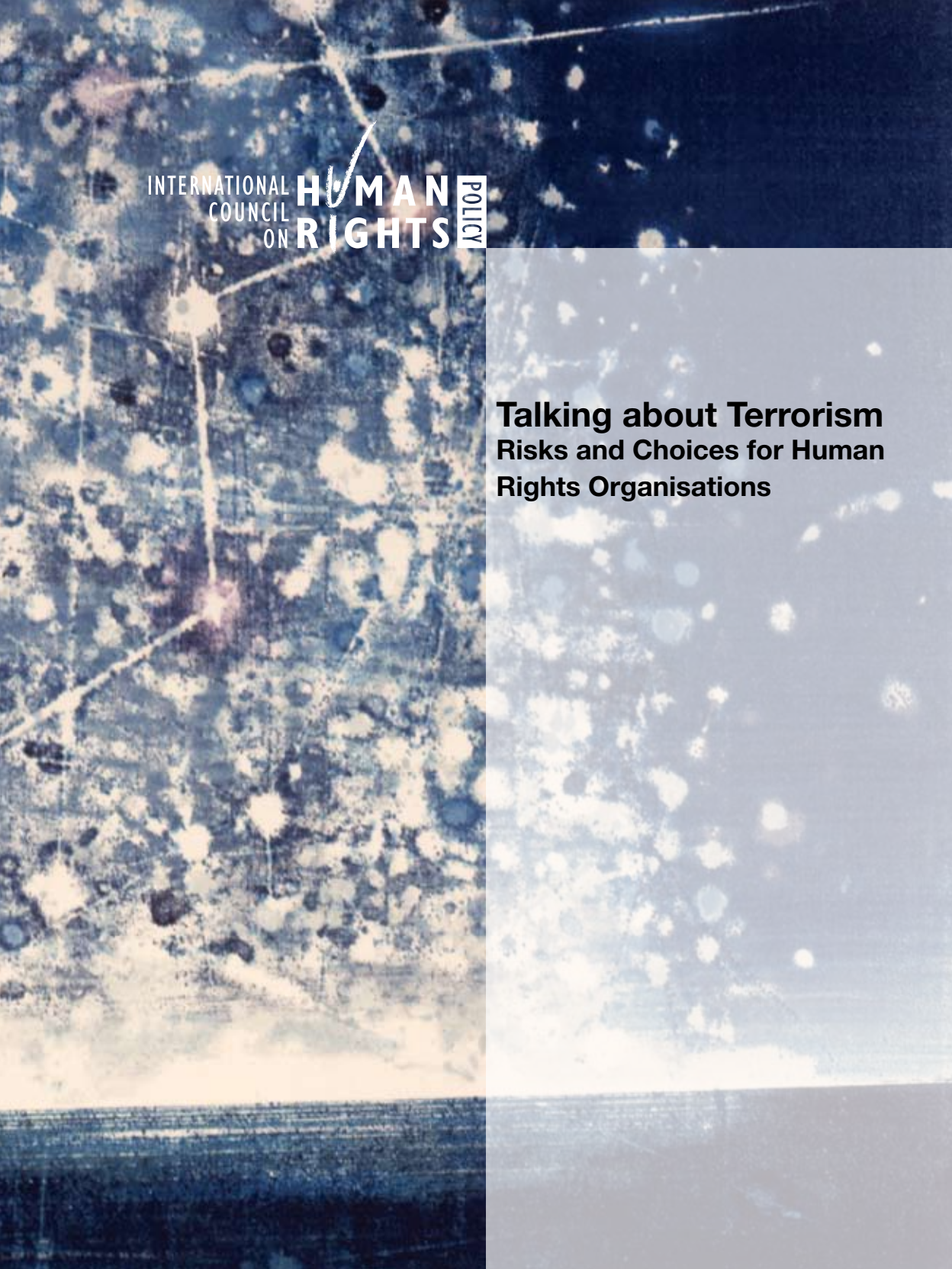


# Talking about Terrorism

## Risks and Choices for Human Rights Organisations

**International Council on Human Rights Policy**

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Cover illustration

The Milky Way, 1968, *detail*. Joichi Hoshi, 1913-1979. Coloured woodblock print.

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# Talking about Terrorism – Risks and Choices for Human Rights Organisations

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- Neil Hicks, Director, International Programs & Human Rights Defenders Program, Human Rights First: *Problems Confronting Human Rights Defenders – New Pressure Coming from States*.
- Sidney Jones, South East Asia Project Director, International Crisis Group: *Terrorism, Human Rights and Advocacy Strategies*.
- Professor Martin Scheinin, Director of the Institute for Human Rights at Åbo Akademi University (and subsequently appointed UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism): *Politically Motivated Violence and Acts of Terror: Conceptual and Legal Issues*.
- Wilder Tayler, then Legal and Policy Director of Human Rights Watch: *Notes on the Human Rights Movement and the Issue of Terrorism*.

These papers may be accessed on the International Council's web site at: www.ichrp.org/en/projects/129.

The Lahore meeting also made reference to published papers by:

- Jelena Pejic, "Terrorist Acts and Groups: A Role for International Law", *British Year Book of International Law* 75 (2005): 71-100.
- Alan B. Krueger and Jitka Maleckova, "Education, Poverty, Political Violence and Terrorism: Is There a Causal Connection?", National Bureau of Economic Research, Working Paper No. 9074, JEL No. J2 (July 2002).

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Patricia Gossman researched and prepared a first draft. Monette Zard developed and extended the draft during 2006, with additional writing by Robert Archer. Richard Carver prepared the final report and held consultations during 2007. In March 2007, the Council organised a meeting in Geneva to discuss the draft with Ghanim Alnajjar, Avi Berg, John Caulker, Aideen Gilmore, Cecilia Jimenez, Tanya Lokshina, Jelena Pejic, Aisling Reidy, Feray Salman, Malcolm Smart, Francisco Soberon and Wilder Tayler. Richard Carver subsequently visited the

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Monette Zard designed and managed this project until she left the Council at the end of 2006; it was then managed by Robert Archer in collaboration with Richard Carver.

# FOREWORD

*by Martin Scheinin*

This report by the International Council on Human Rights Policy responds to a real demand. As explained in the introductory section, human rights NGOs, human rights activists and other actors engaged in the promotion of human rights may suffer today from a certain legitimacy gap. While the role of governments as human rights violators has certainly not faded away, in many parts of the world ordinary people feel even more threatened by acts of terrorism. Hence, they may think that the human rights movement hasn't got its priorities right if it continues unilaterally to address human rights violations committed by states but is silent in respect of atrocities committed by terrorists.

The dilemma is genuine, since human rights actors also need to retain their own identity and integrity. While members of the general public may perceive human rights groups to be the conscience of humankind, committed to a noble cause and therefore always a role model for others, human rights activists for their part continue to have good grounds for choosing human rights work instead of running for political office, making a career in the military or becoming a journalist. There are different ways to "do good" locally, nationally and globally and human rights work is certainly one of the most visible and genuine choices an individual can make. But in a particular situation human rights are not always or necessarily the absolute top priority for members of the general public.

Because this legitimacy gap represents a genuine dilemma, there is no easy solution to it. Rather, human rights groups need to accept that, in addition to campaigning for their cause, they should consider the public's perception of their work and priorities. The current report will be of assistance in that process. It takes a broad approach by putting terrorism in context, inter alia by looking at the defining elements that distinguish it from other forms of protest and violence, and then discusses the legal framework that is applicable in the fight against terrorism. After that fairly thorough but at the same time non-technical discussion, the report moves on to tackle the legitimacy issues encountered by human rights actors. In a well-founded way it discusses problems that arise, as well as solutions to those problems, when human rights groups discuss policies to address terrorism with governments and the general public, and even with groups that may be tempted to resort to violence themselves.

The report is a welcome addition to the line of original and thoughtful studies by the Council.

*Professor Martin Scheinin is the Director of the Institute for Human Rights, Åbo Akademi University in Finland, and is the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.*

## INTRODUCTION AND BACKGROUND

Extreme violence and terrorism have created a variety of challenges and dilemmas for human rights advocates. In many countries these were further complicated by the events of September 2001, which triggered a profound and often disturbing debate about how societies and governments should respond to terrorist acts while respecting human rights and the rule of law.[1]

Critics argue that human rights organisations have not positioned themselves to advantage in this discussion. It is claimed they spend too much time defending the rights of people accused of terrorist offences and too little advocating the rights of victims; and that they have misread the profound threat that modern terrorism poses. These criticisms have been particularly directed at international human rights organisations and at those active in predominantly non-Muslim countries that have been the target of attacks by jihadist armed groups.

This report examines some of these criticisms and asks how human rights advocates can most effectively shape public policy and influence public attitudes in this area (as well as engage with non-state groups that use violence or sympathise with its use), while continuing to defend human rights and the rule of law.

Terrorism is generally understood to refer to the deliberate killing of innocent people (and hostage-taking and destruction of property) in order to spread fear through populations and force the hand of political leaders.[2] Militant groups seeking to overthrow authority have frequently used exemplary violence to intimidate political opponents via public opinion. States too have employed terror to intimidate and repress their opponents. The latter issue is not addressed in this report, not to minimise its importance, but because the human rights movement has not encountered the same problems of law and policy in addressing itself to state terror.

The subject that this report addresses is therefore not political violence as such, but its most extreme manifestations, whatever cause is enlisted as justification. It is precisely because extreme violence or terrorism is so often a tactic employed by the weak against the powerful that there has often been reluctance on the part of human rights groups to engage fully with the issues that it poses.

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1 This debate has been deepened by other terrorist incidents, for example in Amman (2005), Bali (2005 and 2002), Istanbul (2003), London (2005), Madrid (2004), and Riyadh (2003).

2 Walzer, 2002. Walzer distinguishes this basic and most widespread form of terrorism from 'state terrorism' used by governments against their people to spread fear, and from 'war terrorism', the effort to kill civilians in such large numbers that their government is forced to surrender.

## International law

If political motivation distinguishes an act of terrorism from mere criminal violence, in practice the distinction is often contested. Violent acts are not defendable purely because they may have a political motive. Human rights groups have had to tread a fine line in their attempts to preserve space for legitimate forms of political struggle while ensuring that gratuitous or unjustified violence is condemned.

They have generally refused to employ the term "terrorism" and used specific definitions of terrorist acts contained in international treaties. Broadly speaking, read together with international humanitarian law (IHL) and international human rights law, these treaties establish parameters of acceptable conduct in almost all situations, both during peacetime and when a state of war exists.

In peacetime, international human rights law is most relevant. It focuses primarily on the responsibilities and obligations of states and assigns limited responsibility to other actors, such as independent armed groups. Though the human rights framework does not explicitly state when and how violence can legitimately be used, it is not pacifist (although of course some advocates are). Complex and nuanced tests have evolved to determine the legitimacy of any resort to violence (notably in extradition law, which traditionally makes exceptions for "political offences"). These tests assess the aim, purpose or motivation of violence: whether it is proportionate when assessed against these purposes; whether it is targeted or indiscriminate, etc. When violent acts are judged to have failed such tests, they are regarded in law as common crimes that should be dealt with by the domestic legal system.

In conditions of war (that is, when it has been determined that an international or internal armed conflict exists), international humanitarian law applies. This binds both state and non-state actors (if they attain a certain level of organisation) to respect certain core principles. They are required, for example, to distinguish between civilians and combatants, and to use violence proportionately and within certain limits.[3] Although this is a matter of some controversy, human rights norms continue to apply to a considerable extent, even in armed conflict.[4]

It should be added that international criminal law has evolved rapidly in recent years. The latter assigns individual responsibility for particularly heinous acts such as war crimes and crimes against humanity. In such cases, it is essentially irrelevant whether a state of war or peace exists. The creation of an International Criminal Court (ICC) in 2002 will tend to entrench international accountability for such crimes.

3 These rules, that underpin IHL are set out primarily in the four Geneva Conventions of 1949 and two Additional Protocols of 1977. For more information see www.icrc.org.

4 Doswald-Beck, 2006.

## A new political context?

Unfortunately, although these bodies of law provide tools for distinguishing between legitimate and other forms of political struggle, including terrorism, they are complex to apply and are not easily communicated to a broad public, especially one that is anxious about its safety.

In addition, changes in the political environment have further complicated matters. Following the events of September 2001, efforts to conclude a Comprehensive Convention on International Terrorism intensified. The Security Council formed a Counter-Terrorism Committee in 2001, which has been increasingly active and requires states to take action to combat terrorism. As a result of this and a range of other diplomatic initiatives, many governments have introduced new legislation designed to monitor and restrict activities (such as arms trading, electronic communications and money laundering) that can assist or provide a cover for terrorism. In many cases this legislation serves at the same time to strengthen government powers and curtail privacy and other civil rights.

Some governments have gone further and challenged established principles of human rights law and state behaviour. Willingness to allow highly coercive interrogation techniques has put in question the absolute prohibition on all forms of torture and cruel, inhuman or degrading treatment. States have also been willing (informally for the moment) to send individuals in their custody to other countries where they may face torture or persecution, though this too is formally prohibited. Use of administrative detention, particularly of foreigners, has increased. Non-discrimination – a fundamental principle of the human rights framework that has always been vulnerable in war – has been undermined by more aggressive surveillance and detention practices. Each of these developments has been justified on the grounds that innocent civilians need to be protected.

Human rights organisations have recognised the significance of these policy changes and have realised that their traditional forms of advocacy do not equip them to address all aspects of the political environment that is emerging. Should they continue to focus their advocacy on civil liberties even though they may forfeit their ability to influence key areas of policy? Are some matters outside the sphere of human rights work? Or should they engage with the new agenda – and risk undermining core values they exist to uphold? Is not terrorism itself a challenge to the values underlying human rights and hence a proper concern for human rights organisations?

These particular dilemmas have been posed most sharply in countries where terror attacks are perceived to come from beyond the national borders and to have few or no roots in local society (a perception that may be incorrect). Industrialised countries such as the United States, the United Kingdom and the Russian Federation clearly fall into this category; but the divide here is

not between the geo-political North and South (or East and West). Kenya, for example, is another country where there is a widespread perception that it has become caught up in a global dispute that is none of its concern.

Similar dilemmas and choices arise where armed insurgent groups are widely feared for the severity of their abuses against their civilian population: Peru, Sierra Leone, Uganda and Algeria provide four of the sharpest examples.

In other scenarios human rights groups may be criticised on different grounds – for failing to understand and sympathise with the reasons for violent insurgency, for relying on the rule of law in ways that are seen to be naïve or unrealistic, or for being ready to engage with governments that seem to lack the most elementary good faith. Such situations are not the primary focus of this report, although a final chapter does consider the question of how human rights advocates might speak to those who advocate extreme violence or who support armed groups labelled by many as "terrorist".

It is very important to emphasise the wide variety of different political contexts that exist at national level (and the fact that a report such as this one cannot address every situation). Different social groups may also experience the same situation in different ways, depending on their political, ethnic or religious affiliation. The possibility of extreme violence may be experienced as a threat, whether immediate or distant. Or it may be seen as containing liberating possibilities. It may even be both at the same time.

The agents of such extreme violence may be from the same community or from outside, a factor that is certain to influence how the violence is perceived. Those responsible may be members of non-state armed groups or they may be state forces. In a number of instances they may be a mixture – government, or elements of it, may sponsor or foment terrorist violence.

Finally, it must be remembered that, in these situations, human rights advocates often face particularly difficult problems. As defenders of democracy and the rule of law, they themselves become the target of political movements, including perhaps both government supporters and extreme violent groups. Such has been the case in several South Asian countries. Human rights organisations may find that their very existence comes under challenge as the public polarises away from the "middle ground" of reasoned argument and the rule of law is challenged from different points of the political spectrum by those who use or advocate political violence.

## Human rights organisations

The issues raised in this report are of greater relevance to non-governmental human rights organisations than to others concerned with the defence of human rights, for example in government, intergovernmental organisations,

the judicial system or even national human rights institutions (NHRIs). Terms such as "human rights organisations" or "human rights advocates" are used interchangeably in this report and can generally be understood to refer to non-governmental groups, unless the context indicates otherwise.

Other types of human rights defenders – in government, the judiciary or in intergovernmental organisations, for example – do not generally encounter the same criticisms as non-governmental human rights organisations on the issue of terrorism, nor do they face the same dilemmas. In such institutions, the responsibility to address the problem of terrorism is clearly understood, although it may of course prompt sharp debates about the best way to proceed. Hence judges may be highly critical of government practices and overbroad anti-terrorist laws. The United Nations human rights machinery may find itself at odds with the Security Council and the Counter-Terrorism Committee.[5] To that extent, the discussion in this report may be of wider relevance. However, national criminal justice systems and the United Nations do not generally face the accusation that they are "soft" on terrorism. The matters under consideration here primarily concern non-governmental human rights defenders.

A word needs to be added about the potentially awkward position of national human rights institutions. These are official, statutory bodies whose principal responsibility is to monitor government behaviour. To the extent that their monitoring of government practice relates to terrorism and counter-terrorist measures, the discussion in this report may be relevant. However, NHRIs, by virtue of their official character, may find it much more difficult to address themselves to the impact of terrorist violence since, unlike non-governmental organisations (NGOs), they are unlikely to be perceived as impartial. The Uganda Human Rights Commission, for example, has been criticised for its condemnation of abuses by an opposition armed group.

It is important also to note that national and international human rights NGOs have rather different experiences of confronting the dilemmas posed by terrorism. Indeed the dilemmas may be different and this may circumscribe their response. National groups, for example, may find it easier to address the totality of issues surrounding a political conflict that leads to terrorist violence; at the same time, they may face practical constraints, such as threats to their own security, that affect international groups less.

5 See, for example, *Report of the Human Rights Committee*, 2004, UN Doc A/59/40 Vol 1 56-60 (Belgium); *Report of the Human Rights Committee*, 2006, UN Doc A/61/40 Vol 1 20-25 (Canada); See also *Castillo Petruzzi et al. v. Peru* [1999] IACHR 6 (30 May 1999) para. 121.

# PART ONE

## BACKGROUND AND LAW

# I. TERRORISM: CONTEXT AND BACKGROUND

In later chapters we will discuss the legal definition of terrorism and the different frameworks of law that have been developed to determine when use of violence is justified and proportionate. This chapter puts modern terrorism in context and suggests how human rights organisations have responded to it historically.

Government officials, the public and "terrorists" themselves, look at politically-inspired violence from very different points of view, and do not generally frame their discussions of terrorism in precise legal terms. On the contrary: most discussion of this issue is charged with emotion and shaped by political loyalties. Those who are the objects of attack tend to describe terrorism (and those who commit terrorist acts) as criminal, evil or irrational, while sympathisers may regard those who commit the violence as heroes or defenders of justice.

The *criminality* of terrorism is hardly in doubt, at least in purely legal terms. Yet, precisely because terrorism is designed to create an atmosphere of fear and emotional anxiety (far outweighing its military threat), it generates powerful emotions that tend to be amplified by an observer's political loyalties, memories of past loss and proximity to risk.

The moral charge that terrorism is *evil* is an even more fickle political reference. In numerous instances, terrorists who have been vilified and ostracised for their activities have subsequently been integrated into the political establishment, either because their aims have been achieved or in order to stem violence. A notable recent example is the involvement of Irish republican leaders in the government of Northern Ireland. The role that Zionist terrorist groups played in the creation of the state of Israel provides another.

The description of terrorism as *irrational* also depends on perspective. Those who adopt terrorist methods say that they respond to circumstances and evaluate their methods by results; they certainly consider they act rationally. For victims, on the other hand, the violence inflicted upon them is indeed experienced as arbitrary, unpredictable and without cause or justification.

