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CHAPTER 14

Countering Terrorism while Respecting Human Rights

Learning objectives for Chapter 14

After completing this chapter you should be able to:

- *Appreciate the international legal framework of human rights standards and principles within which any State counter-terrorism measures (and the conduct of individual officials and officers) must be understood.*
- *Explain the content and effect of some of the main human rights protections arising in a counter-terrorism context.*
- *Explain the principled, practical and professional consequences of lack of respect for human rights in a counter-terrorism context.*
- *Proactively building human rights components into any counter-terrorism training measures, in line with international requirements.*



Chapter 14

Countering Terrorism while Respecting Human Rights

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14.1 Introduction

"States must ensure that any measure taken to combat terrorism comply with all their obligations under international law...in particular, international refugee, human rights and humanitarian law."

United Nations Security Council Resolution 1456 (2003) [6]

"[In cooperating against terrorism in response to Security Council Resolution 1373]...our actions will reflect the fundamental values upon which the Commonwealth is based, including democracy, human rights, the rule of law, freedom of belief, freedom of political opinion, justice and equality..."

Commonwealth Heads of Government, 25 October 2001

Given the phenomenon of international terrorism, police officers in Commonwealth countries may be required to be involved in the prevention and investigation of terrorist activity. It is vital for trainers to impart to such officers that any counter-terrorist measures taken by a Commonwealth country take place within the framework of international human rights law. This affects the permissible conduct of police involved in this field.

There are those who might argue that terrorism is such an exceptional issue that normal standards, including human rights standards, do not apply. While terrorism raises some unique challenges, this is overall a false argument, as the international community and the Commonwealth Heads of Government have made clear. And it is clear that the most effective counter-terrorism measures are not exceptional: they involve ordinary police investigation and community liaison.

In order to acknowledge, anticipate and deal with such issues, and to provide officers with relevant and applicable information that can help guide their conduct, training on human rights and counter-terrorism for police should emphasise three things:

1. Human rights standards are not 'soft' on terrorism, unduly restrictive to the State, or 'pro-terrorist' at the expense of victims. International minimum standards have resulted from an international legal consensus by States themselves, which have jointly given careful expression balancing interests and rights. It is important to create this awareness in training so that police accept and implement human rights. Human rights considerations do not always only limit what States can do – in fact, they require and enable a State to take counter-terrorism measures to protect the public.
2. Terrorist activity is first and foremost criminal activity. Even if there are political motives involved, the methods used are criminal. It follows that most counter-terrorism policing involves ordinary civil policing methods. The normal methods of prevention and investigation apply, and work best.





3. It is imperative that police officers understand the human rights limitations on counter-terrorism activities, and the practical ways in which these affect what they can and cannot do. Just as importantly, the trainer has a responsibility to develop in the trainee an understanding of the broad strategic and societal framework of policing counter-terrorism. Laws aim to strike a balance between community security and civil freedoms, to preserve our societies' basic features. Police conduct that is abusive or indistinguishable from terrorist conduct undermines the campaign.

In addition to setting the framework of standards and applicable rights, this chapter aims to equip trainers to encourage law enforcement officials to recognise that upholding human rights is not merely compatible with a successful counter-terrorism strategy, but an essential element of any such strategy. The following section addresses this point.

"It is still just core policing skills"

From a human rights perspective, law enforcement action should not look very different just because it takes place in a counter-terrorism context. Terrorist activities are crimes and should be approached first and foremost as crimes.

Some modifications are needed, but the basic principles of crime scene management, for example, are the same. The community remains the best source of intelligence, information, cooperation and support. This requires human-rights based policing that treats the community accordingly.

14.2 Human Rights in Counter-Terrorism: a hindrance to effective action?

It is useful to consider two of the many misconceptions and misgivings about human rights that might be anticipated from a law enforcement perspective in a counter-terrorism context. These might be stated as follows:

- (i) that the human rights system gives undue precedence to the rights of terrorist suspects over the safety of innocent civilians or law enforcement agents – that human rights advocates unduly focus on what the State does or does not do; and
- (ii) that the imperatives of the struggle against terrorist behaviour make human rights considerations inapplicable, less useful, unrealistic ('human rights law is soft on terrorists') or unworkable.

