

Human Rights and the Fight against Terrorism: Challenges and Opportunities



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1. Challenge: Who has human rights obligations?



- States', self-evidently
- Terrorists'?
 - Issue of legitimacy
 - Issue of law
- Intergovernmental organizations'?
 - What theory?
 - Customary international law
 - Obligations under the UN Charter
 - Delegated powers
 - Rights and obligations devolve with territory

Human rights obligations and the UN Security Council



- Charter article 103 -> counter-terrorism resolutions adopted under Chapter VII (1373) trump any human rights treaty obligations?
- Res. 1456 para 6 (and 1624 para 4)
 - States must ensure that any measure 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;
- Back to square one?

Sanctions against individuals (SC res. 1267)



- SC measures may affect individuals directly, without the involvement of a member state
- *Kadi v. Council and Commission* (T-315/01) and *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* (T-306/01): any court can review whether SC resolutions are in conflict with *jus cogens*
- Meanwhile: piecemeal improvements in the sanctions regime

Mechanisms for accountability



- There is no right without a remedy. HR violation is the conclusion through a procedure
- International criminal law
 - Conventions against terrorism
 - Rome Statute of the International Criminal Court
- Articles on State Responsibility
 - Through imputation of state responsibility also the wrongfulness of the act is established
 - Tainted by the statist nature of the concept?
- Towards a World Court of Human Rights
 - Jurisdiction can be extended to IGOs, TNCs, etc.

2. Challenge: Where do human rights apply?



- Extraterritorial effect of HR treaties
 - A specific, territorial type of treaties?
- The struggle by the Eur. Court of HR
 - *Bankovic et al. v. NATO countries*
 - *Ilascu et al. v. Moldova and Russia*
- US report under the ICCPR
 - Eleanor Roosevelt 1950
 - The HRC concluding observations

HRC and the extraterritorial effect of human rights treaties



- *Lopez Burgos v. Uruguay* (1981)
 - Abduction of citizens on foreign soil by State agents
- Concluding Observations on Israel (1998 and 2003)
 - the Covenant must be held applicable to the occupied territories and those areas of Southern Lebanon and West Bekaa where Israel exercises effective control (CCPR/C/79/Add.93)
 - the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by [Israel's] authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of state responsibility of Israel under the principles of public international law (CCPR/CO/78/ISR)
- General Comment No. 31 (2004)
 - 10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction...

3. Challenge: The substance of HR when fighting terrorism?



- How serious are the loopholes?
 - Derogations during a state of emergency
 - Permissible restrictions
 - Legitimate aim/legal basis/necessary incl. proportionate
 - Risk of expanding the proportionality test into all-encompassing "balancing"
 - Torture as the paradigmatic case of a Rule
 - Reservations and their severability
 - International humanitarian law as *lex specialis*

Human rights often affected in the fight against terrorism



- The prohibition against torture and inhuman treatment (ICCPR art 7 and 10)
- The right to a fair trial (art 14)
- The prohibition against arbitrary detention (9)
- The right to leave one's own country and the right to seek asylum (ICCPR 12-13, Refugee Convention)
- The prohibition against discrimination (inter alia, profiling) (ICCPR art 26)
- Freedom of religion, freedom of expression, freedom of association (arts 18, 19, 21, 22)
- The right to privacy (art 17)

How torture is being justified



- "The ticking bomb scenario"
 - Factually, legally and morally flawed
- Redefining torture
 - "Moderate physical pressure"
- Moving torture offshore
 - Denial of extraterritorial human rights obligations
 - Denial of the applicability of IHL
 - Outsourcing torture/torture by proxy
 - Compromising *non-refoulement*
 - "Balancing test"/real risk v. "more likely than not"
 - Diplomatic assurances

4. Conclusion



- The post-9/11 challenges are welcome as they also open opportunities
- *Not* everybody agrees about human rights
- The need for good lawyers, for academic research on theory, doctrines, concepts and the nitty-gritty of treaty interpretation
- The need for solid expertise in public international law