Because it is so difficult to speak objectively about terrorism, it is therefore essential to speak in careful terms. In this context, it is increasingly recognised how much harm the United States administration did (not least to its own interests) when it loosely proclaimed, after the attacks in September 2001, that it was engaged in a "war on terror". Legally the situation could not accurately be described as a war, while "terror" and "terrorism" are not tangible enemies.[6] Ill-considered language has led the government down a path that damaged the quality of its policy-making, undermined protection of human rights in many countries and arguably harmed the country's larger interests.

6 See Abi-Saab, 2002; Megret, 2002; Sassoli, 2006a.

## What is terrorism?

Terrorism is essentially a method that seeks to achieve political goals by spreading fear. As noted, governments have also used terror as a tactic, but it is particularly associated with "asymmetrical conflicts" where one party is militarily much weaker than the other. A recent history of the car bomb described this weapon – the terrorist tactic par excellence – as the "poor man's air force". This is not to romanticise the impact of terrorism. The same writer described the car bomb as "an inherently fascist weapon guaranteed to leave its perpetrators awash in the blood of innocents".[7] It must be stressed, at the same time, that many armed groups fighting on unequal terms have elected *not* to use terrorist violence, on military, political or ethical grounds. Those who choose terrorist tactics should naturally be held responsible for the choices they make. This said, irrespective of where one stands on the political spectrum, it is important to understand the logic and character of politically-motivated violence, in order to prevent or contain it, or contain its abuse.

Currently, suicide bombing is the aspect of terrorism that tends to arouse greatest public concern. This is partly because it is so difficult to combat. Suicide bombing undoubtedly brings another dimension to terrorist attacks. Past security measures have been premised on the assumption that terrorists will wish to escape alive (hence procedures such as matching airline passengers with their hold baggage). Suicide bombing is effective because it evades such measures. Attacks are often technically simpler as well: truck bombs of the kind that have killed thousands of people in Iraq can be exploded more easily if they are steered and detonated by a human driver. The fear they inspire, as well as the technical difficulties of combating them, often lead security agencies to overreact. In Iraq and other conflicts, many individuals have been shot in their vehicles because they have been mistaken for suicide bombers; in an infamous incident in London in 2005 a Brazilian was shot dead by police on the London Underground for the same reason.

The murderous effect of suicide bombs, and their ability to spread fear, are therefore not in question. However, it is often assumed, less reasonably, that their use demonstrates the irrational intransigence of those who plan and carry them. Discussions in the popular media tend particularly to associate both suicide bombing and tolerance of suicide with Islam, which has not helped sensible appraisal. All military cultures place a high premium on self-sacrifice (witness the Japanese *kamikaze* pilots in the Pacific war of the 1940s); Islam, in common with other major religions, prohibits suicide; and the Liberation Tigers of Tamil Eelam (who are not Muslim) were responsible for the suicide bombings that killed most people between 1980 and September 2001.[8] It should be recalled also that the mere use of suicide tactics does not in itself constitute

7 Davis, 2007, p. 10.

8 Pape, 2003.

terrorism. Because they attacked military targets, the *kamikaze* pilots were not terrorists in legal terms. Those who attack military targets in a range of armed conflicts today are not terrorists for the same reason.

Moreover, studies of suicide bombers have shown that many are well-educated and have stable social backgrounds. They are often motivated by desperation at the obstacles in the way of their cause, or by personal bereavement. Many have been motivated by revenge, after family or friends have been killed.[9] One study of suicide terrorism concluded that promotion of nationalist aims has been the main objective of all suicide bombing campaigns since 1980, and suggested this was so because nationalism most effectively offsets the loss of support that extreme tactics cause in terrorists' own communities:

> …[I]t is not that the terrorists pursue radical goals and then seek others' support. Rather, the terrorists are simply the members of their societies who are the most optimistic about the usefulness of violence for achieving goals that many, and often most, support.[10]

Many of the groups that have used suicide bombers – including Hizb'allah in Lebanon, Hamas in Palestine, the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, various Chechen national groups, different Iraqi factions – have had the rational and often realisable goal of securing national self-determination. Pape argues that even al-Qaeda fits this pattern on the grounds that two of its stated demands were the expulsion of United States (US) troops from the Arabian Peninsula and of Israeli troops from Jerusalem. Both these aims are technically realisable (could be the subject of negotiation) and command political support.[11]

Al-Qaeda is hardly a classic example of nationalist terrorism, however. Not only is it not recognisably an organisation (being more like a network, or even a franchise[12]). More importantly, it appears to belong in a tradition of terrorism that emphasises the cleansing power of violence. This view considers terrorism to be, not a last resort of the weak, but an act that has its own virtue. An early expression of this tradition can be found in an anarchist tract of the 1880s, which argued:

- "Outrageous violence will seize the public imagination;
- Its audience can thus be awakened to political issues;
- Violence is inherently empowering and a "cleansing force";

9 Pedahzur, 2006, p. 202.

10 Pape, 2003.

11 Ould Mohamedou, 2005, p. 29.

12 Burke, 2004, p. 355.

- Systematic violence can threaten the state and impel it into delegitimising reactions;
- Violence can destabilise the social order and threaten social breakdown;
- Ultimately the people will reject the government and turn to the "terrorists".[13]

For human rights advocates (and others), groups that speak in such terms are particularly intractable. They speak a language that hardly seems to intersect with the vocabulary of rights and seek aims that often seem antipathetic to the aims of human rights actors. If this space is occupied by al-Qaeda, it is also most definitely the territory of several other current or recent armed groups: the Lord's Resistance Army in Uganda, Sendero Luminoso in Peru, and arguably several of the factions in recent conflicts in Liberia and Sierra Leone.

Because of the fear they generate, discussions of terrorism tend also to focus on the present. It is therefore important to remember that extreme forms of politically-motivated violence have a long past. Anarchist violence prompted considerable alarm in the late nineteenth and early twentieth centuries. It manifested itself in political assassinations and random attacks on civilians, such as Mario Buda's prototype car bomb attack on Wall Street in 1920.[14] Anarchists accounted for a Russian Tsar, an American president and a French prime minister. They also communicated with one another internationally (the French prime minister was killed by an Italian) and made use of dangerous new technologies, notably dynamite.

A later generation of terrorists had similar characteristics. Many left-wing terrorist groups in the 1960s and 1970s had international links, and shared a common interest in the Palestinian struggle. They too made use of recent explosives technology (in this case Semtex), threatened air and sea transport, and put civilian lives at great risk.[15]

Put in this context, the threat that current forms of terrorism pose in the early twenty-first century does not look so unusual. Current and past movements have created international connections; each has tried to exploit advances in technology to develop new weapons.

Will today's movements develop chemical, biological or even nuclear weapons? The risk this poses is no doubt considerable – though perilously difficult to

13 Johannes Most's Philosophy of the Bomb, cited in Townshend, 2002, p. 157.

14 Davis, 2007.

15 It is worth noting that the Venezuelan Ilich Ramirez Sanchez (nicknamed "Carlos the Jackal"), who was the Osama bin Laden of his day, was blamed inaccurately for terrorist attacks such as the massacre of Israeli athletes at the 1972 Munich Olympics and the 1976 hijacking of an Air France flight to Entebbe in Uganda.

estimate, given the inaccuracy of so many official statements on the matter. There has been one chemical terrorist attack (a 1995 sarin gas attack on the Tokyo subway by the Aum Shinrikyo sect, in which twelve people died). Several people also died from anthrax disseminated through the US postal system soon after September 2001. In London in 2003 police claimed to have uncovered a terrorist plot involving the poison ricin (though no ricin was found and it later emerged that no-one involved had the expertise to make it.[16])

The greatest fear is that terrorists will gain access to nuclear weapons. Given the rate of nuclear proliferation, this is not itself improbable. The practical obstacle for armed groups (and also states) is developing a delivery system that will explode such a bomb. Given the technical difficulty of doing this, attention has centred on the threat posed by "dirty bombs" – conventional explosive devices that would disperse radioactive material. The practicability of these is disputed, and such a bomb has never been used. Two are known to have been created by Chechen rebels, but neither exploded. Nevertheless, the potential for massive loss of life is real.

The danger is that contemporary technological advances, combined with the emergence of armed groups that would be prepared to use them, might lead to terrorist attacks that would cause death on an unprecedented scale. The civilian casualties caused by terrorists using conventional weapons, in Algeria, Pakistan, Afghanistan and Iraq, illustrate the scale of the potential threat.

When discussing such risks, terrorists' aims and motivation are an important factor. Terrorist violence is almost invariably symbolic. This was clearly true of the September 11 attacks in the United States, where the targets selected were visible symbols of US financial and military power. The same may be said of Sierra Leonean rebels who severed the hands of civilians to stop them from voting. In both instances, the violence used was simultaneously coercive and demonstrative. It made a point. In the words of Regis Debray, these were "manifestos written in the blood of others".[17]

The September 11 attacks were the largest terrorist attacks in history, whether measured by death toll or symbolic impact. However, in addition to their human consequences, their significance lies in their effect on government policies. Many states reoriented their foreign and domestic policies towards security and counter-terrorism in ways that have affected a wide range of policy processes – in fields from banking and immigration, to surveillance and legal procedure. These changes have become the subject of a new policy controversy. Adherents argue they are the necessary response to a new and profound threat. Critics

16 All those charged with conspiracy to commit murder were acquitted. One was convicted of "public nuisance" and another two with possession of false passports.

17 Debray, 2002, p. 11.

claim that these policies are exaggerated and ill-conceived, and will have the opposite effect to that intended, because they give al-Qaeda legitimacy and recognition and thereby promote the latter's objectives.

## The historical response of human rights groups

Historically, the way that human rights organisations dealt with violence committed by armed groups reflected the central importance of international human rights law to their work. Because these standards apply primarily to the powers and obligations of states, the behaviour of armed non-governmental groups was considered to fall outside the scope and authority of human rights monitoring; since non-state actors do not ratify international human rights treaties, they could not be held responsible for implementing them. In line with this thinking, until the 1980s human rights organisations tended to condemn abuses by armed groups where appropriate, but did not engage further. International human rights groups generally did not concede, for example, that campaigns by extremely violent groups like RENAMO (Resistência Nacional Moçambicana) or the Contras in Nicaragua had such a destructive effect on the fabric of society that they prevented governments in the countries concerned from meeting their human rights obligations (especially, but not exclusively, in the field of economic and social rights).

For many years, Amnesty International therefore took the view that "abuses" by armed groups (then called "non-governmental entities") should be distinguished from "violations" of human rights by government. Until 1991 the organisation did not conduct research or campaigning activities on abuses by non-governmental entities. In that year, Amnesty International's sovereign body, the International Council Meeting, changed this long-standing position, recognising "the seriousness of the human suffering caused by acts against individuals, in contravention of fundamental standards of humane behaviour, that are perpetrated by political non-governmental entities". The starting point of this change was clearly the perspective and rights of victims. The same decision clarified that Amnesty International "should continue to regard human rights as the individual's rights in relation to governmental authority".[18]

In parallel, during the 1980s Human Rights Watch had started to work directly on abuses carried out by armed opposition groups, particularly in Nicaragua and El Salvador. Human Rights Watch sidestepped the problem of how to fit the behaviour of non-government actors into international human rights law by applying international humanitarian law, notably Protocol II additional to the Geneva Conventions and Common Article 3 of the Geneva Conventions. The reasons why it took this approach are instructive. It felt the need to appear

18 Cited in Wilder Tayler, "Notes on the Human Rights Movement and the Issue of Terrorism", paper for International Council on Human Rights Policy, Meeting on Human Rights and Political Violence, Lahore, May 2005.

balanced in its reporting of abuses in a conflict situation that had global political implications. It was also sensible of the fact that the claims of the victims of the war had been somewhat neglected by human rights organisations.

**Terrorism: evolution of an international response**

The late 1980s saw activities emerge at a different UN level. In the Commission on Human Rights, governments led by Colombia and Peru started pushing for a resolution on the threat to human rights posed by the activities of armed opposition groups. In 1990 the Commission adopted a resolution entitled "Consequences of acts of violence committed by armed groups that spread terror among the population and by drug traffickers on the enjoyment of human rights". The text expressed deep concern at the "adverse effect, on the enjoyment of human rights, of persistent acts of violence committed in many countries by armed groups, regardless of their origin, that spread terror among the population …". The Commission mechanisms were asked to pay attention to those acts of violence in their reports and non-governmental organisations were encouraged "to bear in mind the adverse effect, on the enjoyment of human rights, of the acts of violence committed ... by armed groups ...". Non-governmental organisations (NGOs) and some Western states opposed this trend because they feared it could redirect the attention of international bodies monitoring human rights violations. The Commission continued to pass this resolution for a number of years, but it fell short of qualifying acts of terror as human rights violations.

Between 1995 and 2004, a different type of resolution on "Human Rights and Terrorism" was passed each year. In its preambular paragraphs the resolution expressed deep concern about the "gross violations of human rights perpetrated by terrorist groups". In its operative paragraphs it went on to condemn "all acts, methods and practices of terrorism, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, as acts aimed at the destruction of human rights, fundamental freedoms and democracy …". Starting in 1999 the Commission also condemned "violations of the right to live free from fear and of the right to life, liberty and security". The Sub-commission, for its part, appointed a Special Rapporteur to conduct a study on human rights and terrorism that was finalised in 2004.

It is noteworthy that whereas human rights advocates have striven to demarcate clearly in their advocacy and reporting, the line between "violations" of human rights committed by states, and human rights "abuses" committed by non state actors, such legal niceties have not been observed by other important human rights actors.

This said, NGOs campaigned for the creation of an independent enquiry mechanism on the promotion and protection of human rights while countering terrorism, finally established by the Commission on Human rights in 2005.[19]

At national level, human rights organisations were often obliged to take public positions on abuses by armed groups, to retain their credibility. This created many problems for domestic human rights researchers and advocates. Just as critics of governments that violate human rights are routinely accused of working on behalf of the government's political opponents, so those who try to report the abuses, or influence the behaviour, of opposition armed groups often put themselves (or those they try to protect) at physical risk.

19 Now the Special Rapporteur of the Human Rights Council on the promotion and protection of human rights while countering terrorism.

As Amnesty International and Human Rights Watch (and scholars) have struggled with this issue, concerted attempts have been made to theorise the position of non-state actors within international human rights law. At the same time, human rights groups, both international and domestic, have repeatedly grappled with acutely difficult situations involving terrorist violence. A consistent approach is hardly any closer, although the scholarly consensus is definitely shifting towards a view that states are no longer the sole subjects of international law.[20]

Even after human rights groups began to monitor abuses by armed opposition more systematically, however, they did not seriously engage with the question of terrorism. Before 2001 many were unwilling to employ the term or discuss its existence, both because they were unclear what "terrorism" denoted and because they wished to avoid politically biased categorisation of certain groups as "terrorist" (while other groups escaped the label). In some societies, like Turkey, human rights groups avoided the term altogether, regarding it as a label used by government to dehumanise opponents and deny them their rights. Most organisations were willing to speak only of "terrorist acts".[21] For the same reasons, human rights groups did not participate actively in multilateral efforts before 2001 to define terrorism or punish those accused of it. Even in 1996, they were largely absent from a failed attempt to adopt a United Nations (UN) Comprehensive Convention on International Terrorism.

Human rights groups generally classified terrorist acts as crimes, which could be addressed appropriately by domestic or international law enforcement measures, largely mirroring the approach taken by states in the 1980s and 1990s.[22] After September 11, however, and subsequent attacks in Madrid, London, Amman, Bali, Mumbai and elsewhere, the sustainability of a law enforcement approach was questioned. The scale and character of the attacks and the sophisticated planning that preceded them were seen to be new; and international responses to them, led by the United States, took an explicitly military form. Especially in industrial countries that suffered attack, many human

20 Alston, Academy of European Law, and New York University, Center for Human Rights and Global Justice, 2005, p. 387. Clapham, 1993, p. 385.

21 There are many examples of selective labelling. An intriguing recent one comes from the United Kingdom where two men arrested for possession of large quantities of chemicals and bomb-making equipment were rather noticeably *not* charged under the Terrorism Act but under a law dating from the nineteenth century. They were members of a neo-Nazi group accused of planning racist attacks. Islamist militants arrested in similar circumstances have invariably been charged under anti-terrorism laws.

22 After the Lockerbie bombing, for example, the US government worked primarily through the UN Security Council to ensure that the perpetrators were brought to trial. Law enforcement was also the principal approach applied when the World Trade Centre was bombed in 1993 and following the bombings in Dar es Salaam and Nairobi in 1998.

rights organisations felt that these developments had profound implications for their work. In addition, new criticisms of human rights emerged. Organisations that sought to uphold a criminal justice approach (with the emphasis on checking executive power that it implies) were portrayed as naïve and slow to adapt to the new realities.[23] As already noted, a number of fundamental human rights legal principles were questioned. Some observers also claimed that an insecure public was impatient with arguments that highlighted the due process rights of those accused of terrorism and did not stress to the same extent the rights of victims.[24]

The first response of human rights advocates was to draw on international humanitarian law (IHL), which explicitly applies to all parties to an armed conflict, including non-state actors. Even before 2001, human rights advocates had used an IHL analysis to monitor and assess the activities of armed groups that qualified as parties in an internal or international armed conflict. This expertise was put to good use after September 2001, principally in Afghanistan. Nevertheless, an IHL approach was not sufficient. While use of the terminology of "war" might appeal in a rhetorical sense, many acts of violence against civilians take place away from theatres of conflict, where IHL does not apply. In addition, many of the groups in question did not meet IHL criteria for defining them as "parties to a conflict". Indeed, few outside the United States consider that the situation after September 2001 qualifies as a global armed conflict.

The new political environment has therefore profoundly challenged human rights advocates in many countries. They have felt obliged to ask themselves whether they should change or adapt their practice, and their reading of legal principles, in order to engage effectively with new policy issues that the "war on terror" has forced into the public domain.

The next chapter and chapter IV look at legal aspects of this problem. Chapter III explores existing international conventions and their definitions of terrorism, and asks whether a global definition of terrorism is desirable or achievable. The main obstacles to achieving agreement are discussed, including 'right to resistance' and 'state terrorism'. Chapter IV examines the contribution that can be made by the three most relevant bodies of law: international humanitarian law, international criminal law, and international human rights law. In discussing IHL, the report examines whether the "war on terror" *is* a war, in terms of IHL, and more briefly the issues of collateral damage and proportionality.

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23 See for example David Rieff, "What is Really at Stake in the US Campaign Against Terrorism", Crimes of War Project, available at www.crimesofwar.org. Over time, court judgments (and the failure of purely military policies) have begun to restore the credibility of law enforcement approaches, both in Europe and in the United States. However, courts work with extreme slowness and a strategy based on judicial review would not meet the need either.

24 Whether this perception of public attitudes is correct is discussed in Chapter V.

# II. THE LEGAL FRAMEWORK: DEFINING TERRORISM

## What is a terrorist act?

States have tried unsuccessfully to agree a definition of terrorism in international law since at least 1937.[25] The search has been likened to the quest for the Holy Grail.[26] After the September 2001 attacks, a United Nations (UN) Security Council Resolution noted that states shall "prevent and suppress the financing of terrorist acts" and take the "necessary steps to prevent the commission of terrorist acts", but it did not define the term "terrorist acts"[27] – and agreement in the United Nations on a Comprehensive Convention on International Terrorism has been stalled since. Traditional stumbling blocks to agreement include where to draw the line between terrorism and legitimate acts of resistance; whether states should be held legally responsible for committing acts of terrorism; and how the legal regime established by the Convention will be delimited from international humanitarian law (IHL). As one commentator has noted, agreement has proved difficult because states have tended to focus too much on who could be labelled a terrorist rather than what a terrorist act looks like.[28]

> Article 2(1) of the Draft Comprehensive Convention on International Terrorism provides that:
>
> (1) Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
>
> (a) Death or serious bodily injury to any person; or
>
> (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
>
> (c) Damage to property, places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss,
>
> when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or abstain from doing an act.