These two points will now be dealt with briefly:

"Rights for terrorists? What about terrorist victims?"

- As noted in the introduction, the law governing the limits of permissible State conduct has been arrived at by an international legal consensus. This makes clear that acts of terrorism are among the gravest violations of human rights. Those who plan, finance and carry out acts of terrorism have, particularly by their indiscriminate attacks on civilians, attacked these very values and freedoms.



- It therefore goes almost without saying (and international human rights considerations dictate this) that States not only have the right but indeed the duty to take positive measures against terrorists. For example, the right to life includes an obligation on States to act (within the Rule of Law) to protect their populations against all threats to life and property.
- Of course, there will be 'hard cases' where the balance between public security and not interfering with individual rights is very difficult. But that is not to say, as one sometimes hears, that terrorist suspects have 'more' rights than their victims.

"Human rights standards are unworkable or unrealistic in a counter-terrorism context"

- While difficult balancing issues arise, it would not be correct to suggest that the human rights system cannot accommodate the necessities of counter-terrorism (and therefore should be put aside). The balancing tensions are not new, and the system has developed detailed precedents and guidelines to recognise the different imperatives. Answers to dilemmas raised by the peculiar challenges of combating terrorism can be found within the existing body of law, which sets the outer boundaries and minimum standards of permissible official conduct. An effective international strategy to counter terrorism should use human rights as its unifying framework.

"If there is a question of dilemmas in combating terrorism, these dilemmas can be phrased in terms of the application of various human rights...the international regulations...themselves provide to a great extent the guidelines for resolving the questions concerning the acceptable and unacceptable measures in the fight against terrorism"

A Resolvable Conflict - Declaration of the International Helsinki Federation for Human Rights (the Hague, 15 September 2003) and Human Rights - A Uniting Framework (United Nations High Commissioner for Human Rights, 27 February 2002, para [5]).

14.3 International legal frameworks on policing and counter-terrorism
General international human rights law

The most important matter to bear in mind is that the existence of a counter-terrorism environment does not change the applicability of international legal standards as a whole. The provisions of the *Universal Declaration and the International Covenant on Civil and Political Rights*, for instance, adequately cover the counter-terrorism context (see below and the annex). There are some variations to international standards that account for the challenges of countering terrorism, as below.



The UN Security Council

The significance of human rights in any State counter-terrorism measures is made clear by United Nations Security Council Resolution 1456 (2003). This Resolution, which was passed under Chapter 7 of the UN Charter which is binding on all member countries, clearly directed that States have a duty to ensure that “any measure taken to combat terrorism comply with all their obligations under international law...in particular, international refugee, human rights and humanitarian law”. The effect for police officers, as representatives of the State, is that they are obliged to act in a way consistent with the international obligations of their State.

Other UN and international bodies

The General Assembly has a number of times expressed unequivocally the importance of protecting human rights and fundamental freedoms while combating terrorism. The various special procedures mechanisms and expert bodies of the UN Human Rights Commission have also stressed the importance of ensuring that country responses to terrorism are compliant with human rights obligations. The same is true of the reports of treaty bodies, such as that of the Committee Against Torture (under the Convention Against Torture), and the Human Rights Committee under the ICCPR. Detailed comments by such committees have gone a long way towards defining more precisely where the legal limits of counter-terrorist measures lie.

The Commonwealth and regional organisations

The Commonwealth Heads of Government’s Statement on terrorism, issued shortly after September 11, 2001, addressed the need to preserve basic liberties while combating terrorism.

The same message is echoed in some statements, conventions and protocols of other international or regional organisations, such as the formal statements of the Organisation of American States (2002), the Council of Europe (Resolution 1271 of 2002), and the South Asia Association for Regional Cooperation (SAARC) Additional Protocol (2004). Some of these organisations, as well as national governments or institutions, have produced extensive guidelines on human rights in counter-terrorism.

