be caused to a terrorism suspect, at the lower end of the scale, up to endangering his right to live, at the higher end of the scale. Every counter-terrorism measure should be analyzed with reference to those two scales. The level of legitimization in the use of this or the other counter-terrorism measures at a specific time should be decided by comparing the level of necessity and the level of limitation of rights for each measure.

In this context we should also refer to the question of the need to use ethnic profiling and the level of limitation of rights that using ethnic profiling might cause. As mentioned previously, I have found the need to use ethnic profiling as a necessary measure in countering the phenomenon of global jihadi terrorism and trying to thwart terrorist attacks in crowded places and airports, particularly in Western society. This measure, therefore, is necessary although it cannot be considered a miracle solution to the problem. No one should expect that using one measure or another can solve the problem of terrorism as a miracle solution. Fighting terrorism is a frustrating, ongoing multi-layered policy. In the circumstances, characteristics, and level of threat that global jihadi terrorism poses to the safety of the contemporary world, and since using this measure appropriately might limit the damage that might be caused to nothing more than inconvenience, ethnic profiling should be regarded as one necessary, effective and legitimate part of the multi-layered counter-terrorism puzzle.

## **Part VI: Conclusion**

The era of Global Jihadism, together with the threat of non-convention terrorism and the need for universal and effective implementation of the international framework on counter-terrorism, has brought with it public pressure for adequate security laws and a consequent proliferation of counter-terrorist legislation and policies. The manner in which some counter-terrorist legislation and policies have developed has in turn seen a growing concern from both non-governmental and inter-governmental agencies about the need to ensure compliance with human rights when seeking to combat terrorism. The aim of this paper has been to assess the various international and regional directions and guidelines on the subject and draw from these a workable set of considerations to be taken into account when attempting to determine the balance to be struck between counter-terrorism and human rights. In advocating the Guide in Part IV of this paper, the authors have been conscious to bring into account the relevant and practical matters particular to countering terrorism. Likewise, in drawing out a set of principles from the guidelines examined, they have also been careful not to overshadow the technical and particular requirements of the various international human rights treaties to which a State might be party.

What should be emphasized, and as is illustrated through the Part V case study on racial profiling, is that this Guide does not necessarily provide easy answers. There remains debate about the peremptory versus qualified status of some human rights. Cultural ideals, and political persuasions, will likewise result in different values being seen to attach to certain rights (a matter that is inherently recognized in the margin of appreciation jurisprudence of the European Court of Human Rights). Even without those factors, the proportionality test advocated in Part IV(7) of the paper requires an assessment to be made and, as objective as one would seek to be, assessments of this nature often involve debate and disagreement. What the Guide ensures, however, is that such debate reflects upon all relevant factors germane to both countering terrorism and complying with international human rights obligations.