Although negotiations on the Comprehensive Convention have been unsuccessful, many sectoral as well as regional and domestic definitions of terrorism have been elaborated since the Tokyo Convention on offences committed on aircraft entered into force in 1969. Some were created in reaction to specific incidents of terrorism, or to procedural difficulties presented by the

25 For a good overview see Golder and Williams, 2004.

26 Levitt, 1986.

27 UNSC, UN Doc S/Res/1373 of 28 September 2001.

28 Nick Howen, *Military Force and Criminal Justice: The US Response to 11 September and International Law*, paper for an ICHRP meeting on Global Trends and Human Rights: Before and After September 11, Geneva, 13-12 January 2002.

international dimension of specific incidents. For example, the October 1985 seizure of the Achille Lauro by the Palestine Liberation Front is considered to be the catalyst for the 1988 Convention for the Suppression of Acts against the Safety of Maritime Navigation. The themes covered by these conventions include the criminalisation of specific acts against certain categories of persons and against civil aviation and maritime navigation. The conventions also prohibit the use of bombs and other explosive or nuclear materials, and the financing of terrorism.

Regional organisations have also adopted a number of binding instruments in relation to terrorism. The Organisation of American States, probably the first to do so, adopted a treaty in 1971 to prevent and punish acts of terrorism against persons "to whom the state has the duty according to international law to give special protection" (generally diplomats and public officials). The Council of Europe approved the European Convention on the Suppression of Terrorism in 1977 (and, more recently, a Convention on the Prevention of Terrorism in 2006). The South Asian Association for Regional Cooperation (SAARC) (1987), the League of Arab States (1998), the Organisation of Islamic Conference (1999), the Commonwealth of Independent States (1999) and the Organisation of African Unity (1999) all followed suit.[29] Many of the regional conventions go further than global treaties in defining terrorism, introducing concepts such as state terrorism, and environmental and technological terrorism. The African Union (AU – succeeding the Organisation of African Unity), Arab and Islamic regional treaties exclude from their definition of terrorism struggles for self-determination and liberation from foreign occupation, aggression and colonialism.[30]

All the above conventions require an international element in order to trigger their mechanisms, so that the perpetrator or the victim of the crime must be of

29 See for example Arab Convention for the Suppression of Terrorism, April 22, 1998, League of Arab States, at www.al-bab.com/arab/docs/league/terrorism98.htm; Convention of the Organization of the Islamic Conference on Combating International Terrorism, July 1, 1999, at www.oic-un.org/26icfm/c.html; European Convention on the Suppression of Terrorism, January 27, 1977, 1137 UNT.S. 93, 94; Council of Europe Convention on the Prevention of Terrorism (2005), CETS Number 196, at http://conventions.coe.int/Treaty/en/Treaties/Html/090.htm and http://conventions.coe.int/Treaty/EN/Treaties/Html/196.htm; *OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, February 2, 1971*, available at www.oas.org/juridico/english/Treaties/a-49.html; OAU Convention on the Prevention and Combating of Terrorism, July 14, 1999, at http://untreaty.un.org/English/Terrorism/oau_e.pdf. SAARC Regional Convention on Suppression of Terrorism, November 4, 1987, at http://untreaty.un.org/English/Terrorism/Conv18.pdf.

30 See Arab Convention on the Suppression of Terrorism, Article 2(a). The Article goes on to note that "[t]his provision shall not apply to any act prejudicing the territorial integrity of any Arab State". See also Convention of the Organisation of the Islamic Conference on Combating International Terrorism, Art.2(a); OAU Convention on the Prevention and Combating of Terrorism, Art.3(1). See Laferrière, 2002.

different nationalities, or the jurisdiction must belong to a different state. Their application is therefore restricted to "international" terrorism.

Most acts described also require the existence of a specific intent, for example to "intimidate a population" or "to compel a government or an international organisation to do or to abstain from doing" something. The vast majority of the treaties seek to protect civilians or civilian property. All the treaties establish the obligation to criminalise the actions defined, and include an obligation to extradite or prosecute. All the treaties contain some references to fundamental human rights guarantees for those deprived of liberty as a result of the convention. Some of the conventions include clauses that protect the principle of *non refoulement* where extradition has been requested for discriminatory reasons. At the same time a number of conventions restrict or eliminate the exception of political offence.

Even without a global consensus on a comprehensive definition, therefore, terrorism has not gone unregulated. Beyond the evolving framework described above, terrorist acts are crimes under domestic law, under existing international and regional conventions on terrorism, and, provided requisite criteria are met, may qualify as war crimes or as crimes against humanity. (See the discussion on IHL below.) As a result, it can be said that the international community today has an imperfect but fairly global system of treaties against specific terrorist activities.

To the extent that these treaties complement and overlap with one another they may amount to an international criminal code on terrorism, and go some way to fill the gap generated by the absence of a comprehensive convention.

Certainly the term is already being used in many, if not most domestic legal systems today, reflecting, in part, the legislative activism that followed the events of September 11; it has also become embedded in public discourse.

## Is a global definition necessary or desirable?

At the same time, the lack of a global definition that reflects human rights standards gives states considerable latitude to define as "terrorist" increasingly large groups of people, including political opponents. On these grounds, it can be argued that defining the term precisely would limit the scope of serious criminal sanctions under international law, and restrain a state's ability to restrict certain civil liberties.[31]

Given the consequences of describing a person as a terrorist, those who take this position suggest that the term should be defined as precisely as possible

31 Saul, 2006, p. 373; Lim, 2005, pp. 37-64.

to ensure that the powers of the state are strictly circumscribed. For these and other reasons the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has said that a definition of terrorism is necessary.[32]

On the other side, many advocates fear that a comprehensive definition might reflect the broader usages seen in many national anti-terrorist laws, which would have dangerous implications for human rights protection. These sometimes move away from the strict definition of attacks or threats to persons, to cover damage to property, sometimes encompassing broader public order or sedition offences. The extension of the definition of terrorism to "preparatory" offences has created the danger that individuals who have a loose association with the political objectives of terrorist attacks may be penalised, even if they do not support the use of violent methods.

The United Kingdom's definition of terrorism, contained in the Terrorism Act 2000, is sometimes held up as a good example, reflecting the narrower terminology in the international definitions. Yet it contains "the use or threat ... of action which involves serious violence against any person or property'' for the purpose of advancing a ''political, religious or ideological cause".

This definition has been criticised for its vague wording, the confusing notion of "violence to property" and its potential application to a variety of social or political causes. The law also defines as terrorism action "designed seriously to interfere with or seriously to disrupt an electronic system". This presumably refers to attempts to hack into computer systems.

Anti-terrorist laws often extend the definition of terrorism to areas of legitimate dissent. Towards the extreme, Algeria combines (without distinguishing) the concepts of "terrorism" and "subversion", which include:

- obstructing traffic or freedom of movement on the roads or gathering in public places;
- undermining the symbols of the Nation and the Republic and desecrating burial places … .[33]

Although there are specific reasons for the creation of these offences (derived from the tactics of Algerian armed groups), they are problematic because they conflate terrorist acts and other offences.

Domestic definitions also arouse concern because they are often accompanied by lists of organisations designated as terrorist. This moves away from the notion that terrorism consists of a catalogue of acts, towards the idea that support of a particular cause is inherently terrorist.

32 See E/CN.4/2006/98 of 28 December 2005.

33 • « entraver la circulation ou la liberté de mouvement sur les voies et occuper les places publiques par attroupements;
• attenter aux symboles de la Nation et de la République et profaner les sepultures … . »

US State Department guidelines include any group that may be "engaged in planning and preparations for possible future acts of terrorism or retains the capability and intent to carry out such acts". India's Prevention of Terrorism Act (POTA) broadly defines terrorism to include acts of violence or disruption of essential services carried out with "intent to threaten the unity and integrity of India or to strike terror in any part of the people".

Such proposals are not new, of course, and some governments in the past have undoubtedly exploited them to deal with unwelcome opposition in their societies. Many examples can be cited of problematic laws enacted to crack down on "terrorists". For instance, India's Terrorist and Disruptive Activities Act was used during the late 1980s and 1990s to detain not only suspected members of armed groups known to have engaged in violence (particularly members of Sikh and Kashmiri groups) but hundreds of others. It finally lapsed in 1995 only to be replaced by the Prevention of Terrorism Ordinance in 2001. Malaysia's Internal Security Act (ISA) has been used to imprison pro-democracy activists and students, as well as alleged Muslim extremists.

Nevertheless, it is new that so high a proportion of governments across the world should adopt a largely shared approach to what they perceive to be a common threat. Even if, in many cases, governments are still using anti-terrorist legislation to curb domestic dissent that may have little or no relationship to al-Qaeda, this difference needs to be recognised.

Overbroad definitions of terrorism have potentially harmful implications for protection of human rights. This is one reason that human rights organisations have generally opposed them. Nevertheless, governments and others argue that by establishing the international crime of terrorism, the international community will gain an added tool to catch and prosecute an elusive enemy. This will help states carry out their duty to act because terrorism threatens the security and freedoms of a great majority of citizens, for whose safety they are responsible.

The problem that governments have failed to address adequately is that excessively broad definitions of terrorism hamper international cooperation in counter-terrorist operations. Extradition and the exercise of universal jurisdiction over terrorist crimes is problematic or sometimes impossible if there is no commonly agreed definition.

The case for or against a comprehensive definition of terrorism is therefore not clear cut. While many advocates have come to see the benefit of a single comprehensive definition in principle, they continue to doubt that it is achievable. Politically, however, human rights groups may find it increasingly difficult to justify refusing to engage in international discussions of the issue. If this proves true, what elements of a comprehensive definition are likely to command human rights support?

## Elements of a comprehensive definition

From a human rights perspective, support is most likely to coalesce around a definition that focuses on indiscriminate or targeted violence against civilians which aims to spread terror.

The definition formulated by the UN High-level Panel on Threats, Challenges and Change provides a starting point, although no consensus among human rights organisations has yet emerged to support it. In its 2004 report, *A More Secure World*, the High-level Panel described terrorism as:

> Any action […] that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organisation to do or to abstain from doing any act.[34]

The advantage of this description is that it focuses entirely on the act, and not the actor. It excludes possible justifications related to perpetrators and their motivation, and focuses on what type of violence is used, against whom and for what purpose. Under this description, whether a situation of armed conflict exists is irrelevant. According to the High-level Panel, terrorism occurs when three qualifying conditions are present simultaneously:

- When a degree of violence is applied that is "intended to cause death or serious bodily harm";
- When the victims of the act of violence are "civilians or non-combatants"; and
- When the motivation of the violent act is "to intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act".

A terrorist act would have to meet all three conditions.

In formulating this description, the High-level Panel excluded from its consideration acts that were committed by states (state terrorism). Some will see in this an imbalance that benefits states which can (and do) condemn the actions of enemy combatants as "terrorist" while escaping similar stigmatisation. The description also excluded the possibility that certain acts could be considered a legitimate exercise of the right of resistance.[35]

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34 Para. 164 of *A More Secure World: Our Shared Responsibility – Report of the Secretary-General's High-level Panel on Threats, Challenges and Change*, 2 December 2004, A/59/565. The full report is available at www.un.org/secureworld/report.pdf.

35 Ibid, para. 160.

In his March 2005 report, reflecting upon the High-level Panel report, the UN Secretary-General strongly endorsed the move towards a consensus definition that would set aside the two stumbling blocks of "state terrorism" and "the right of resistance".[36] Nevertheless, both are issues of real concern, and human rights organisations will continue to want to give both attention as the search is made for a sound global definition.

## The "right to resist"

Discussions of the "right to resist" have a long history. Some people assert that under certain circumstances people have a right to resist abuses of authority, and even to use violent means to do so. This claim underpins many human rights discussions regarding "political offences" and political violence by non-state actors. The notion of the right to resist also provides moral, political or legal legitimacy to the struggles of oppressed people who seek to overturn, or defend themselves against, a regime that oppresses them. When is resistance justified? What degree of violence is justified in such situations?

Traditionally, those who argue that some violent acts should not be described as terrorism have emphasised the importance of context. In particular, they tend to say that the right of resistance is justified in asymmetrical conflicts, where one side (usually the state) has overwhelming military superiority. Without access to comparable weapons, the argument goes, armed groups are not in a position to take on "military targets" and are obliged to attack softer targets, including civilians.

These arguments were made when human rights organisations first applied IHL to armed groups in internal conflicts. It should be noted that the High-level Panel's description of terrorism does not equate all acts of violence against the state by non-state actors, or consider all such acts to be terrorist. It limits itself to deadly attacks on civilians and other non-combatants carried out for a specific purpose. In a situation of armed conflict these would be prohibited under IHL in any case.

Even where a weak organisation faces overwhelming military power, of course, terrorism is a choice. Insurgent groups or civilian populations facing intense repression, occupation or acts of state terror have not always taken this path. Many political movements that opted to use political violence would claim to have set parameters for its use. The African National Congress (ANC) in South Africa, for example, though labelled terrorist by its own and many foreign governments, permitted sabotage against strategic (non-human) targets, and

36 *In Larger Freedom: Towards Development, Security and Human Rights for All.* Report of the Secretary-General, follow-up to the outcome of the Millennium Summit, A/59/2005, para. 91.

opposed targeting of civilians.[37] Other examples could be cited. Sometimes these have reflected the basic values of humanitarian law, which distinguish legitimate attacks on combatants from illegitimate attacks on civilians, but at other times they do not.

The debate on a comprehensive definition of terrorism has tended to counterpose the notion of a right to resist, which presumes that some violent acts are legitimate, and the notion of terrorism, which tends to outlaw and stigmatise particular acts of violence irrespective of context. It is unclear that such a counterposition is inevitable (although it may be politically useful for some states that wish to block the adoption of the UN Convention). Logically the right to engage in conflict can clearly be distinguished from the legality of the methods used in conflict. In traditional discussions of the obligations of states, the terms *jus ad bellum* and *jus in bello* express this distinction – law on the use of force and law on the conduct of war.

Human rights advocates have frequently argued that it is sufficient to describe an act as a crime: nothing was added by using the term "terrorism" or "terrorist". Moreover, in times of armed conflict, such acts could be evaluated objectively in terms of war crimes and violations of IHL. (Indeed, this is the only law that could be applicable. Domestic criminal law will always preserve the state's monopoly of violence and will never recognise that violent acts may be legitimate in terms of the right to resist.) While this argument remains defensible (certainly in the absence of a clear definition of terrorism), it may be replied that some groups embrace the "terrorist" label, describe themselves as terrorist organisations and urge their adherents to engage in terrorist violence. The semantic debate of human rights organisations about use of the term "terrorist" may have been overtaken by the recent evolution of extremist organisations.[38]

The reality is that "terrorism" is widely recognised to exist and a growing body of international law has emerged that addresses it. Human rights advocates may need to engage with these developments.

## State terrorism

Illegal or disproportionate use of violence against individuals by the state has always been the principal focus of human rights monitoring – whether that violence has taken the form of torture, extrajudicial killings or, in the context of conflicts, indiscriminate bombing and similar attacks. Although there is

37 In isolated instances the military wing of the ANC did bomb civilian targets.

38 Some jihadi Salafi groups including Jemaah Islamiyah (JI) describe themselves as "irhabiyun", which in Arabic means "those who cause fear". Comments of Sidney Jones, expert on JI at an International Council meeting in Lahore, Pakistan, in May 2005 and in subsequent correspondence of 17 October 2006, on file at the International Council.

little doubt that states can commit terrorist acts (as Greenpeace confirmed when French government agents blew up the *Rainbow Warrior* in 1985), few international human rights organisations have adopted the terminology of state terrorism. By contrast, a number of national human rights organisations in Latin America and the Middle East use the term freely.

State terrorism is to be distinguished from *state-sponsored* terrorism. In many instances, states have created or supported ostensibly non-governmental armed groups that commit terrorist acts. Indeed, the 2001 invasion of Afghanistan was justified on the grounds that that country's government was a sponsor of the al-Qaeda network. Similarly, the International Court of Justice found the United States guilty of sponsoring Contra rebel attacks on Nicaragua in the 1980s, a policy described by a former director of the Central Intelligence Agency as "state-supported terrorism".[39] In principle, if not in practice, legal mechanisms exist to address this issue.[40]

Human rights advocates that have been reticent to adopt the term argue that it is unhelpful to speak of state terrorism because it covers acts that are already well covered by other provisions of international law.[41] What is to be gained, they ask, by describing as state-sponsored terrorism actions that are already considered to be violations of human rights or war crimes? Other advocates argue that human rights organisations should use the term "terrorism" to condemn indiscriminate killings of civilians, including those committed in the course of internal armed conflicts and those committed by states. The issue remains alive among human rights advocates.

* * * * *

Debate on both the above issues will continue to complicate agreement on a definition of terrorism. On balance, nevertheless, this report leans towards the view that it is time for human rights organisations to involve themselves in efforts to achieve a working definition, in order to move forward on the more pressing tasks of developing legal and advocacy tools to address terrorism in a meaningful way. Reluctance to engage on the issue during the period before September 2001 meant that many of the standards developed in this period

39 "Nicaragua Case", *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits) [1986] ICJ Rep 1986 14* (1986). Admiral Stansfield Turner, testimony before House Subcommittee on Western Hemispheric Affairs, 16 April 1985.

40 In the Nicaragua case, the United States government refused to recognise or comply with the court's judgment.

41 See for example, *A More Secure World*, where the Secretary-General's High-level Panel states with respect to arguments that state terrorism be included in any definition of the problem, "We believe that the legal and normative framework against State violations is far stronger than in the case of non-State actors and we do not find this objection to be compelling".

lacked the benefit of inputs from or oversight by human rights advocates. A similar absence cannot really be justified in the current period, when international legislation and practice is rapidly changing the human rights landscape. Simply put, the human rights community can no longer afford not to engage. A starting point in that work is likely to be the idea that terrorism essentially names a method – the murder of civilians. But whatever approach or working definition is adopted, it should define terrorism narrowly and practically to ensure that those who apply the term can avoid being drawn into the service of state agendas, on the one hand, or paralysed by arguments over the right to resist. In addition it should not contradict IHL: acts committed in an armed conflict should not be labelled "terrorist" if they do not violate IHL.

Human Rights First has overcome two problems by creating its own definition of terrorism: it avoids the danger that it will be misunderstood in its references to terrorism and it (temporarily) fills the void left by the absence of a comprehensive definition:

> Preamble: "Human Rights First proposes to define terrorism in order to achieve consistency in its use of the term in both internal and external communications. This definition is not meant to be, and is not capable of being used as, a precise criminal law definition. Although the definition excludes state action, states are accountable when they support or carry out similar acts of violence that are prohibited under international or domestic law.
>
> Definition of terrorism: "Terrorism is any action or threat of action by individuals or groups acting outside the framework of state authority intended to cause death or serious bodily harm to civilians or non-combatants, or the taking of hostages, in order to intimidate a population or compel a government or an international organization to do or to abstain from doing any act. This definition applies under any circumstances, in peacetime or war, irrespective of the motivations of the perpetrator(s)."

# III. THE RELEVANCE OF DIFFERENT BODIES OF LAW

The difficult legal issues that surround "terrorism" extend beyond the question of definition. Since 2001 debate has focused on the role and application of different bodies of international law. To what extent does international humanitarian law (the laws of war) apply to struggles between states and armed groups? Are recent advances in international criminal law of help in addressing the issue? How far can international human rights law, with its historical focus on state conduct, be applied to non-state actors who are responsible for terrorist acts?

## International humanitarian law (IHL)

International humanitarian law comes into play in situations of armed conflict. It includes the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, in addition to a range of other legally binding instruments, and customary international humanitarian law. While IHL does not define terrorism, it prohibits most acts committed against civilians and civilian objects during armed conflicts that would commonly be considered "terrorist" if they took place outside armed conflict.