14.4 What principles and rights relate to counter-terrorism measures?

From the international sources above, it is possible to describe the basic legal principles, in particular those related to human rights which form the parameters within which police counter-terrorism conduct should take place.

Lawfulness and Non-arbitrariness

All measures taken by States to combat terrorism must be lawful. Measures and actions should not be ‘arbitrary’ and based only on an official’s discretion. For the law enforcement official, this means acting only when certain that one’s actions are legally permitted and covered by law.

Any limits on rights must be within the law, which should define limiting scenarios as precisely as possible. Limitations should be necessary and proportionate to the aim that is sought to be achieved.



Non-discrimination and equality

It is a fundamental principle of international human rights law that all persons have a right to be recognised as a person before the law, are to be treated as equal before the law, and are entitled without any discrimination to equal protection of the law.

Principles of proportionality and necessity

In effecting arrest, search, interview, imprisonment or detention; or any legal use of force, law enforcement officials are obliged only to use as much force as is necessary and proportionate to the degree of threat present. To act unnecessarily and with excessive force takes the act, and the official doing it, outside the law.

Rule of Law issues: independent oversight and judicial review

Official actions that deal with the fundamental rights of persons (arrest, detention, etc) require a process of independent and impartial review, even if this is adapted suitably where sensitive information is involved.

Right to Life

Everyone has the right to life. There is an international legal prohibition on the State depriving a person of their life without any cause in law (a lawful justification would be self-defence or defence of others). It is easy to imagine how those involved in counter-terrorist operations require very clear instructions on the use of lethal force so as to act always within the law.

The right to life can place a more positive obligation on State officials not only to refrain from the intentional and unlawful taking of life, but to also to take appropriate steps to safeguard the lives of those within its jurisdiction. Thus the right to life both justifies State measures (eg positive obligations) and limits the arbitrary or excessive use of lethal force by state officers.

Torture (and inhuman, cruel and degrading treatment)

As chapter 6 makes clear, there is a clear rule of international law (capable of attracting consequences in international criminal tribunals) that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Torture is absolutely prohibited in international law.

In the famous case of *Chahal v United Kingdom* (1996), the European Court of Human Rights held as follows:

“The Court is well aware of the immense difficulties faced by States in protecting their communities from terrorist violence.

However, even in these circumstances, the [*European Convention on Human Rights*] prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.”

It is worth repeating that evidence obtained by torture is inadmissible and may prejudice the chances of a conviction. In addition to principled reasons why the ‘products’ of torture are generally inadmissible in court, the fact is that such admissions are practically speaking ‘bad evidence’ and unreliable: they are obtained under duress. Such persons might say anything to escape suffering. Objective evidence or intelligence is preferable to admissions, in any event.



Arrest, search and seizure

Normal international rules apply, as set out in earlier chapters – that no-one is to be deprived of their liberty by arrest or detention except on grounds and procedures provided for by law. So, no one shall be subjected to arbitrary arrest, and everyone has the right to be informed of the reasons for their arrest, and to challenge the legality of it in court. Search of persons and property should be undertaken within the law and with respect for dignity and humanity of individuals.

Arbitrary, prolonged, and indefinite detention

Detention by police (pre-trial detention) should be only be for a reasonable period of time provided for by law. A person arrested or detained for terrorist activities must be allowed to challenge the lawfulness of the arrest and detention before a court and should be brought without undue delay before a competent and independent tribunal. See chapter 4 for details.

Any person suspected of terrorist activities and detained pending trial is entitled to regular supervision of the lawfulness of the detention by a court. What counts as 'reasonable time' before a person is brought before a court depends on all the circumstances, but is something courts are capable of deciding.

Conditions of Detention

All persons are to be treated with at least the minimum protections consistent with the requirements of human dignity.

The special imperatives of the fight against terrorism may justify that persons detained under counter-terrorism laws may be subject to more stringent conditions than other prisoners (eg access to information and exchange of information), but from a legal point, they are entitled to no lesser rights than other prisoners generally.