Two principles are particularly relevant. First, IHL does not prohibit certain uses of force, including the taking of life, against enemy combatants in the context of an international armed conflict. Under the principle of "distinction", force may be used against a military objective, in a way that affords maximum protection to civilians and civilian objects. The emphasis is on ensuring that civilians are not the target of attack. The *context* and the *victim* are the crucial definitional elements that determine whether use of violence, even if deadly, is legal under IHL and hence legitimate in a more general (legal, moral or political) sense.

The second principle is proportionality. Even when force may legitimately be used against enemy combatants or other military objectives, IHL requires combatants to avoid disproportionate or excessive force. The principle concedes, in effect, that even if civilians are not the targets of attack, they may be affected. It therefore seeks to minimise the impact of "collateral damage".

Other references in IHL prohibit measures that terrorised among the civilian population. The Fourth Geneva Convention (Article 33) prohibits "all measures of intimidation or of terrorism", while Additional Protocol II (Article 4) prohibits "acts of terrorism" against persons who are not, or who are no longer, taking part in hostilities. Both Additional Protocols to the Geneva Conventions also prohibit such acts: "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[42]

42 Additional Protocol I, Article 51 (2) and Additional Protocol II, Article 13 (2).

A lawful attack on military targets, of course, may spread fear among civilians. The provisions outlaw attacks that specifically *aim* to terrorise civilians – for example campaigns of shelling or sniping of civilians in urban areas.[43]

Humanitarian law principles thus provide human rights advocates with ways to distinguish between unlawful attacks by non-state groups against civilians and lawful attacks against military targets, and between those who engage in acts of terror and those whose primary objective is not to kill and injure civilians.

IHL developed to address war between states – international armed conflict. However, by Common Article 3 of the four Geneva Conventions, basic protections have been extended to situations of non-international armed conflict, that is, where one of the parties is not a state. These protections were developed under Additional Protocol II of 1977.

## Is the "war on terror" a war?

IHL can only be relevant to the analysis of acts of terrorism in the context of an international or internal armed conflict. Whether the "war on terror" is a war is therefore of more than purely political importance. The United States (US) government has argued that it is engaged in an international armed conflict in which regular forces of the United States and its allies face an organised military force operating globally, which has promoted terrorism. Human rights advocates therefore find themselves confronting the question of whether this "war" can properly be characterised as an armed conflict in the legal sense.[44]

In any discussion of this subject, it is important to recall the fundamental nature of international humanitarian law, which recognises and accommodates the violence of war, but strikes a compromise in doing so, in order to protect civilians and others not involved in hostilities. This compromise has been described clearly by one commentator:

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43 See Article 51(2) in Additional Protocol I (applicable to international armed conflicts) and Article 13(2) in Additional Protocol II (applicable in internal conflicts) both of which state that: "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." See also International Committee of the Red Cross, "International humanitarian law: questions and answers", at www.icrc.org. For additional discussion, see International Criminal Tribunal for the Former Yugoslavia (ICTY) (decision in *Prosecutor v. Galic*, Case No. IT-98-29-T (Trial Chamber), December 5, 2003, at www.un.org/icty/cases-e/index-e.htm). Stanislav Galic, commander of the Sarajevo Romanija Corps, was held personally responsible for violations of the laws of war (the first person to be found guilty by the ICTY of "spreading terror among the civilian population") and crimes against humanity (murder and inhumane acts) for a campaign of shelling and sniping in Sarajevo. He was sentenced to 20 years imprisonment and has filed an appeal.

44 For an excellent discussion on this see Pejic, 2005.

> … A licence to kill enemy combatants, and to detain without charges or trials anyone who poses a security risk, is the price paid for rules designed to minimize human suffering. In peacetime, domestic and international criminal and human rights law prohibits and punishes homicide. Where the *lex specialis* of humanitarian law is active, however, those prohibitions are narrowed and humanity is denied some very fundamental protections provided by other legal regimes.[45]

For this reason, IHL strictly limits and defines the circumstances in which a conflict can be said to exist and IHL itself can be applied.

According to the International Committee of the Red Cross (ICRC), terrorism (and by implication counter-terrorism) are subject to humanitarian law only when incidents of violence rise to the level of armed conflict. The violence must pass a certain intensity or threshold, extending beyond sporadic riots or internal disturbances. Secondly, the opposing parties must be defined and identified. This can include both states and non-state actors, but it follows that, for an armed group to qualify as a "party" to a conflict, it must have a certain level of organisation and a command structure.

This is important because of another key feature of IHL. Its rules apply equally to all parties to an armed conflict, irrespective of whether the party concerned instigated the war or acted purely in self-defence.[46] It is therefore vital to ensure that the group concerned is able to respect IHL in its conduct of hostilities. The principle of equality implies that "as a matter of law there can be no wars in which one side has all the rights and the other has none".[47]

If one were to apply the logic of IHL to all the violence occurring between states and transnational terrorist networks, these networks would need to be accorded the same rights and responsibilities as the states fighting them – a proposition that states are unlikely to welcome.[48] It would imply, for example, that attacks by non-state actors on lawful military targets would be legitimate, as would proportional collateral damage caused to civilians.[49]

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45 Rona, 2003.

46 The right or wrong of the use of force is a separate consideration and the subject of another body of law – *jus ad bellum*.

47 See, www.icrc.org/web/eng/siteeng0.nsf/html/5YNLEV, International Committee of the Red Cross, 5-05-2004, "International humanitarian law and terrorism: questions and answers".

48 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report prepared by the International Committee of the Red Cross, 28th International Conference of the Red Cross and Red Crescent, Geneva, 2-6 December 2003, at p. 18.

49 See Stahn, 2002.

This last point is important. It means that, if the United States is in an armed conflict with al-Qaeda (or any other terrorist group), the latter would be entitled to attack US military targets, even causing collateral civilian casualties, provided that these were not deliberate and that the force used was proportional to the military objective. No crime would be committed under IHL in such an attack. As the seat of the Department of Defense, the Pentagon would arguably be a legitimate target in this context (but to attack it with a hijacked civilian aircraft would still be prohibited under IHL). As one commentator observes: "…it is the very axiom of IHL that, unlike criminal law, it must permit both sides to hope for victory while respecting its rules; otherwise the rules will not be respected."[50]

The issue of status has always raised difficult questions in relation to protection during conflicts, not least because governments are usually unwilling to grant recognition to independent armed groups or political organisations that seek to overthrow them or deny their authority. Politically and legally, many of these problems are familiar ones, even if they remain difficult to resolve.

Here too, however, the decision of the United States to declare a global "war on terror" after it was attacked in September 2001 has raised fresh issues for governments and human rights organisations that reference to precedent cannot perfectly address. Many commentators have ridiculed the administration's language.

> Wars against proper nouns… have anyway advantages over those against common nouns (e.g., crime, poverty, terrorism), since proper nouns can surrender and promise not to do it again.[51]

The United States (US) position was subsequently reformulated in a somewhat more sophisticated form. John B. Bellinger III, legal advisor to the Secretary of State, said in 2006 that the US does not believe itself to be in a legal state of war with all terrorists, merely that the US "must strongly oppose… terrorism in all its forms, everywhere around the globe". He stated that it is possible for a state to be in armed conflict with a non-state entity and that it is lawful for the US to use force against al-Qaeda wherever necessary. "To those who might disagree, I would ask you to consider the alternatives."[52]

Bellinger argued that critics of his government's position "often assert the law as they wish it were, rather than as it actually exists today". He pointed out that the war by the US and its allies against the Taliban government of Afghanistan was an international armed conflict in the terms of IHL. He further stated that this war with the Taliban continued after it was ousted from government in June

50 Sassoli, 2006b, p. 26.

51 Rona, 2003.

52 Bellinger, 2006.

2002. In parallel, the United States was in an armed conflict with al-Qaeda, not only in Afghanistan but internationally.[53]

Bellinger's argument is essentially a more sophisticated restatement of earlier US positions. However, it does not overcome the legal problems it claims to address. The United States cannot be engaged in an international armed conflict with al-Qaeda, because such conflicts can only be between states. It could in principle be engaged in a global non-international armed conflict with al-Qaeda, but to support this proposition it would have to demonstrate that al-Qaeda has the characteristics of a party to an armed conflict worldwide (including a certain level of organisation and a command structure). This is the interpretation of some scholars[54] and also the implicit judgment of the US Supreme Court.[55] Others, such as the ICRC, believe that every situation of violence, including violence associated with the "war on terror" must be analysed on a case-by-case basis to determine how it should be qualified (international armed conflict, non-international armed conflict, or not an armed conflict).

The United States refused to extend to those captured in the "war on terror" the protections that prisoners of war are accorded under the Geneva conventions. It said that they were "unlawful combatants" because they did not wear uniforms or bear arms openly. Yet there is no such category in IHL. If they were civilians taking part in the conflict, they could indeed be detained and dealt with under the criminal law of the relevant jurisdiction, in this case Afghanistan. The creation of a special prison in Cuba, on an American military base outside US legal jurisdiction, came to symbolise the legal uncertainty which the US administration imposed on this "war" – as well as the legal limbo imposed as a result on those detained as terrorists or terrorist sympathisers.[56]

The trend of legal judgements in the US on terrorist cases since 2001 has somewhat reversed the US position. Though legal procedures advance slowly, and legal decisions lag far behind events, courts have tended both to affirm the entitlement of detainees to legal safeguards, and contest US administration

53 Ibid.

54 For example, Sassoli, 2006a.

55 In the case of *Hamdan v. Rumsfeld*.

56 The case of *Hamdan v. Rumsfeld* is particularly noteworthy. Salim Ahmed Hamdan is a Yemeni national, captured by Afghan forces and handed over to the US military in Afghanistan in late 2001. He was held at the US Naval Base at Guantanamo Bay, Cuba, from early 2002, and in 2004 was referred for trial by military commission under the President's Order of November 13, 2001. Hamdan was alleged to have served as Osama Bin Laden's personal driver. In a 5-3 decision on June 29, 2006, the US Supreme Court held that the President had exceeded his authority in establishing military commissions. The Court also ruled that the commissions violated US military law and the Geneva Conventions, international treaties signed and ratified by the United States. For a fuller discussion of the import of this decision see Cole, 2006.

rulings that suspend basic legal entitlements to protection under both the Geneva Conventions and the civil justice system. Several states closely allied to the United States' campaign have adopted a similar position. A leading minister in the British government, the closest ally of the US, said:

> We do not use the phrase 'war on terror' because we can't win by military means alone, and because this isn't us against one organized enemy with a clear identity and a coherent set of objectives … .[57]

A separate human rights concern is the military character of many policies introduced since 2001 to combat terrorism. The new focus on security in the context of the "war on terror" has given military institutions a disproportionate influence, particularly in countries where civilian rule is weak, undermining the development of civilian governance and the rule of law.

## International criminal law

International criminal law has developed in recent years as a means of assigning individual criminal responsibility for the gravest crimes to individuals. Two expressions of international criminal law are potentially relevant, although still of limited application to terrorist violence. First, *ad hoc* international tribunals have been formed to prosecute and punish perpetrators of international crimes; the recent and continuing experiences of the criminal tribunals for the former Yugoslavia and Rwanda are examples. Second, certain international treaties require states to enact criminal law provisions within their legal system in order to meet the requirements of the treaties in question. Examples include treaties on humanitarian law (so-called grave breaches), certain human rights treaties (the Genocide Convention, the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and the Convention for the Elimination of All Forms of Racial Discrimination) and treaties related to combating terrorism and other international crimes.

The adoption in 1998 of the Rome Statute of the International Criminal Court (ICC) marked a major step forward towards forming a coherent international criminal legal system.[58] For the first time, individual perpetrators can now be tried before an international tribunal for crimes that are defined in an international instrument. However, while this is seen as a breakthrough and suggests the emergence of a "strong" form of international criminal law, it remains unclear to what extent the Rome Statute and ICC can address extreme forms of violence by private individuals in terms of international criminal law.

The issue of terrorism actually provided an important impetus towards the elaboration of the Rome Statute. However, in the drafting process terrorism

57 Hilary Benn, Associated Press, April 17, 2007.

58 On the potential role of the ICC, see Goldstone and Simpson, 2003.

was excluded as a distinct category of crime. One reason was the absence of an agreed definition. Nevertheless, Article 5 of the Rome Statute establishes the ICC's jurisdiction over three categories of international crimes relevant to terrorism:

a) genocide (as defined in Article 6),

b) crimes against humanity (as defined in Article 7), and

c) war crimes (as defined in Article 8).

Although acts of terrorism are not included in the Rome Statute, they might on occasions fall within the definition of other crimes that are within the Court's jurisdiction. Former United Nations High Commissioner for Human Rights, Mary Robinson, declared the 2001 attacks on the World Trade Centre to be a "crime against humanity", for example. Such crimes include "murder" and "inhumane acts" committed as part of a widespread or systematic attack directed against a civilian population. Crimes against humanity can take place in both war and peace time.[59]

War crimes, on the other hand, may take place only during an international or non-international armed conflict. The Rome Statute specifically excludes from its application "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature". The wording of Article 8 of the Rome Statute is broad enough to cover different forms and degrees of violence under the notion of war crimes. The victim of the crime is, again, a crucial definitional element and here the Rome Statute takes its substantive content from humanitarian law and IHL's categories of "protected persons", including civilians, prisoners of war, the wounded and the sick, etc. Some acts of terror could be included under this provision, though they would properly be considered war crimes.

Private individuals, including terrorists, may be prosecuted before the ICC for genocide, for instance if they commit violent acts against members of a particular national, ethnic, racial or religious group, provided this is done "with intent to destroy, in whole or in part" the group in question. The essential definitional elements of genocide are related to the victim and the intention of the perpetrator. However, most acts of terror today do not approach the definition of genocide.

It has been argued that it will be difficult to prosecute individual acts of extreme or serious violence by non-state actors (and others) before the ICC, because of the intent requirement for the crime of genocide and the contextual requirement for both crimes against humanity (widespread or systematic attack) and war

59 Rome Statute, Article 7, Appendix 3 to the Statute.

crimes (armed conflict).[60] Even if the ICC proves to have a limited capacity to prosecute cases of terrorism by non-state actors, the Rome Statute paves the way for further standard-setting work in the field of direct international criminal responsibility. In practice, most terrorist acts will clearly continue to fall under domestic law and will be prosecuted at that level.

### International human rights law

Human rights treaties provide a normative point of reference in this area, because they set out principles that should govern the state's responses to crimes of all kinds. The principles embodied in human rights treaties include:

- the universality of human rights, including the idea that every human being (including criminals and terrorists) has rights that should be respected;
- the absolute (non-derogable) nature of certain human rights, including rights that are extremely relevant to terrorism and the fight against it (prohibition of torture and any form of inhumane treatment; prohibition of retroactive criminal laws; the principle of legality in the field of criminal law; prohibition of arbitrary deprivation of life; prohibition of hostage-taking, etc.);
- various limitations on the application of capital punishment even for the most serious crimes, including the requirement of strict observance of all procedural guarantees, including effective legal assistance and the right of appeal; alternatively for states that have ratified a relevant additional/optional protocol or otherwise abolished capital punishment, the exclusion of capital punishment even in cases of terrorism;
- the prohibition of *refoulement* (the transfer of a person through extradition or any other procedure to another state that would not respect the above principles);
- the right to a fair trial, including the numerous detailed provisions of the rights of the defendant in a criminal trial; and
- the prohibition of arbitrary deprivation of liberty and the requirement of effective judicial review over any form of arrest or detention.

60 In this regard, the ICC's decision to bring charges against leaders of the Lord's Resistance Army is particularly significant because it could set a precedent for further action of this kind. On 7 October 2005 the Ugandan government announced that the ICC had issued warrants regarding six men – Joseph Kony, the leader of the LRA, and five of his deputies. The warrants were delivered to Uganda, Sudan and Congo, the three countries where the men are believed to be hiding. However, the warrants later became seen as an obstacle to the peace process. A provisional peace agreement between Uganda and the LRA includes provisions for the domestic trial of those who have committed abuses; but as of April 2008 the Ugandan government said that it will not hand the suspects over to the ICC.

When they discuss extreme or serious acts of violence that are politically motivated, human rights advocates consider the above principles to be fundamental elements of the human rights framework, applicable to all crimes and to all who commit them. The difficulty they face is that, when they assert these principles, they are not in a position to demand in terms that perpetrators should be held accountable. This is because – as already discussed – human rights covenants apply primarily to states (which sign them) and monitoring and enforcement mechanisms established by international human rights law focus on state responsibility. They do not describe the accountability of non-state actors, or say how crimes that the latter commit should be dealt with … except by re-affirming the state's responsibility to protect the rights of its citizens. Even if there is general agreement that human rights norms express commonly shared moral obligations that should be respected by all actors, and though it is gradually becoming more widely accepted (in public debate and by lawyers) that private actors such as businesses and terrorist groups can be considered responsible for certain breaches of human rights, few effective mechanisms of accountability yet exist under existing human rights treaties that enable such claims to be considered.

As a result, the position of human rights advocates can appear to be lop-sided. Their legal arguments and their advocacy put onerous requirements on the state to protect the civil rights of those accused of terrorist crimes, but they appear to have much less to say about the obligations and accountability of those who commit terrorist acts, or the rights of those who are harmed by them. Human rights arguments look partial as a result: this is one reason why rights organisations are sometimes accused of double standards – even though their commitment to human rights principles does not imply in any way sympathy for violent acts or those who commit them.

The relatively weak ability of human rights law to address the accountability of non-state actors also explains why the traditional legal approach of human rights groups is not well-equipped to address the full range of issues that recent terrorism and counter-terrorism policies have generated. Traditional human rights advocacy has not been in a position to engage with some areas of recent anti-terrorism policy, while the refusal of most human rights organisations to use the notion of "terrorism", or define it, has become politically difficult to sustain. Where acts of terrorism occur, a strictly legal (or doctrinal) approach[61] that holds states responsible for the actions of third parties may be perceived as irresponsible by sections of the general public, and irrelevant or lop-sided by policy-makers. Nor is this merely a presentational problem. Governments do have a duty to protect the public from acts of extreme and arbitrary violence, and face difficulties in apprehending those responsible for such acts. Both governments and civilians

61 The Inter-American Court of Human Rights applies a standard of "due diligence", the UN Human Rights Committee refers to the state's obligation to respect and ensure an individual's "right to the security of the person", and the European Court of Human Rights attributes to the state "positive obligations" under the right to life.

at risk are entitled to expect human rights organisations to recognise and take account of this dimension of government responsibility.

Yet, at the same time, events since September 2001 have demonstrated the importance of the core function of human rights organisations in holding states to account. No task is more vital than to affirm and uphold basic principles of justice as set out in international human rights law. These principles have clearly been put at risk by some new security-led anti-terrorism strategies. Prisoners have been denied legal rights at Guantanamo Bay, and tortured and ill-treated (with a significant degree of official cognisance) at Abu Ghraib. There is increasing evidence to show that detainees have been interrogated in secret locations and informally rendered (unofficially extradited) to countries that practice torture. In a number of countries, anti-terrorism legislation has been introduced or has been applied with the effect of suppressing legitimate dissent and civil liberties.

In this context, how could human rights advocates develop positions that would allow them to address new political demands that are made on them, without diluting or distorting core principles of human rights on which the rule of law and the protection of all liberties depend?

The remainder of this report attempts to sketch the beginnings of an answer to this question.

# IV. THE NEED FOR NEW THINKING: LAW AND MORE

Many human rights groups recognise that they have difficulty in responding to the challenges identified at the end of the last chapter, and that this is not just a communications problem.

Chapters I and II reviewed why human rights organisations have often been reluctant to use the term "terrorism", and why they have not developed public positions on political violence that cover the full range of issues that concern the public and government. By no means all these questions have a primarily legal character, however. In this chapter, we review broader criticisms of human rights positions on terrorism. What are the principal criticisms? Which ones are new, and which ones matter?

## Balance

The first criticism has already been identified. Some people do not understand or appreciate why human rights advocates rarely appear to criticise in any detail the atrocities committed by al-Qaeda and groups like it, and lack a meaningful response to such violence, but punctiliously reiterate shortcomings – some of which appear minor – in the performance of governments that attempt to suppress such groups.

One or two quotations will give a flavour:

> It seems that, whatever havoc terrorist may wreak on a society, the more serious human-rights problem in the eyes of Amnesty International and Human Rights Watch lies in the methods that the public authorities have adopted to combat these 'indistinct enemies'….
>
> Since Algeria and Uzbekistan are violent and autocratic regimes, it may not be surprising – but it is deplorable – that the human-rights community should have declined to recognize their legitimate security concerns. In both situations, the task is to choose between the lesser of two evils, which is hardly these organizations' forte.[62]

These remarks come from representatives of Freedom House, a conservative US civil liberties group. It would be misleading, however, to suppose that the critique comes from only one point on the political spectrum. One of the most sustained critiques of the practice of human rights groups was made in Algeria during the 1990s, where rights advocates were felt to have failed to respond adequately to massive abuses by armed groups.[63]

62 Karatnycky and Puddington, 2002.

63 Bennoune, forthcoming.

The criticism here is clear and twofold: human rights organisations are more concerned with the behaviour of the authorities than they are with the crimes of the terrorists, and they fail to acknowledge that states have legitimate security concerns.

The critique is not new, of course. In countries that have experienced long-running political conflicts, governments and sections of public opinion have consistently tended to criticise human rights groups on the same grounds.

It is important to highlight two points here. The first is that the emphasis human rights groups place on the responsibilities of the state reflects the origins of international human rights law.[64] The second is that human rights organisations do condemn terrorist atrocities. Many human rights groups were quick to do so after the events of 11 September 2001, often describing the attacks as a crime against humanity. Some human rights organisations refuse to accord legitimacy to any political violence that puts civilians at risk.[65] Across the world human rights organisations regularly condemn murders of civilians. What is in question, therefore, is not a failure to condemn: the criticism is rather that human rights advocates monitor state performance punctiliously but judge non-state actors in broad terms and in less detail, and as a result their analysis is incomplete.

A subordinate criticism is that human rights organisations are obsessed by government and by government abuses of power and that this blinds them to the fact that states have a clear duty to protect the security of those living within their jurisdiction and also play an essential role in protecting rights and freedoms.

As we have seen, human rights analysis focuses on the responsibilities of states for sound reasons, founded in international law and its history. As also noted, their policies continue to evolve. Activists and legal professionals have both become more willing to explore and extend human rights law to cover actions by non-state actors such as businesses and armed groups; and international humanitarian law already covers armed groups that have been recognised as parties to an armed conflict.

This criticism essentially calls on human rights groups to do more to help states fulfil their responsibility to protect, and recognise more frankly the very great difficulties they face in doing so.

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64 There have been other issues, for instance the human rights responsibilities of business, where a similar lack of law did not prevent human rights groups from engagement.

65 For example the Committee for the Administration of Justice (CAJ) in Northern Ireland. For a fuller discussion of these issues see Eiten Felner and Michael Ignatieff, "Human Rights Leaders in Conflict Zones: A Case Study of the Politics of 'Moral Entrepreneurs'", conference paper for Harvard University available at www.ksg.harvard.edu/cchrp/pdf/Felner.2004.pdf.

## Risk

The above criticism links with another: that human rights organisations fail to take sufficiently seriously the danger that terrorism poses to society. In short, their assessment of risk is inaccurate.

This criticism is open to challenge. It can be argued that, although many people were killed and wounded in New York (2001), Nairobi (1998), Bali (2002 and 2005), Casablanca (2003), Madrid (2004), London and Amman (2005), Mumbai (2006), and in other attacks, the actual risk to individuals from terrorism is quite low. It can also be argued that the global focus on terrorism reflects the fact that industrialised countries in Europe and North America find themselves targeted. Between 1970 and 2000, armed groups such as Sendero Luminoso (Peru), RENAMO (Mozambique), the Contras (Nicaragua), and various Liberian and Sierra Leonean rebel groups caused enormous civilian casualties without prompting discussion of a global terrorism crisis. On these grounds, it can be argued that the risk of terrorism has been exaggerated, and that the costs and disturbances caused by counter-terrorist policies are not justified.

Are such comparisons fair? Those on the other side of this argument assert that terrorism today is of a different order. Recent terrorist cells have been willing to use catastrophic means to kill civilians, and have done so with virtually no sense of restraint. In addition, they operate internationally across national borders and above national conflicts, making the task of police and security forces much harder and implying that no society is safe from the risk of attack.

Moreover, they argue that actual risk is far higher than this suggests. Unless such groups are found and arrested, they will eventually find ways of causing far larger numbers of casualties, by spreading diseases or poisons, or exploding a "dirty bomb". It is with this in mind that human rights organisations are sometimes accused of being naive when they argue that legal safeguards must be observed in every detail, not merely on principle but because it is the solution to combating political violence.

A related line of criticism is that the defence of rights in the context of combating terrorism entails embracing "lesser evils" – departures from some of the fundamental principles that have underpinned human rights advocacy and the international standards:

> When democracies fight terrorism, they are defending the proposition that their political life should be free of violence. But defeating terror requires violence. It may also require coercion, secrecy, deception, even violation of rights. How can democracies resort to these means without destroying the values for which they stand? How can they resort to the lesser evil without succumbing to the greater? Putting the problem this way is not popular. Civil libertarians don't want to think about lesser evils. Security is as much a right as liberty, but civil libertarians haven't wanted to ask which freedoms we might have to trade in order to keep secure…

> But thinking about lesser evils is unavoidable. Sticking too firmly to the rule of law simply allows terrorists too much leeway to exploit our freedoms. Abandoning the rule of law altogether betrays our most valued institutions. To defeat evil, we may have to traffic in evils: indefinite detention of suspects, coercive interrogations, targeted assassinations, even pre-emptive war. These are evils because each strays from national and international law and because they kill people or deprive them of freedom without due process. They can be justified only because they prevent the greater evil. The question is not whether we should be trafficking in lesser evils but whether we can keep lesser evils under the control of free institutions. If we can't, any victories we gain in the war on terror will be Pyrrhic ones.[66]

Torture is one area where human rights groups have been most obviously pressured to "think anew". Most famously, United States lawyer Alan Dershowitz has argued that, although torture is evil, it will continue to take place, regardless of the good intentions of lawyers and human rights activists. Hence he argues that its practice should be regulated. Torture would be judicially licensed and:

> The warrant would limit the torture to nonlethal means, such as sterile needles, being inserted beneath the nails to cause excruciating pain without endangering life.[67]

The aim of this is to provide the authorities with vital information that would allow them to neutralise a so-called "ticking bomb" and save many lives. This information would not be used in judicial proceedings.

Two questions arise in relation to the above criticisms. Are the legal frameworks and safeguards that are central to the human rights approach fit to cope with the threats posed by modern political terrorist groups? Second, how can human rights organisations address the wider problems of risk that these groups have created?

## Relevance of law

Critics of the human rights approach respond to the first of these questions by saying that it is foolish to rely so heavily on the rule of law and principles of legal accountability to tackle violent militants, when the latter do not value, or actively oppose, such principles. Many of the terrorist movements that have recently emerged are influenced by ideological assumptions that differ markedly from those governing the conduct of states, or those that inspire human rights law. Such critics are unconvinced that a rationalist state-led intellectual model is appropriate for defining the political relationship between a state such as Spain and, for example, militant cells inspired by the thinking of al-Qaeda. They ask: Is such a focus appropriate – even relevant?

66 Ignatieff, 2004.

67 Dershowitz, 2002.

Human rights groups do have experience of trying to influence the behaviour of non-state armed groups. For obvious reasons, however, the groups with whom they have had dialogue have tended to share certain assumptions about state behaviour. In most cases, armed groups that have been ready to use the language of human rights have aimed to form the government or have wished to resemble a government in their organisation and conduct. The African National Congress (ANC) in South Africa would be an example of such a movement. The political objectives of these organisations has broadly reflected the assumptions of international law, with respect to sovereignty, state jurisdiction etc.

Other movements have a quite different character, and their organisational structure is less compatible with models of human rights accountability. They may have a highly authoritarian leadership that encourages arbitrary or extreme violence. They may proclaim an ideology that shares little common ground with the notion of the Westphalian state or human rights law. Al-Qaeda is far from being the only example – it at least has a clearly articulated set of demands, even if these may be purely notional. Peruvian human rights organisations were never able to engage with cadres of Sendero Luminoso, who considered human rights defenders to be enemies and often killed them when found. Devotional and violent movements like Fodeh Sankoh's Revolutionary United Front (RUF) in Sierra Leone, the Lord's Resistance Army (LRA) in Uganda, or the Aum Shinrikyo Sum in Japan present similar difficulties.

Some armed groups are also highly secretive. It has been all but impossible for national human rights groups to monitor the Liberation Tigers of Tamil Eelam (LTTE), for example, an organisation noted for its cult of secrecy, authoritarianism and spectacular attacks.[68]

There is not necessarily a direct correspondence between the aims of a movement and its espousal of extreme violence. Hamas in Palestine and the LTTE in Sri Lanka are both contemporary examples of organisations that use suicide bombings against civilian targets but support nationalist objectives that resemble the political objectives of, say, the ANC in South Africa or the Irish Republican Army (IRA) in Ireland.

Violent and fanatical movements have always existed, of course, and have always inspired particular fear. The political use of terror was a familiar concept as far back as the 18th century.[69] Even the use of suicide as a method of

68 International human rights groups, operating at distance, have had more success.

69 The word "terrorism" was coined during France's Reign of Terror in 1793-94 to describe the tactics used by the new state. "Originally, the leaders of this systematized attempt to weed out 'traitors' among the revolutionary ranks praised terror as the best way to defend liberty, but as the French Revolution soured, the word soon took on grim echoes of state violence and guillotines." *From Terrorism: Questions & Answers*, Council on Foreign Relations, with the Markle Foundation, http://cfrterrorism.org/terrorism/introduction.html.

terror has a long pedigree.[70] Nevertheless, the recent high visibility of such groups, and the enormous suffering their activities have caused, should prompt human rights organisations to address this criticism seriously. Are human rights organisations in a position to engage with groups that have sharply distinct (or incoherent) intellectual, moral and religious goals, or that use extreme violence against civilians in order to achieve their objectives? If so, on what terms?

## Victims' rights

Human rights advocates also face the criticism that they fail to give adequate attention to victims' rights.[71] This criticism takes two forms. One is a demand that human rights organisations should advocate more actively for victims' compensation. On this matter, human rights organisations would normally agree that governments should compensate victims of attack, and provide restitution where this is possible. They also have a responsibility to arrest and prosecute individuals responsible for such attacks. At issue therefore is whether they give enough attention to this question.

A second more radical critique is that human rights organisations are partial in their advocacy. It is argued that they focus disproportionately on the rights of detainees, and fail to highlight equally the right of ordinary people to security – their right to life, to freedom of movement and to freedom from fear, which are no less fundamental to the notion of civil liberty than the rights of detainees. This interesting challenge is discussed later on.

The question here is whether human rights organisations may have been too ready to adhere strictly to the assumption that human rights law applies only to states. Aside from being strictly incorrect (it is now uncontroversial to assert that it applies also to international organisations) this would be inconsistent with the practice of much of the human rights movement internationally, and the opinion of a growing number of scholars, who argue that human rights law applies to other actors. Women's human rights organisations have played a particularly important role here. They have grappled for many years with an issue that is analogous to that posed by non-state armed groups. Violence against women is now clearly understood to be a human rights violation, irrespective of whether perpetrators are state agents. The example is especially relevant given that women are so often the victims of abuses by non-state armed groups.[72]

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70 Jewish sects of Sicarii ("daggers") used suicide in Roman-occupied Judea as did the Islamic Order of Assassins (*hashashin*) during the early Crusader times.

71 The same criticism is raised in countries suffering from high crime levels, where human rights lawyers are accused of using the law to hobble police inquiries and protect criminals from prosecution, without regard for the suffering of crime victims. See International Council on Human Rights Policy, 2003.

72 Bennoune, forthcoming.

## Root causes

Finally, a separate criticism is made, concerning the question of cause. The controversy here concerns the nature of the strategies required to combat terrorism. Human rights advocates (and civil society organisations more generally) have tended to argue that, to be successful, strategies against terrorism must address the causes of political disaffection – and in general terms these are assumed to include poverty, social exclusion, and political discrimination. It is argued that strategies which rely heavily on military force, or invasive policing, are misconceived: much more attention should be given to social investment, promotion of political and economic rights, and transfers of resources to areas of poverty.

Critics have challenged these assumptions, on the grounds that most of the leaders of al-Qaeda, and also many Palestinian suicide bombers, have been well-educated (often in Western European universities) and socially as well as economically middle class. Behind this discussion is an implied or explicit criticism that human rights organisations have imported "soft" values into their analysis of terrorism, causing them to fudge their moral assessment of those who participate in terrorist movements, and to be inappropriately critical of security-led approaches. The latter, such critics argue, are necessary to deal with the very dangerous threat that terrorist groups pose.

Such critics have said that human rights advocates do not try to "understand" torture, but are uncompromising in their opposition to it. Why do they adopt a more understanding position on terrorism? No one can seriously question the importance of explaining human rights violations – understanding is obviously a precondition for effective prevention. The danger critics point to is that the call for "understanding" may shade into an improper tolerance, even complicity.

Human rights advocates sometimes argue that the political causes of terrorism need to be addressed – the national, cultural or religious oppression that provides either a reason or a rationale for extreme violence. In such cases human rights organisations can be exposed to even more damaging criticism. Any attempt to suggest that a legitimate grievance may underlie terrorist acts may be perceived to endorse those acts, to imply complicity with those responsible or be a capitulation to terrorism.

Additionally, it is sometimes charged that human rights advocates are insufficiently critical of the ideologies behind certain terrorist groups. These ideologies may inherently conflict with human rights values, especially on issues such as women's rights, and freedom of conscience and freedom of expression, as well as on issues more directly relating to terrorist acts.[73]

73 Ibid.

## Where do we go from here?

Taken together with the threat to human rights work posed by terrorism (and counter-terrorist responses to it), these are substantial criticisms. Left unanswered, they might undermine the credibility of human rights organisations across a wide area of their activities. To respond, human rights organisations have not only to develop credible answers to these various criticisms, but to adapt their practices in order to respond to terrorism in a more holistic and adequate manner.

The second half of this report explores how human rights organisations might develop arguments, responding to these criticisms, that could be persuasive to the three principal audiences they deal with – each of which has somewhat different expectations of human rights organisations.

- *Government*: human rights organisations need to show they can engage with government across the range of issues that government has to consider.
- *The general public* (including the victims of terrorist acts): arguments need to reassure civil society that the analysis of human rights organisations is principled but also balanced and relevant.
- *Those who sympathise with political organisations that use violence*: can human rights organisations persuade those who support such groups to accept the restraints on violence that are set out in human rights standards?

In developing positions in relation to the above audiences, it is suggested that human rights organisations will find it necessary to meet the following three tests, if they are to meet their objectives successfully:

- Are their arguments *consistent across different audiences*? Do they make comparable and reasonable demands on government and on other parties?
- Are their arguments *compatible with human rights principles* and human rights law?
- Do their arguments adequately address *the rights of civilians at risk and victims* of terrorist acts?

The chapters that follow take each of these audiences and sketch out elements of an approach that might begin to meet these tests.

# PART TWO

## TALKING ABOUT TERRORISM

# V. TALKING TO GOVERNMENT

No very general statements can be made about the relations between human rights non-governmental organisations (NGOs) and governments. A national NGO will naturally make a thorough initial analysis of its government's stance on issues raised by political violence and acts of terrorism before taking any position itself, because in the absence of such an analysis it will be impossible to make good judgements about what forms of official dialogue are appropriate. International NGOs need to make a similar contextual analysis before engaging in policy debates about terrorism with national governments. This much is obvious and straightforward – though it is far from simple to accomplish.

The problem is that many governments are ambivalent when they frame policy in this area, and this is particularly true of democratic governments that ostensibly support human rights actively. When such countries have been targeted, in several instances terrorist attacks have had a direct impact on political thinking as well as public attitudes. Such countries are very often in favour both of protecting human rights *and* of anti-terrorist policies that require the limitation or suspension of certain rights. Policy discussions with such governments are obviously fraught with complication for all concerned.

At the other end of the spectrum are oppressive governments that seize the opportunities offered by international anti-terrorism initiatives to further suppress human rights and civil liberties. It will clearly be difficult and may be inappropriate for human rights organisations to enter a dialogue with such governments on the subject of terrorism.

In between can be found any number of situations, each likely to present complex and sensitive policy dilemmas. For example, a number of governments that are democratising their political institutions and broadly sympathise with long-term human rights objectives remain adamantly committed to an aggressive security-driven approach to domestic insurgency. The Turkish government's approach to the Partiya Karkerên Kurdistan (PKK – the Kurdish Workers' Party) and the Thai government's response to violence in its Southern provinces are examples.

No simple generalisation should therefore be attempted. The appropriateness of any discussion of terrorism, and particular policies for dealing with it, can only be assessed in context. Moreover, to complicate matters further, human rights organisations must not only calibrate and assess the nature of their engagement with governments, but ensure that what they say to governments is consistent.

This said, a certain number of general remarks can be made about how human rights organisations might establish a sound platform for discussing terrorism and political violence with their governments. In this chapter, we look first at

what human rights organisations should indisputably be doing and saying; and secondly at some of the dilemmas and difficult issues that need more consideration.

## Pointers for engagement

The first thing to be said plainly is that it is important that human rights organisations pursue their traditional work.

They should clearly make sure that counter-terrorist policies do not violate human rights, and that the rights and due process of detainees accused of terrorism should be respected. Most governments expect human rights organisations to monitor them and criticise any violations of legal and judicial procedures. Human rights organisations properly criticise governments when these occur.

The importance of such work in the current context cannot be exaggerated. Since September 2001, human rights advocates have been sharply reminded that few rights can be taken for granted. They have been shocked, in particular, by the readiness of the United States (US) to question international understanding of what is prohibited by the United Nations (UN) Convention against Torture, Other Cruel, Inhuman or Degrading Treatment or Punishment,[74] by the rapid spread of ill-treatment in detention facilities (such as Abu Ghraib), and by the willingness to suspend or remove fundamental legal protections from certain categories of prisoners who are accused of terrorist offences.

They have been painfully reminded (if demonstration was necessary) of the core importance of investigative monitoring and legal oversight – particularly when issues of terrorist violence arise. It is therefore of vital importance that human rights organisations continue and deepen their work in this area – whether or not that work is well-understood or appreciated by the governments concerned, or the wider public.

Traditionally, the primary concern of human rights groups was the individual victim and ensuring respect for individual rights. Human rights organisations were careful to assert their independence of any party – including parties to

74 It should be noted that the US entered a number of reservations when it ratified the UN Convention Against Torture in 1980, including that it would only be bound by the obligation to prevent "cruel, inhuman or degrading treatment or punishment" insofar as the term means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and Fourteenth Amendments to the US Constitution. US reservations also specify that mental pain or suffering only refers to prolonged mental harm from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the use or threat of mind-altering substances; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to the above mistreatment. See www1.umn.edu/humanrts/usdocs/tortres.html.

conflict. Where terrorism is an issue, it is likely that human rights organisations will want to reaffirm their position of independence, both in relation to state and non-state actors. This too is an obvious and straightforward recommendation – and it too may be very difficult to sustain in practice, given the passionate animosity and tension that terrorism regularly generates among the public, in the media and in government circles.