Due Process / Access-to-Justice / Fair Trial Rights

Terrorist suspects are entitled to the presumption of innocence of criminal charges against them as is applicable under a fair trial process. Article 14.3 of the ICCPR provides in full the minimum standards of justice and fairness for a person facing trial on criminal charges.

Some restrictions however, on normal fair trial rights may be justifiable in the counter-terrorism context. These do not affect police officers so much as they do prosecutors and courts. The imperatives of the fight against terrorism may justify certain restrictions to the right of defence, in particular with regard to arrangements for access to lawyers, family, the case file, and to allow for the use of anonymous testimony. Such restrictions to the right of defence must be strictly proportionate to their purpose.

Privacy, confidentiality and personal information issues

It should be remembered that counter-terrorism operations often intrude into the lives of persons and their personal information. As with interference with liberty, clear legal justification must exist for interfering with the privacy of individuals, by whatever technological means.

Measures such as searches, bugging, telephone tapping, surveillance and use of undercover officers, and all measures to collect and process what may be private personal information must be legally authorised, proportional to the information being sought, and subject to a form of independent review. It must be possible to challenge the lawfulness of such measures in court.



Background rights

Law enforcement officers should be conscious that it is not intended that counter-terrorism measures interfere with basic guarantees of freedom of opinion and expression, assembly and association, religious conviction, and so forth.

"...We must never, in the fight against terrorism, lower our standards to theirs...to compromise on the protection of human rights would...hand terrorists a victory they cannot achieve on their own..."

UN Secretary General Kofi Annan, New York, September 2003

14.5 What is the place of international humanitarian law (IHL)?

International humanitarian law (IHL) is the branch of international law that deals with international or internal armed conflict by reference to the *Geneva Conventions* of 1949 and their two *Additional Protocols* of 1977.

Terrorist acts may occur during armed conflicts or in time of peace. As IHL applies only in situations of armed conflict, it does not regulate terrorist acts committed in peacetime. Counter-terrorism operations would only be governed by IHL when terrorist activities reach a level of intensity, frequency and spread such that an armed conflict situation exists. When armed violence is used outside the context of an armed conflict in the legal sense or when a person suspected of terrorist activities is not detained in connection with any armed conflict, humanitarian law does not apply. Instead, domestic laws, as well as international criminal law and human rights govern.

That is, unlike the conduct of military operations, most counter-terrorism operations would be normal civil policing operations (perhaps with some military and other assistance) premised on ultimately achieving a prosecution in a court of law.¹ The creation of special legal regimes resulting from particular conflicts should not be taken as supporting the view that, in a counter-terrorism context, the normal legal regime is not applicable. In any event, fundamental protections of international human rights law do not cease to apply in an armed conflict. IHL and human rights law complement each other.

International human rights (and humanitarian) law define the boundaries of permissible political (and military) conduct. At any one time, at least one of these two bodies of legal safeguards apply.

However, prevention, investigation and prosecution of terrorism is primarily a law and order (policing) function to which criminal law and process should apply, including human rights safeguards.

¹ For further information, see the website of the International Committee of the Red Cross, which supervises the Geneva Conventions: <http://www.icrc.org/eng/ihl>



14.6 The consequences of violations

It is useful for law enforcement officers (and particularly trainers) to consider human rights issues in counter-terrorism from the perspective of the consequences of a lack of compliance with human rights by officials. These consequences can be listed as three "P's" – principled, practical and professional consequences (see also chapter 16).

"Principled consequences" – measures that violate national and international law are wrong as a matter of legal principle.

It is important to note that the State remains responsible in international law for the acts of an officer in violation of fundamental rights. The operational conduct of an officer might have international legal consequences for the State.

As a matter of principle, the conduct of counter-terrorism operations must be according to certain standards, no matter what the behaviour of the 'other side'. If one descends to the level of those with no respect of basic rights and the rule of law, and adopt unjustifiable measures, law enforcement officers become indistinguishable from those they are combating, and lose sight of what sort of society, and values, they are seeking to defend.

"Practical consequences" – as covered in the previous chapter (13), the community is a resource in efforts to prevent and investigate terrorist activity. Indeed, it is the most useful resource:

- Most counter-terrorist operations rely on ordinary policing skills, and
- ordinary policing skills are heavily reliant on community cooperation, and
- community cooperation requires a good human rights record.