In earlier chapters we discussed the reasons why human rights organisations have been reticent about using the term "terrorism" and generally distanced themselves from international attempts to define or prohibit it. Different organisations will make different choices on this matter. It is clear, for example, that a wide range of abuses by private actors can be dealt with by applying international humanitarian law or (in a narrower range of cases) human rights law. Where it is feasible, many organisations will prefer to adopt these approaches. It is also clear that, where states commit serious violations of rights, they can usually be held accountable under existing international law.

A forthright response can be made to the criticism that human rights organisations focus too much on monitoring government. Human rights organisations should give no ground at all to those who question whether they emphasise legal process too much. On the contrary, this work is a core vocation of human rights organisations and the latter have a duty to ensure that governments respect law. In addition, events since September 2001 have demonstrated the relative fragility of respect for legal procedure and human rights even in societies, such as the United States, in which legal process and the rule of law are strongly entrenched. They confirm that politicised violence, and terrorism in particular, shake the legal checks and balances on executive authority and respect for due process faster than almost anything else. Punctilious monitoring of violations of legal process, and advocacy to restore legal protections, is absolutely justified.

Human rights organisations should therefore continue to insist, loudly and confidently, that respect for law is vital both to the health of states and societies, and policies designed to stop the occurrence of politicised violence and terrorism.

It might be allowed that monitoring of the state is just one part of the work that needs to be done. It is indispensable, and a core element of a human rights organisation's responsibilities; but it is not a sufficient strategy in itself. What this means is that human rights organisations may need to *complement* the traditional work of monitoring states and holding them to account; they should not reduce or relativise that work.

This said, it can be argued on several grounds that human rights organisations should consider engaging with the notion of terrorism, in order to influence policies that deal with it. First, governments are already applying the term, which has been defined in a number of international documents. Second, a raft of international initiatives, taken not least by the UN Security Council, are driving the development of new anti-terrorism policies that will change the law and conduct of states in many countries. Third, a broad definition of (non-state) terrorism is rather nearer to emerging. Whether or not human rights organisations choose to make use of the term in public, they are almost bound to engage with the issue when they lobby government privately – certainly in

the United States and European countries, which are actively developing new policies, including legal reforms, designed to suppress terrorism.

If they do choose to engage in policy arguments on this subject (whether in private or in public), human rights organisations will probably prefer to retain their focus on the act itself, rather than the motive or the actor.

They will also probably separate, at least pragmatically, the issues of non-state and state terrorism. State obligations are of a different order than private obligations under human rights law. In addition, they are covered in far more detail. There are therefore sound reasons to separate the two questions.

One of the advantages of working with an agreed definition of terrorism is that this will strengthen the ability of human rights advocates to monitor government measures such as the listing of individuals and organisations as "terrorist", a process that may have serious consequences and often lacks due process. Listing takes place not only at national level but through the UN Security Council and other intergovernmental organisations such as the European Union.

## Developing a balanced argument

As part of their effort to demonstrate independence and a properly inclusive analysis, human rights organisations may also wish to develop a fuller description of the rights of citizens to be secure and free from fear. This would go a long way towards enabling them to claim persuasively that their analysis of political violence was even-handed and rights-based.

What might such an analysis look like? Put another way, what sort of argument might be developed that would be

- consistent with human rights and international humanitarian law,
- even-handed in relation to state and non-state actors' responsibilities, and
- accessible and persuasive to a broader public audience, including policy-makers?

Such an analysis might re-focus attention on the entitlement of citizens and other individuals to essential forms of protection, including protection of their right to life, and protection from intimidation, arbitrary detention, extortion and physical ill-treatment. In these regards, non-state actors who are responsible for acts such as abductions, intimidation of civilians and cruelty could legitimately be faulted, on human rights grounds, even if the process of accountability in relation to international human rights law would necessarily be different.

Arguments drawing on entitlement to security could be extended to cover a wide range of relevant issues. For example, acts that arbitrarily put the health

of private individuals at risk (such as indiscriminate attacks on civilians) would be censurable. More broadly, similar arguments could be applied to policies and acts that deprive people of the right to move around safely, or provide themselves with the means of economic subsistence, or express themselves freely, or practice their religion, and so forth.

What is at issue here? This kind of argument is not designed to efface the differences of status between state and non-state actors that are evident in international human rights law. It does not assert that a person who organises a terrorist attack is subject to, or required to respect, international human rights law in the same manner as a state. Instead, it suggests that individuals and states both have a common *a priori* duty to respect the security and rights of others, including their right to life.

It will be said that this form of words is too simple: it fails to distinguish between civilians and combatants (or officials and non-officials, or legitimate targets and illegitimate targets), and does not permit distinctions to be made between illegitimate violence and the right to resist.

This is only partly true. The first emphasis should be on "*a priori*". The burden of proof should be on those who use violence to show that their violence is proportionate and justified. In the absence of sound justification, violence should be avoided. What then is "sound justification"? There is probably no short cut on this matter. History suggests that context and local judgements will play a role.

In the past this has been a highly controversial area. However, the old assumption that international human rights law is entirely state-centred is shared by very few these days. Many legal scholars have questioned the assumption, while advocates and activists have been creative in applying human rights standards to other non-state actors, such as private companies, and to issues such as gender violence perpetrated by private individuals.[75]

It is nevertheless essential to clarify that these suggestions signal no change of approach to the state's obligation. States have a duty to take action to promote, protect and fulfil the human rights of people under their jurisdiction. Their obligations extend to ensuring that other actors who commit abuses are prevented from doing so, punished when required (according to law) and that victims receive redress or appropriate compensation. States are also required to invest effort and resources towards the creation of conditions in which human

75 Bennoune, forthcoming. Alston, Academy of European Law, and New York University, Center for Human Rights and Global Justice, *2005*. Among other concerns, classical human rights lawyers would argue that extending human rights accountability to non state actors is legally impossible, as well as ill-advised from a policy perspective, because it allows government to shirk or shift their own human rights responsibilities. See discussion in Clapham, 1993, pp. 25-56.

rights can be fulfilled. Private actors, by contrast, have a narrower range of responsibilities. They have a responsibility to avoid doing harm to the rights of others, but have no authority to take action against others who violate rights (for example by imprisoning them), and have no legal obligation to take action to redress or repair the consequences of abuses by others.

Of course, to the extent that armed groups occupy territory and acquire characteristics of states, their actual responsibility to fulfil, promote and protect will tend to grow – as the framework of international humanitarian law acknowledges.[76]

Faced by the question of states, and non-state actors' responsibilities under human rights law, human rights actors confront three possible options. The first, and arguably most radical, would see them adopt the position that non-state actors are legally bound by human rights law.

Alternatively, they could adopt an interpretative position that seeks to build on the evolving understanding that human rights law can bind non-state actors in certain circumstances; through their advocacy and litigation, they could try to develop these areas as much as possible.

Finally, human rights groups could acknowledge a legal gap, as they did with business some years before, and devote their energies to developing new standards.

What the argument does, therefore, is affirm that every actor contributes to the protection of rights, and has a duty towards others in this regard.[77] The use of violence for political ends, including terrorism, highlights this duty in a particularly dramatic manner, in relation to the most fundamental rights to safety and physical integrity.

An approach of this kind responds to the first criticism set out in the previous chapter, namely that human rights organisations are over-punctilious in their condemnation of states and unspecific in their condemnation of terrorism. It provides a framework round which human rights organisations can start to develop a meaningful analysis of the phenomenon of terrorism, and mobilise

76 Private companies are subject to the same observation. As their "footprint" in the local economy grows, they will be expected to contribute more to the creation of conditions in which human rights can be respected and fulfilled. Investing in the capacity and financial viability of government will be part of this effort. The increasing demands made on business by civil society advocates and the public in many countries reflect this trend. For a succinct summary of the challenge this represents for business, see John Ruggie, Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, February 2006, at www1.umn.edu/humanrts/business/RuggieReport2006.html.

77 For a more detailed discussion of individual responsibilities in relation to international human rights law, see International Council on Human Rights Policy, 1998; Clapham, 2006.

opinion. It is one that puts the individual who suffers abuse at the centre – a key human rights principle.

An obvious risk is that arguments of this kind, if presented carelessly, may weaken the hard logic of human rights law and as a result undermine state accountability. Constructing and presenting the argument carefully will therefore be vital.

If this can be done, however, almost every issue that politicised violence and terrorism raises could be analysed in the way suggested. It could address kidnapping and ransoming, ill-treatment and torture, sectarian killings, bombings and assassinations. Moreover, it would be possible to speak about the issues in terms that would apply to states and non-state groups equally, and that would be accessible and persuasive to a public audience.

Even where the legal framework is least helpful, such an approach enables human rights organisations to focus their monitoring, advocacy and campaigning strategies on the point of view of the citizen or individual (or victim, survivor or civilian).

This has two particular merits. It draws attention to an individual's entitlement to security from arbitrary violence – whoever commits it. Second, it becomes possible to make judgements (in moral, not necessarily legal terms) about acts that are impermissible, by applying criteria that are even-handed in relation to the perpetrator.

> It is hard to explain how I felt at that moment [when the bombs went off]. I felt loss, people dying and destruction everywhere, and at that moment I knew what it meant to be safe. It is very difficult when someone loses this sense of safety. Feeling safe is a blessing.[78]

## The claims of victims

Developing more detailed positions in the way suggested will probably require human rights groups to give more detailed attention to the claims of victims and issues of compensation.

As noted earlier, it has increasingly become the practice of human rights organisations to monitor and report on abuses by non-state actors, particularly if it is possible to apply international humanitarian law standards. Even where this is not the case, a strong case can be made for documenting political attacks by armed groups against civilians. Doing so demonstrates, first, that human rights organisations have a strong concern for victims and, more broadly, for the

78 Muhammad Yusri, after witnessing three bomb blasts in Dahan, Egypt, quoted in the *International Herald Tribune*, 26 April 2006.

general public at risk. Secondly, it indicates to government that human rights organisations are primarily interested in protecting people and rights, rather than condemning government. On both grounds, human rights organisations are less vulnerable to the charge that they are partisan or lop-sided in their interests.

Americas Watch first documented abuses by the Salvadoran *Frente Farabundo Martí para la Liberación Nacional* (FMLN) and the Nicaraguan Contras in order to rebut criticism by the United States administration that it focused solely on government abuses. At the same time, this work enabled Americas Watch to support a category of victims that had not been given much attention by human rights organisations: civilians affected by war. Human rights organisations now frequently document abuses by armed groups in areas of conflict.

Many of the best national organisations that document violations in Israel and Palestine report violations and abuses by forces on both sides, using standards drawn from both human rights law and international humanitarian law. Local reporting in Colombia, where conflict is as murderous and as deeply entrenched, has evolved similarly, though local reporting of non-state violations has generally been less explicit than reporting of abuses by government forces and government militias. In conflicts such as Chechnya and Sri Lanka, balanced reporting of abuses has been hampered by logistical difficulties and the danger involved in monitoring groups such as the Liberation Tigers of Tamil Eelam (LTTE). In Peru, reporting of abuses by Shining Path in rural areas was even more difficult, and was scarcely attempted at the time, while the scale of rural abuse by government forces was not properly documented until after the conflict ended. It is easy to criticise human rights organisations for failing to report non-state abuses as consistently as state ones: in practice, balanced reporting of non-state abuses is frequently more dangerous and technically and logistically more complex.

In one important respect the duties of states and the accountability of armed groups cannot be described "evenhandedly", however. Whereas human rights organisations can coherently call upon both governments and armed groups to avoid actions that are likely to kill or maim innocent people (bystanders, civilians, non-combatants, children), it will not always be realistic to call on armed groups to provide restitution or compensation to individuals who have been injured by their attacks, or to the families of those their attacks have killed.

In practice this means that human rights organisations may wish to support victims' groups, or the families of victims when they seek compensation or financial assistance from government; may advocate the rights of victims and victims' groups; and may support governments in their efforts to provide compensation and redress to victims. This has been, for example, the position of Kenyan human rights groups in claiming compensation for Kenyan victims of the 1998 bombing of the US embassy in Nairobi. All these things can be done without adopting political positions in relation to the conflict in question, or the political claims of the parties involved.

This may be a principled response to acts of extreme violence at any time, but it is likely to acquire particular practical force at the point when a conflict is drawing

to a close or reaching resolution.[79] At this point human rights organisations are, in any event, likely to be addressing questions of accountability and redress and ensuring that they are not neglected in the interests of political expediency. In these circumstances both governments and armed groups may make common cause in avoiding the issue. Sierra Leone provides a striking positive example of human rights advocacy in support of redress for victims of extreme violence by non-state armed groups.

A policy that actively supports the claims of victims of political violence (following acts by state or non-state agents) will respond to the criticism that human rights NGOs privilege the rights to due process of those who are accused of crimes, including terrorist crimes, but give little attention to the rights of their victims.

In practice, the response to this criticism needs to be on three levels. It is, first, right to recognise that victims do have rights to redress, and compensation; their suffering should also be recognised. Second, it needs to be affirmed and argued that, where innocent people (bystanders, civilians, children etc.) have been victims of arbitrary violence, their fundamental rights have been violated and this is not acceptable. Third, human rights organisations will wish to reaffirm the importance of defending the right to due process of those accused of crimes, including terrorist crimes. The response should not involve any weakening of position in relation to this last matter – but rather consists of strengthening the attention given to rights of victims and the legitimate claims they may make on government.

The particular significance of this third point is that the supposed interests of victims are sometimes enlisted as a justification for faulty legal processes resulting in miscarriages of justice. Yet the conviction and imprisonment of the wrong people for terrorist attacks serves the interests of neither victims nor the broader public that deserves adequate protection.

If human rights organisations take up the claims of those who have suffered from terrorist violence, it is evident they should speak up equally on behalf of those who have been victims of "anti-terrorist" violence by state officials. Usually this point is uncontroversial. Sometimes, however, in situations where terrorist violence is particularly widespread, there may be a temptation to shift focus away from government behaviour. Human rights groups that have worked consistently on violence by armed groups, for example in Uganda, have found that in practice a different standard of proof applies to their documentation of state and non-state violations. Abuses by rebels are seldom challenged publicly and may not be carefully documented. Claims of abuses by government forces, on the other hand, are invariably disputed, so full documentation is necessary. The upshot – somewhat the opposite of the usual situation – is that rebel atrocities are reported more fully.

Another important cautionary note is that human rights groups will wish to monitor the extent to which governments use the suffering of victims of terrorism in inappropriate ways to justify policies. In conflict-ridden societies, the political

79 International Council on Human Rights Policy, 2006b.

attitudes of victims are unlikely to be homogeneous; even in New York, where the attacks in September 2001 hit a peaceful society and where the response might have been expected to be uniform, victims' groups expressed a variety of views. Some expressed outspoken opposition to the idea that the attack justified the use of military force overseas.

## Strong anti-discrimination positions

In countries where terrorism is an issue, human rights organisations have often found that they need to develop strong anti-discrimination positions in parallel to policies that support the claims of victims. This is because religious or cultural minorities frequently suffer discrimination or curtailment of their civil rights when societies polarise following incidents of political violence or acts of terrorism. Public opinion may identify the whole community with the groups responsible for violence, as the Irish community in Britain experienced when the Irish Republican Army (IRA) exploded bombs on the British mainland; or the security services and police may target such communities as they try to suppress the groups responsible for violence. Both these problems clearly arose in a number of countries after the attacks against the United States in 2001. Muslim minorities experienced discrimination; and young Arab and Muslim men experienced particularly heavy surveillance.

It should be stressed that such discrimination is not recent, and is not confined to the incidence of terrorism.

Though discrimination may occur for many reasons, however, following acts of terrorism it is likely to be particularly severe, precisely because such attacks provoke extreme insecurity and fear in the targeted population. Those who defend the rights of those accused of terrorist attacks become very unpopular; and it can become difficult to speak on behalf of a community that is perceived to be associated with people responsible for them.

The work of Israel-based human rights organisations that advocate the rights of Palestinians, and the work of human rights organisations that defend the civil liberties of Muslim communities in Europe and the United States, is therefore particularly important. If human rights organisations condemn acts of political violence and support the claims of victims of that violence, without demonstrating support for those who face public prejudice or suffer official discrimination because of that violence, they will be perceived as biased.

## Considerations of effectiveness

Human rights advocates can deploy another argument in support of the rule of law: its effectiveness as a means of combating terrorism. Often this is done in a broad rhetorical sense, usually along the lines that, when human rights

and the rule of law are undermined, the terrorists have won. There is value in this approach, but more pragmatic approaches are also relevant (and equally principled).

The normal rules of criminal procedure have evolved in different legal systems because they are considered to be the most effective way of discovering the truth. Their imperfections are acknowledged, but it is accepted that a dispassionate testing of evidence is the least worst way of making sure that those responsible are apprehended and penalised. When the system fails – when the wrong person is imprisoned for a terrorist bombing for example – it is not only the rights of that person that are infringed. The community as a whole has not seen justice done and is not protected from the actual perpetrators, who continue to walk free. Of course, no system is infallible, but fallibility increases greatly when long-standing safeguards are removed, specifically in terrorist cases. To point this out is not special pleading on behalf of those accused of terrorism, but rather a principled argument in favour of the community's interests as a whole.

Many other human rights violations of human rights or breaches of the law, purportedly justified by counter-terrorist ends, can be answered with consideration of effectiveness (as well as the underlying argument of principle). Torture and ill-treatment are increasingly justified on grounds of expediency (although re-labelled to disguise the true nature of the practice). Yet torture can be opposed on pragmatic as well as principled grounds. The so-called "ticking bomb scenario" – where a terrorist must be tortured in order to save thousands of innocent civilians – never occurs in reality, outside the imagination of television scriptwriters.[80] The truth is that torture will often yield inaccurate information, since the victim will be inclined to give replies to please the torturer and stop the treatment. Even where information gathered under torture is accurate, it will never be admissible in legal proceedings. In the long term, torturing suspects will undermine the capacity of police and other security agencies to conduct proper interrogations and assemble evidence through a process of investigation.

This exemplifies a broader problem with the counter-terrorist measures that many states have adopted. Human rights law permits states of emergency and derogation from certain protections for a limited period, as discussed below. Yet emergencies tend to degrade the capacity of state agencies to carry out their work in a professional and effective way, especially through short-cuts in the criminal justice process such as extended pre-trial detention or long-term detention without trial, as well as torture and other ill-treatment. The long-term impact on the capacity of the state to prevent and detect crime can be very serious. Countries such as South Africa and many Latin American states are clear examples of how long-term exceptionalism can atrophy the professional skills required in law enforcement.

80 Association for the Prevention of Torture, 2007.

## The challenge of derogation

In this report, we have emphasised that human rights organisations have a particular responsibility to ensure that governments respect the rule of law and the right of all persons to due process. We have noted that this work becomes especially necessary (and challenging) when acts of terrorism occur, because respect for legal procedure is more likely to be ignored. There is a wealth of evidence to support this assertion – both in relation to government behaviour since the "war on terror" was declared in 2001, and government response to earlier and older examples of political violence.[81]

But what exactly are the limits of government authority when it is faced by political violence, terrorism, or threats to public security? To this question, unfortunately, no simple answer can be given. Human rights law permits governments to restrict certain liberties in the public interest, if the measures taken are proportional to the threat and do not undermine the content of the right itself. This is part of the constant process of balancing different rights. Hence, for example, governments are permitted to limit the right to freedom of expression on grounds of national security.

Governments are also permitted to suspend (derogate) certain rights in times of public emergency.

> … in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties … may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[82]

One of the important characteristics of derogation (as distinct from limitation of rights) is that it is a temporary measure, under constant review, that can continue only for the length of the emergency that it is necessary to address.

Two comments are relevant here: One is that, in practice, some governments have maintained "states of emergency" for very long periods of time. Such practices are evidently pernicious. The other is to emphasise that certain rights cannot be suspended. Governments are not permitted under any circumstances

81 The struggle in Peru in the 1980s-90s, Northern Ireland in the 1970s-1990s, the Philippines in the 1960s, to name three.

82 International Covenant on Civil and Political Rights (1966).

to arbitrarily deprive people of life, to torture or enslave, or deny freedom of religion and conscience.[83]

It is important to recognise and affirm these non-negotiable limits. Some "lesser evil" approaches (described in Chapter IV, above) go beyond these boundaries and depart from the first principles of human rights. They posit the application of different standards to "us" (in this case Western societies) and them. "We" can take the risk of indefinite detention, coercive interrogations and the rest because we do so for the right reasons – to avoid the greater evil. "Our" opponents – the greater evil – are not allowed to do this.[84] Yet human rights standards are universal standards that apply to everyone equally.

The argument that regards torture as permissible is the most extreme version of "lesser evil" thinking; it generates a strangely inverted moral universe in which good people are allowed to do evil, but remain good, while their enemies, evil by definition, are condemned if they act in the same way.

Other "lesser evil" arguments would not countenance "torture", but would allow "coercive interrogation", including sleep deprivation, hooding and other forms of treatment that "would produce stress".[85] Yet the prohibition of cruel, inhuman or degrading treatment is equally non-derogable and absolute. US human rights organisations have been confronting government attempts to "redefine" torture to encompass such cruel treatment.

83 Article 4 of the International Covenant on Civil and Political Rights (ICCPR) (1966), Article 15 of the European Convention on Human Rights (ECHR) (1950) and Article 27 of the American Convention on Human Rights (1969) recognise that some rights can be derogated from in time of public emergency. The African Charter on Human and Peoples' Rights (1981) does not contain a derogation clause. All three conventions, however, note that certain rights are not subject to suspension under any circumstances. These include the right to life; freedom of thought, conscience and religion; freedom from torture and cruel, inhuman or degrading treatment or punishment, and the principles of precision and of non-retroactivity of criminal law (except where a later law imposes a lighter penalty). Building on states' other obligations under international law, the UN Human Rights Committee, which monitors the ICCPR, has also developed an additional list of rights that cannot be subject to lawful derogation. (See General Comment No. 29.) These include: all persons deprived of liberty must be treated with respect for their dignity; hostage taking, abduction, and unacknowledged detention are prohibited; persons belonging to minorities are to be protected; unlawful deportations or transfers of population are prohibited; and "no declaration of a state of emergency … may be invoked as justification for a State party to engage itself … in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence".

84 See Gearty, 2005.

85 Ignatieff, 2004.

Real dangers thus surface when human rights advocates, in good faith, try to accommodate to the practical dilemmas that governments face in fighting terrorism. The accommodations above fail because they abandon some first principles of human rights, notably their universal application. But the failure of such efforts does not preclude the possibility that human rights advocates might address government's good faith dilemmas *from within the existing framework of human rights*.

The fact that governments are entitled to suspend or curtail certain liberties in situations of public emergency, including freedom of movement and freedom of association, means that human rights organisations as well as governments must consider – and perhaps negotiate – what forms or degrees of restriction or derogation are legitimate in given circumstances.[86]

There are genuine areas of debate about the legitimate scope of counter-terrorist measures. They relate particularly to the area of prevention. Counter-terrorism is driven to a large extent by intelligence. Governments that receive information about potential acts of terrorism may face several interconnected dilemmas. They need to take preventive action to protect the public, but lack evidence strong enough to secure a conviction in criminal proceedings. Additionally, they may be reluctant to make the nature of the information public, for fear of jeopardising intelligence sources. It is clearly against all human rights standards and the rule of law for individuals to be *punished* on the strength of secret information that they do not know and cannot challenge. But is it legitimate for the authorities to take *preventive* action in order to protect the public from terrorism?

In its purest form, this is a genuine dilemma. In many instances, however, the dilemma is less pure. What if the information in question has been received from a friendly foreign intelligence service – one that is known to have used torture? Is it legitimate to act upon such information – and does taking action imply that the authorities concerned condone the means by which it was acquired?

Problems of this sort lie behind the various forms of administrative measure that have been adopted to restrict the activities of potential terrorists. These may include surveillance of various kinds; freezing of bank accounts; restrictions on freedom of movement; or deportation (of foreign nationals). In all such cases, the rights of the suspected persons are actually or potentially curtailed; yet, since they are never declared to be criminal suspects, they have no access to the evidence against them or to any of the other guarantees laid down by criminal procedure.

86 There are numerous sources for those interested in reading more about legitimate restrictions and derogations of human rights. For a clear overview of legal standards in this area see FIDH, 2005.

Adoption of such preventive measures arguably falls short of the limitations on the liberty of the person that would require derogation from the requirements of the International Covenant on Civil and Political Rights or regional human rights instruments containing equivalent protections. They do not constitute administrative detention. How therefore should human rights groups respond when asked what they would do if faced with the government's dilemma? Do they deny that the dilemma exists? Do they advocate that no actions of this kind should be taken? Or limit action to the very minimum? Or argue for the declaration of a state of emergency and derogation from treaty guarantees of the liberty of the individual – on the grounds that at least this is known territory containing its own guarantees?

It is at least arguable that in certain circumstances human rights groups might consider the latter option. Not only does derogation in a state of emergency contain its own in-built guarantees. In addition, an established process of impartial review of administrative detention might be preferable to the use of measures falling just short of detention based upon secret and unchallengeable intelligence.

Another, even more sensitive debate about preventive measures relates to the question of so-called "targeted killing". In situations of armed conflict, IHL allows forces on either side to target the combatants of the other side. In non-international armed conflicts this is controversial, because civilians cannot be directly targeted "unless and for such time as they take a direct part in hostilities". In other circumstances targeted killing of terrorist suspects is not permitted. Law enforcement officials are bound by the same principles of minimal and proportional use of force that would apply in any situation. But what is a reasonable use of force? Where an armed police officer believes that a suicide bomber is about to detonate a bomb, is targeted killing permitted?[87]

Pragmatism collides very hard with principle in such matters. As a result, certainly for human rights advocates, the requirements of prevention present dilemmas that are morally and politically difficult.

The risks for human rights advocates of entering into discussion of derogation or limitation of rights are evident. Most consider that their primary duty is to protect and uphold rights, and challenge governments to improve their adherence to them. Consenting to the suspension or curtailment of rights, even in an emergency, feels intuitively dangerous for several reasons:

- It might strengthen the hand of those in government who want to increase executive powers (for example to implement wide-ranging counter-terrorism policies).

87 Kretzmer, 2005.

- It might undermine the authority of human rights law by establishing a precedent for curtailing certain liberties, without guarantee of restoration (the slippery slope argument).
- It might induce negotiations that undermine the independence and credibility of human rights organisations, or co-opt them into processes that over time undermine liberty.
- Where one state decides to limit or derogate rights, and does so in a considered and legal manner, it may provoke other states to do the same less scrupulously.

For these reasons, most human rights organisations have been unwilling to engage, at least publicly, in detailed discussion of the content of legitimate limitation or derogation. Understandably, they tend to believe that, while governments are entitled in law to derogate, it is not the job of a human rights organisation to collaborate in framing such decisions, but rather to monitor and assess them against standards in international (and national) law.

Unfortunately, this is not wholly adequate. Of course human rights advocates will not accept derogations or limitations that undermine the very content of the rights themselves. Yet the reason that derogations and limitations are permitted is precisely because there are emergency situations where it is legitimate and proper to limit some rights in order to guarantee others. Hence it is reasonable within human rights law to countenance, for example, limitations on the right to freedom of expression as a protection against incitement to violence. While human rights advocates are instinctively wary of limitations on rights, they equally have a principled obligation to those who are potential victims of violence.

It should be added, of course, that where the government in question has little respect for human rights or legal procedure, or has declared an indefinite state of emergency, principled detachment is obviously the correct position to take. In such cases, indeed, a policy choice will scarcely present itself.

In societies where there is an apparent attachment to the rule of law and individual liberty, on the other hand, the situation is less clear-cut. Principled detachment is still a simpler position to defend; but it brings its own risks and dilemmas. In particular, if human rights organisations refuse to discuss the content of legitimate derogation or limitation of rights following terrorist violence, they lay themselves open to the charge that (whatever they say) they do not take seriously the entitlement of citizens to be free from fear and protected from arbitrary attack. In addition, government lawyers and officials (who are themselves obliged to balance public safety against respect for civil liberties) are likely to consider such positions irresponsible or complacent. The risk is that if human rights organisations do not engage with the difficult political and legal decisions that governments face when terrorism and political violence occur, they will make themselves irrelevant.

It should be clear from the above that engagement must remain a choice for individual organisations to take; that refusal to discuss derogation and limitation carries risks, as does discussion of derogation and limitation; and that policy choices must be set in context. In summary, it might be said that the more a government is genuinely respectful of legal principles, and the judicial system is sound and independent, the more human rights organisations can justify discussing derogation. Regardless of the choices that human rights organisations make, however, their positions should be consistent whichever government they are addressing.

It is also worth noting that a number of organisations have adopted a different, but equally relevant approach. Speaking of the "war on terror", they have challenged the notion that a "trade-off" between human rights/civil liberties and public security is necessary.[88] Their approach is based on the assumption that the international human rights system was designed precisely to address situations in which grave political crimes had taken place. Far from being under-equipped, such organisations argue, the human rights system is well-armed to deal with terrorism. Some organisations, for example, argue that torture is not only morally wrong and contrary to international law, but also ineffective because it may yield inaccurate information. They stress that unsafe convictions, leading to imprisonment of innocent people charged with terrorist offences, will leave the real perpetrators free to commit further criminal acts. In general, they seek to build the case that integrating human rights into counter-terrorist strategies can make them more effective.

## Risk

With respect to the political judgements that must be made when issues of limitation and derogation are considered, many of these are essentially concerned with assessment of risk. This raises different issues for human rights advocates.

Many of the arguments brought forward to justify aggressive counter-insurgency policies, involving curtailment of legal rights, rely on claims that they will be effective or will address a significant risk. It has often been argued, for example, that it is effective to repress violent opposition groups and their sympathisers by military force or brutal tactics; or that exceptional personal surveillance is necessary to prevent acts of terrorism occurring in public transport, nuclear power stations, etc.

The difficulty with such arguments is that they are appealing but rarely susceptible to proof. It is argued that in some cases aggressive military tactics

88 Human Rights First is a particularly notable example in this regard. See www.humanrightsfirst.org.

have defeated terrorist movements (Peru in the 1990s,[89] Guatemala and Bolivia in the 1960s, Sri Lanka in the 1980s, the Philippines in the 1960s, Algeria in the late 1990s). But as many cases can be found where military force was counterproductive or failed (Vietnam 1960s, Colombia 1990s, Kashmir 1990s,[90] East Timor 1980s), or where a different mix of tactics was more successful (Malaysia 1960s, Ireland 1990s, Spain 1990s). Moreover, it is not clear exactly how the trade-off between "risk" and "loss of freedom" should be calculated.

In the 1990s the Kurdish Workers' Party (PKK) led an extremely violent insurgency that included suicide bombings and indiscriminate attacks on civilians. Though it was to make some concessions to PKK demands, the Turkish government met violence with violence. Turkish security forces razed entire villages and carried out mass arrests, torture and summary executions. Government forces finally captured PKK leader Ocalan and, under pressure from European governments, put him on trial (rather than executing him and thereby making him a martyr).

Over the same period, human rights groups appeared to have some influence. Abuses by the PKK and other groups started to decline in the mid-1990s, soon after human rights groups began denouncing them. Significantly, Turkish NGOs never adopted the government's rhetoric and in particular never referred to the PKK as "terrorists".

In these matters, therefore, human rights organisations clearly need to unpack arguments based on possible outcomes and probable risks and be highly cautious about accepting that such arguments justify limitation of rights. Yet the arguments need to be addressed, intellectually and morally, because they discuss real policy options and risks.

The success of counter-insurgency campaigns often depends on the sociology of the group in question, and in particular its support among the local population. In Sri Lanka, police death squads executed and "disappeared" tens of thousands of suspected supporters of the Janatha Vimukthi Peramuna (People's Liberation Front) (JVP) during the government's campaign against it in 1989-90. With tremendous loss of life and damaging effects on the country's institutions and respect for the rule of law, the organisation was ultimately crushed.[91]

Because the JVP mounted vicious attacks on civilians, however, it had already forfeited public support when the government mounted its crackdown. Though local and international human rights groups spoke out against the death squads, the public acquiesced in the government's campaign.

89 Even in Peru, some human rights organisations found that support for the Shining Path in the early 1990s was weakest in areas where the army had made serious efforts to curb torture and other abuses.

90 Most of the young men who joined militant groups in the late 1980s did so after massive vote rigging ensured that a Muslim coalition party did not gain power in the 1987 elections.

91 A transformed version of it entered politics in the late 1990s and won seats in parliament.

## Root causes

Human rights and civil society organisations also need to be intellectually critical of arguments that they are tempted to use themselves. One example is the argument, sometimes made in official as well as civil society circles, that terrorism and political violence have their roots in poverty or social exclusion, and that consequently a responsible strategy to reduce terrorism should include transfers of resources to poor societies with the objective of increasing their prosperity and reducing disaffection. This is, indeed, an explicit dimension of official policy in the United States and European Union.[92]

Clearly this argument is not false in a simple way; on the contrary, it is rather plausible. But exactly what claim is being made?

It can be argued, for example, that there is an association between the incidence of terrorist activity (or the origins of the individuals responsible for it) and poverty and inequity. This case can certainly be made. Throughout the world young people – clearly the prime source of terrorist militants – are over three times more likely to be unemployed than adults and their prospects are worsening.[93] The overall youth population rose by 10.5 per cent between 1993 and 2003 but youth employment rose by just 0.2 per cent. Unemployment is lowest in East Asia (7 per cent), and rises through South Asia (13 per cent), Latin America and South East Asia (16 per cent) to peak at 21 per cent in Sub-Saharan Africa and 25 per cent the Middle East and North Africa. Just 40 per cent of young people in the Middle East and North Africa are registered in the labour market.[94] While this report cannot analyse these figures, there is likely to be a significant correspondence between rates of youth unemployment and the incidence of terrorist violence (or sympathy for it).

If so, however, the link is not likely to be causal. Analysis of the social origins of individuals connected to terrorism suggests that neither those in positions of leadership, nor the majority of suicide bombers, are motivated by poverty or social disadvantage. A recent study of suicide bombers found that close to half of 180 young Palestinians who carried out suicide attacks in Israel had lost a relative or close friend in the conflict, and that revenge was an important factor

92 The European Union Counter-Terrorism Action Plan of 2005 includes four pillars: prevention, protection, pursuit and response. Prevention includes tackling the root causes which contribute to radicalisation and recruitment into terrorism. Generally, the root causes of terrorism are seen by the European Union to include poverty, autocratic governance, rapid but unmanaged modernisation, and the lack of educational opportunities. Council of the European Union, The European Union Counter-Terrorism Strategy, November 30, 2005.

93 ILO, press release for "Global Employment Trends for Youth 2004", 11 August 2004.

94 Figures from ILO, *Global Employment Trends for Youth* 2004.

in their decision to be a bomber.[95] Analysis of terrorist cadres found that most were educated, sometimes in Western countries, and were comparatively well off.[96]

The claim that terrorism can best be combated by investing resources to reduce poverty and social alienation cannot therefore be made literally. If al-Qaeda's top militants were engineers and architects educated in Germany and the United States, reducing poverty in Morocco and Pakistan is unlikely to deter them. Nor would programmes to reduce unemployment necessarily stop young bombers from Palestine, if their primary motive is revenge.

At the same time, research has suggested that support for the Revolutionary United Front (RUF) rebellion in Sierra Leone was fuelled by the poverty and alienation of a section of the youth.[97] A similar case could be made in countries such as Uganda, Peru and Colombia.

To be sound, an argument of this kind therefore needs to be constructed carefully. It may be that essentially it is making a case for saying that sympathy for terrorism will decline if prosperity and social and economic opportunities increase in countries where poverty or inequality are pronounced. This amounts to a restatement of the old claim that the fish (terrorists) will disappear if the sea in which they swim is drained (they are deprived of popular support). Even this does not clarify what the claim is, however. Is dissent rooted in economic factors (poverty and lack of economic opportunity) or driven by injustice (unfair economic and political relations)? No doubt there is a mix, but the implications for policy are clearly different.

## Closing comments

- The traditional role of human rights organisations in holding governments accountable for the human rights impact of their counter-terrorist measures will remain paramount.

95 Pedahzur, 2006.

96 A study by Alan B. Krueger and Jitka Maleckova did not find a clear relationship existed between levels of education and economic status, and participation in and support for terrorism. On the contrary the authors found a positive correlation between living standards above the poverty line or secondary or higher education and participation in Hizb'allah. Their survey also found that Israeli Jewish settlers who attacked Palestinians in the West Bank in the early 1980s were overwhelmingly from high-paying occupations. ("Education, Poverty, Political Violence and Terrorism: Is There a Causal Connection?", National Bureau of Economic Research, Working Paper No. 9074, July 2002, JEL No. J2, abstract available at www.nber.org/digest/sep02/w9074.html - accessed 17 April 2008.)

97 Richards and International African Institute, 1996, p. 182.

- To this first priority, they can also broaden their approach by analysing more systematically the entitlement of civilians to security, and documenting the manner in which this is undermined by both state and non state actors. This focus would allow them to address the particular needs of victims, minorities and, in some cases, civilians and communities that are perceived to be associated with acts of terrorism.
- Human rights organisations may wish to emphasise the ways in which adherence to human rights and the rule of law may make counter-terrorist measures more effective (and conversely how violations of human rights may undermine their effectiveness).
- Human rights organisations might consider how far they are prepared to go in engaging with discussions about the permissible limitations on human rights and the possibility of derogation in states of emergency. This might go beyond the role that human rights advocates have traditionally played – marking out the limits of possible restrictions – to a more active engagement with government.

# VI. TALKING IN PUBLIC

The last chapter suggested how human rights organisations might address some of the new questions that governments are challenging them to consider with respect to terrorism and counter-terrorism. This chapter looks at how human rights organisations might speak on the same subjects to public audiences and the media.

We begin with some remarks about the nature of public audiences, before going on to analyse some of the arguments that human rights organisations might wish to make when they try to explain their policies and positions in public.

## What is "the public"?

Of course, "the public" is an abstraction. It is a multitude of voices, layered and clustered in complex ways that differ from society to society. Indeed, it is so complex that a distinct industry specialises in extracting precise information about the tastes and attitudes of defined slices of it.

What does the public think about human rights and terrorism? The question is almost impossible to answer because it includes so many variables.

Certain things may nevertheless be said. First of all, public reactions to terrorism (and responses to it) clearly vary greatly from country to country (and within countries). Among countries that have been recent targets for Islamist attacks, for example, public reactions within Spain and the United Kingdom (UK) were rather different from those in the United States (US). The attacks in September 2001 had the immediate effect of rallying public support behind the Bush administration, which used this support to pursue a variety of policies linked to the "war against terror". The publics in Spain and the UK gave their governments no such blank cheque. Most strikingly the Spanish electorate voted its government out of power only days after the Madrid bombings of 11 March 2004.

What these two countries have in common that differentiates them from the United States in particular is a long history of armed nationalist groups using terrorism. (In the longer perspective, they also have experience of aerial bombardment in wartime.) This does not imply that people in Spain and the UK accept or tolerate terrorist attacks; but, more accustomed to these things, they will accommodate differently to them. They also tend to understand that a variety of different responses are required to stop terrorism effectively.

American reactions were different. The US public had little experience of terrorism from abroad. (Nor of any sort of foreign attack: not a single civilian was killed on the US mainland in the Second World War.) Psychologically, the public

therefore felt insulated from international terrorist attack. September 2001 was so shocking, not just because the attacks caused great loss of life, but because they generated a new sense of vulnerability. Partly through its lack of experience of terrorism, the American public has also been more trusting of its government and of the measures government took to deal with terrorist threats.