As a practical matter, then, community policing that has respect for human rights at its centre helps in the overall strategic effort to prevent and prosecute.

It is obvious that (especially over time), a heavy-handed approach to law enforcement generally, will lead to a breakdown in community relations. This may impact upon effective counter-terrorism action: unduly firm treatment of the community that creates resentment can result in disillusioned members of the community identifying with terrorists.

"Professional consequences" – Enforcement agencies should consider how history shows that a failure to self-regulate (ensure that one's methods and practices are compliant with human rights principles) can lead to public outcry and, as a consequence, the imposition of external, intrusive regulation by other agencies. If an agency abuses its powers, it is likely to find those powers taken away, or heavily supervised from outside.

Other 'professional' consequences to consider are the morale, inter-agency and public reputation, and discipline of agencies where a human rights-compliant culture is lacking. And there are of course disciplinary, civil and criminal (and perhaps even international criminal) consequences for individual officials who break the law (and violate human rights unjustifiably) in the course of trying to enforce it.



The day-to-day conduct of officials and officers involved in counter-terrorism must be viewed in the context of the wider strategic picture. A disproportionate or reckless approach towards human life and liberty undermines counter-terrorism measures.

Consider the following statement of the Secretary-General of the Council of Europe, made in September 2002:

"...The temptation for governments and parliaments in countries suffering from terrorist action is to fight fire with fire, setting aside the legal safeguards that exist in a democratic state. But...while the State has the right to employ to the full its arsenal of legal weapons to repress and prevent terrorist activities, it may not use indiscriminate measures which would only undermine the fundamental values they seek to protect. 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."

In a similar vein is a statement in October 2002 of UN Secretary General Kofi Annan:

"...to pursue security at the expense of human rights is short-sighted, self-contradictory, and (in the long run), self-defeating."



Key Points on Human Rights and Policing in a Counter-Terrorism context:

International human rights law recognises the threat that terrorists represent to the population and requires and authorises the State to act to combat terrorism.

At the same time, international human rights law imposes certain limits on what actions the State and its officials can legitimately take, or how it can take them.

By international legal consensus, there are outright prohibitions against the arbitrary use of lethal force and against State torture. There are also fairly clear limits on manner of arrest and detention, the interception of private communications, etc.

The terrorism context does not fundamentally alter basic human rights standards. All actions that impinge on human rights should pass the 'P.L.A.N' test of proportionality, legality, accountability and necessity.

At any one time, international human rights law, international humanitarian law, or international refugee law may be in application. There is no legal 'vacuum' where no law applies to conduct.

It is particularly important for trainers to note the strategic consequences of non-compliance with human rights – in terms of principle, practicality (the effect of abuse by officials on community relations and safe prosecutions) and professionalism (the effects of a poor human rights culture on the integrity, discipline and morale of the agency).

14.7 Summary

There are internationally-recognised and clear minimum standards of conduct that govern the actions of State officials engaged in counter-terrorism efforts at all stages. These standards have been developed over time by the consent and consideration of States themselves. They give justification to protective measures and set limits to State action. They are more than capable of accommodating the requirements of security. Adherence to international human rights principles by investigators should be seen not as a handicap but as further reinforcing the overall responses of democratic countries.

Respect for these basic human rights standards is an indispensable element of long-term, effective, law-based counter-terrorism responses. It is respect for the rule of law, and for minimum standards for the humane treatment, that clearly distinguishes the conduct of law enforcement officials from that of terrorists themselves. Law enforcement that is inconsistent with human rights is, in the long term, likely to be counter-productive.

14.8 Questions for evaluation

- *In what way, if any, is the policing function different in a counter-terrorism environment?*
- *What is the place of human rights standards and which are the most significant standards that apply?*
- *What international moves have there been for the application of human rights standards to State counter-terrorism measures?*
- *What are some of the consequences of non-compliance with human rights in this context?*
- *Why is it so important for trainers to include human rights issues in counter-terrorism training?*