In other parts of the world, experience is different again. Where governments have themselves been sponsors of terrorism, or very violent repression, trust levels may be much lower, as may the public's own sense of its power to influence government. In this regard, the official discourse of government on terrorism will not be heard in Colombia, Sri Lanka or Algeria as it will be heard societies that have a less violent history of civil conflict. Differences of perception between societies, that have implications for public attitudes to government, human rights and terrorism, can be sliced in an almost infinite number of ways.

Nor, of course, is "the public" homogeneous within countries. Fear of being a victim of terrorist attack will be affected by where people live and whether they are likely to visit places that may be targeted. Attitudes will also be affected by individual and community ethnic, political or religious loyalties – and past experience of being either the victims of terrorist attack or official repression. Once again, individuals have numerous identities and their opinions about terrorism (as everything else) reflect these and their interactions (or lack of them) with other people in the workplace, in places of worship, at school and home, in trade unions, sports stadiums, concerts etc.

The mass media also play an important role in "creating" public opinion. In most societies, extreme political violence is occasional and most people have no direct experience of it. Their opinions are derived to a considerable extent from what they learn from newspapers, radio, television and the internet. This report is not able to discuss this question in detail, but attitudes to terrorism and counter-terrorism policies, as well as to human rights, are clearly influenced by the quality and range of public information, the public's access to that information and the degree to which it is subject to political bias or control. These evidently vary greatly in different societies.[98]

In sum, it is difficult for a human rights organisation to know with accuracy what the "public" thinks about terrorism, human rights or related issues. It is tempting but unwise to infer public attitudes on the basis of anecdote or media reports; the media neither purely shape not purely reflect the views of the public.

Where they exist, opinion surveys might provide the best indication of what the public thinks, although most of the questioning conducted by commercial or governmental surveys of public attitudes may not be specific enough to be of

98 International Council on Human Rights Policy, 2002.

great assistance to human rights groups. However, there are regular surveys of issues such as public attitudes to the use of torture. A poll commissioned by the British Broadcasting Corporation in 2006, for example, found that worldwide 59 per cent favoured maintaining a total prohibition on torture, while 29 per cent said that some degree of torture should be permitted. At a national level, however, the figures varied enormously. In the United States they were 58 per cent – around the average – and 36 per cent – rather higher than the average. In the Russian Federation the equivalent figures were 43 per cent and 37 per cent and in Israel 48 and 43 per cent, while in Great Britain, which has also suffered terrorist attacks, they were 72 percent and 24 per cent.[99]

Interpretation is another issue. Is the most relevant figure the number of those rejecting torture unequivocally, or the minority, perhaps sizeable, prepared to endorse it in some circumstances? This is a judgment that can only be made in the national context. This, remember, is just one of a number of issues relating to public opinion that human rights advocates will have to take into account. Some human rights groups, with relatively plentiful resources, commission their own polling in order to be able to shape their public messages more effectively.

In summary, there is a huge variation in popular experience of terrorism and their attitudes towards it. It is not easy for human rights groups to obtain accurate information about public attitudes, which may, in any case, change and evolve depending on the imminence of the terrorist threat or whether there have been recent atrocities. The messages that human rights advocates convey will be dictated by fundamental principles, but the exact form that they take will be shaped by careful research into popular opinion and attitudes.

## Starting points

What general starting points might therefore be relevant when a human rights organisation considers how it might most effectively talk to its wider public about terrorism and official counter-terrorism policies?

First of all, a careful analysis of context will be essential. Parliamentarians will require a different form of presentation than callers on a popular phone-in radio programme, and members of a community that has recently suffered a bomb attack will need something different again. While seeking to remain consistent in what they say, human rights organisations will therefore need to hear and understand the local *preoccupations* of public audiences they speak to before framing arguments that respond to their concerns. This report cannot replace that work: it can merely identify some broader issues that are likely to present themselves. Positioning the arguments in specific contexts must be done locally.

99 World Public Opinion, 2007.

While governments and members of the public may challenge human rights organisations in similar ways, public discussion of terrorism and its effects is likely to be less technical, and less legal, than a similar discussion with officials. Officials have responsibilities which members of the public do not. As a result, though carefully balanced arguments will still need to be developed – and to be consistent with arguments presented to government officials – their logic is likely to be more direct.

A second general point is that political violence and terrorism characteristically polarise society and public attitudes. They cause large numbers of people to take divided and antagonistic positions. In such situations, it becomes much harder to speak in terms that all sides will consider objective. This has obvious policy implications for human rights organisations since their credibility depends on being seen to speak evenhandedly. In the absence of a large "middle", human rights organisations can easily become isolated, holding principled positions that are considered irrelevant both by those who support government counter-terrorism policies and those who sympathise with non-state violence.

A comparable polarisation occurs globally. In a short report we can not do more than broadly indicate the nature of this problem, but it means that public audiences have very different expectations and concerns in different countries.

- In countries like Colombia or Sri Lanka, where a civil conflict is occurring and terrorist groups are locally based, populations may experience politicised violence – by state and non-state actors – as an immediate and continuing personal threat. As a result they may also attach themselves to one of the fighting parties, to obtain security, for example.
- In other countries, populations may experience (foreign) counter-terrorism as no less threatening than the non-state terrorism it is supposed to suppress. Examples might include Afghanistan and Iraq.
- In societies where those committing non-state violence are not locally-based or do not have significant local support, the threat of terrorism may seem foreign – both distant and strange – and therefore difficult to comprehend. Examples might include Spain (with the exception of Euskadi Ta Askatasuna (ETA)), the United States (with the exception of home-grown political violence), or Kenya.

In themselves, such crude categories may not be very helpful. They nevertheless throw light on the important fact that, because people experience violence and terrorism differently in different countries, they perceive threat differently as well. The publics in Colombia, Indonesia and Jordan each have different perceptions and experiences of the threats they face. Iraqis and Afghans, threatened both by domestic violence and foreign counter-terrorism forces, are likely to have an understanding of self-interest and threat that is different again, and both complicated and ambivalent. The attitudes of all these audiences differ sharply

from the fear of apparently irrational violence that is experienced by people in countries like the United States, who felt no personal connection with, or responsibility for, those who attacked them in 2001 – and who therefore cannot explain their behaviour.

These differences of experience and perspective explain why debates about terrorism in the United States and Europe are so different from debates on the same subject in Palestine, Israel, Pakistan, Egypt or Kenya – and why, too, perceptions of threat do not necessarily match actual risk. If the arguments of human rights organisations are to be relevant and are to influence public attitudes in those different contexts, their approach to a discussion of terrorism (and counter-terrorism) must respond effectively to such local concerns and local perceptions of risk.

The United States is towards one end of this spectrum. Since September 11, fear of terrorism has been seared into public consciousness. The government has largely persuaded the public that terrorist groups pose a permanent and dangerous threat, and a (falling) majority continues to believe that aggressive military action abroad is necessary to maintain safety at home. Yet the substance of the threat remains obscure: Americans are not well informed about who is threatening them, or why, or what level of risk they really face. In reality, though their threat response is extremely high compared with most countries, most Americans are much less likely to experience political violence than people in many other parts of the world.

As a result, human rights groups in the United States have faced a formidable task. When they have questioned the need for heightened security, or constraints on civil liberty, they have been criticised for unreasonably tying the government's hands, even undermining the safety of Americans. Public debate has been shifting nonetheless: especially after the Abu Ghraib scandal, judicial authorities have reasserted basic rights in certain cases, and the media have become more critical of the administration's civil liberties record.

The American Civil Liberties Union has not shifted its focus away from campaigning and litigation on civil liberties. (It has not, for example, felt it necessary to focus on the rights of 9/11 survivors and relatives.) It has campaigned under the slogan "Safe and Free", acknowledging the legitimacy and necessity of counter-terrorist efforts, but defending constitutional rights. The organisation conducts regular polling of the public, which reveals that its message is well understood.

In Western Europe, by contrast, public opinion has been critical and fearful of acts of terrorism, but also consistently more independent. This is partly because countries that have been attacked recently, such as Spain and Britain, have an experience of coping with political violence (by ETA and the Irish Revolutionary Army (IRA) respectively) that gives the public a degree of perspective. A more public argument therefore developed when governments wanted to introduce invasive security measures or constrain civil liberties following attacks in 2004 and 2005. On the other hand, there is mounting evidence of a political backlash in some European countries, and in particular an increase in attacks or discrimination on racial and religious grounds.

## Public arguments

These differences of experience and perception help to explain why it is particularly difficult for human rights organisations to communicate successfully with the public on the subject of political violence. They reinforce the obvious point that human rights organisations need to develop an accurate analysis of the context in which they are working, before they develop detailed public positions on terrorism and counter-terrorism.

Defining the context starts with a judgement about the extent to which a government is or is not committed to protecting rights. This judgement will directly influence how an organisation can talk about human rights and government counter-terrorism policies to the public, as well as officials.

A similar judgement needs to be made about groups that are responsible for political violence or terrorist acts. Are they interested in protecting or promoting the rights of people living in the society? If so, are they selective in that commitment? These judgements too will influence how human rights organisations can talk to the public about terrorism, as well as guide decisions about how far they can have a dialogue with or influence armed groups responsible for it.

Third, a judgement needs to be made about the capacity of civil society organisations to articulate their views and make them heard. To what extent do civil society organisations have the expertise to apply international humanitarian law and human rights law in their public advocacy? Are leading human rights organisations isolated in society, or have they established solid public support? Are judicial officials corrupt or independent – are they able to apply human rights and IHL? These judgements too will determine how easily human rights organisations can develop persuasive and influential public positions.[100]

The task of presenting human rights positions effectively to the public is therefore complicated, not only because audiences are often passionately divided and have quite different perceptions of threat in different countries, but because human rights organisations must simultaneously deploy several kinds of argument when they discuss political violence, and must do so clearly and without contradiction. They need to be able to

- discuss and challenge official policies, including misrepresentation or propaganda by government (or the media);
- explain their own position and human rights law; and
- discuss and challenge political claims and policies, as well as propaganda, of non-state groups that commit violence.

100 For a more extended discussion of how human rights organisations have influenced the behaviour of armed groups and the need to contextualise such work, see International Council on Human Rights Policy, 2006a.

## Commenting on government

Precisely because politicised violence creates such passionate responses – among those who are victims of attack, and more widely among people who feel indirectly threatened – monitoring of government is of crucial importance. Even when governments recognise the risks of over-reaction, and value the rule of law, after acts of terrorism they may face enormous public pressure to demonstrate that they are in control and can act to stop further attacks from occurring. If political violence subsequently becomes entrenched and public intolerance of terrorism rises, institutional restraints on executive power tend inevitably to weaken and the risk of executive abuse rises. As noted in the previous chapter, these risks and dangers have been demonstrated in numerous countries where politicised violence has occurred; and events since September 2001 have shown that continued vigilance to prevent abuses is more than ever necessary.

Human rights organisations do not really face a choice in this matter. Their mandates require them to monitor government to ensure that its policies reflect human rights principles and that state officials perform their duties correctly.

They do face a challenge in explaining to the public why they focus particularly on the performance of government and on the duties of government, when bombs are going off in the streets and civilians are being killed. The previous chapter outlined several official criticisms of human rights positions, and suggested elements of a policy approach that, assembled appropriately and in context, might respond to these criticisms effectively. Most public and media critics make similar points, and in general the same responses (once again, assembled appropriately) will help public audiences to appreciate the relevance of human rights. They include:

- a solid methodology for monitoring government and holding it to account;
- more detailed discussion of the entitlement to protection from violence of both the general public and minorities who may become vulnerable as a result of terrorist violence and public reaction to it;
- support for victims of political violence.

We rehearse these positions below, giving attention to differences of presentation that may be required when speaking to a wider public rather than officials.

## Responses

Sound research based on the application of a single standard is critical. Human rights organisations are as subject as others to the pressure to judge in the wake of acts of terror. It becomes much more difficult also to be clearly critical of governments in a climate of public anxiety. For these reasons, human rights

organisations need more than ever to show that they report and analyse acts of violence and violations of rights, not only against objective standards, but evenhandedly, without regard for who is responsible for them.

Human rights groups might start by documenting acts of violence and abuses by non-state actors as carefully as they document acts of violence and violations of rights by government forces and officials; and (where the context permits) giving such information comparable publicity. Many organisations already do this. Human rights organisations have been developing methods of analysis that permit them to report the activities of non-state actors. Advocates can extend these skills, while remaining firmly committed to the much longer tradition of monitoring government behaviour for which they are widely respected. They should document the actions of armed groups not only to modify the behaviour of such groups, but to disarm public and official criticisms that they are not even-handed and to undermine the loose assumption that all armed groups are of one kind, and similarly violent.

At the same time, reporting on armed groups will undoubtedly present problems of selection and prioritisation, resource allocation (both time and money) and risk. These difficulties are likely to affect international and national or local NGOs very differently. They will also raise problems of public presentation. Because international human rights law attributes different legal responsibilities to state and non-state organisations, reporting that is careful and objective necessarily treats these actors differently, making it harder to show that human rights organisations are politically independent.

It should therefore certainly be part of the job of human rights organisations to explain human rights law and why it is constructed in the way that it is. However, a strategy based on explanation alone is unlikely to be successful. Though international human rights law (and international humanitarian law) are intuitively appealing and commonsensical in broad terms, they are complex and in some respects counter-intuitive when it comes to their detailed application – and this is particularly true when it comes to political violence and acts of terrorism. The problems raised by limitation of rights have already been mentioned, as have some of the difficulties associated with determining whether military use of force is proportionate and appropriately targeted. Many explanatory difficulties also arise in relation to the determination of a conflict's status and the identification of combatants and non-combatants. The application of these distinctions is frequently contested by governments as well as by non-state parties.

This suggests that (where the context makes it sensible to do so) human rights organisations should develop forms of presentation that put the clearest possible emphasis on the equal entitlement of all persons (more precisely, all non-combatants) to protection from violence. This would enable human rights advocates to build their arguments, whether directed at government or non-state organisations, on the principle that non-combatants (civilians, bystanders) are entitled to be protected from arbitrary violence.

This implies directing more attention (where that is not already being done) towards the fears and anxieties, and entitlements, of the general public. Organisations can emphasise the right of all persons to be secure, and to move about and associate freely without fear of arbitrary attack. Whereas states have a particular responsibility to act to maintain these entitlements and rights, the argument can be addressed equally to states and non-state actors, and this would ease the spoken or unspoken feeling of many people that human rights organisations place less importance on the security of ordinary people than on the legal entitlements of individuals accused of crimes by the state.

Reporting has a role here too. A hallmark of good human rights research has been its detailed description of individual incidents and its commitment to give names and faces to victims. Human rights organisations have often provided victims or their families with an opportunity to tell their stories, and most human rights researchers can relate anecdotes of meetings with families who knew the chances of finding a "disappeared" relative were virtually non-existent, yet remained eager to say what had happened to them. To the extent that advocates can highlight the personal losses that terrorism as well as counter-terrorism cause, it well also help individuals across society to identify with the values and principles of human rights.

Such reporting certainly draws attention and gives dignity to the needs and rights of victims and survivors. It also permits empathy – with people whose lives are torn apart, often in an instant, by acts of violence that are not personally directed at them and may connect scarcely or not at all to their beliefs or past conduct. Empathy is also an early victim of terrorism and politicised violence. Very often it causes people to think only of the personal risk they run, or to dehumanise those they consider to be on the "other side". Careful reports that describe the human experiences of those caught up in the private and public tragedies that terrorism and counter-terrorism generate can sustain public empathy for others, which may preserve or create a reserve of public sympathy or tolerance when the time comes for political settlement.

As noted earlier, human rights organisations might also wish to give more explicit support to victims' claims to reparation or compensation, both in their advocacy in relation to officials, and in presenting their arguments to the wider public.

If they do so, human rights organisations should no doubt give attention (as needed) to the claims and rights of minorities who suffer from public or official discrimination that is linked to acts of terrorism or reactions to them. It has been noted already that discrimination and violence against certain minorities have increased in Western Europe since September 2001. This is a complex issue. Politicised Islamist groups and neo-fascist groups have been responsible for attacks on Jews and Jewish property, and European nationalist and neo-fascist groups have been responsible for attacks on Muslims in various countries. Where statistics are kept, the number of racially-motivated crimes, and crimes

against members of some religious minorities, have increased. Invasive police surveillance of Muslim communities, particularly young men, has been associated with heightened security policies. Finally, community violence has occurred in both Britain and France, reflecting problems of youth unemployment and social exclusion that particularly touch some Muslim communities.

A number of human rights organisations have done valuable work monitoring and drawing attention to discrimination, in Europe and the United States. Clearly, taking up such issues, alongside efforts to highlight the claims of victims, helps to demonstrate the even-handed character of human rights organisations and their willingness to support claims by all individuals whose rights and whose security are threatened by political terrorism or official policies to counter it.

## Speaking publicly about terrorist organisations

In the next chapter, we look more closely at how human rights organisations might relate to organisations that use political violence. The focus of this chapter continues to be on communication with the general public (and media).

We have already emphasised the importance of context – understanding public perceptions and experiences of threat, and the character of the armed groups in question.

We have emphasised as well the value of precise and sound reporting, both of state behaviour and the conduct of armed groups and groups that commit terrorist violence. The latter form of reporting can have several useful effects. It helps to establish a reputation for evenhandedness. For the armed group and those who may sympathise with it, it is evidence of competence. And it can correct simplistic or misplaced assumptions in the public mind, caused by lack of information or misleading official or media reporting.

In the period since September 2001, for example, it has become important to explain the variety of opinions that exist, not only within Islam, but within Islamist movements. Disagreements over methods and appropriate targets have sharply divided jihadist movements in Algeria, Bosnia, Egypt, Indonesia, Iraq, Lebanon, and Palestine. Similarly, while their rhetoric may be international, most such movements are driven primarily by local issues. This is true of Palestinian organisations, for example, and of Jemaah Islamiyah in Indonesia. Within the larger Islamist community, too, many of those who criticise Western governments' policies oppose indiscriminate attacks on civilians. In short, analyses that do not differentiate between the behaviour and origin of different groups will not lead to coherent policies on terrorism.[101]

101 International Crisis Group, 2005.

This said, a note of caution should be sounded. We mentioned in an earlier chapter the danger of assuming that acts of terrorism or political violence are linked *causally* with the incidence of poverty or political exclusion. Similar risks arise when attempts are made to identify the "root causes" of political violence. While an understanding of context and history are essential, human rights organisations should take care to ensure that they neither appear to simplify history nor adopt a theory of cause that is easily contestable. Both will open them to charges of bias that will undermine their credibility.

In this respect, background analysis should be distinguished from analysis of immediate events. Faced by certain acts, such as torture, human rights advocates do not try to "understand" the background to it but condemn it as morally wrong and illegal. The indiscriminate killing of civilians should be similarly condemned without regard to cause or motive. Indeed, this is a consequence of adopting a definition of terrorism that focuses on the nature of the act rather than on motive or other factors.

In this context, it is worth adding that, just as the presence of grievance does not justify attacks on civilians, neither does an act of terror de-legitimise the aims or grievances of groups that are responsible. This distinction too needs to be respected.

In conclusion, while human rights organisations will want to retain the traditional rigour and discipline that they bring to their research, they may also want to find new ways to communicate their views to the public, as well as to government.[102] This implies that they will need to sustain positions that are

- *politically independent* (that is they do not privilege the interests of any particular actor),
- *in accordance with human rights* (and international humanitarian law) principles, and
- *non-discriminatory* (that is, they show equal concern for the rights of all individuals, irrespective of religion, political belief, race etc).

This chapter has suggested various elements of an approach that – applied sensibly in context – may help them to achieve these goals. They include:

- Analyse the audience. Break down the idea of the "public" into its constituent parts and consider what are the interests and predispositions of these different groups.
- Analyse the context. Public attitudes will be shaped by their own experience of terrorism (and media portrayals).

102 International Council on Human Rights Policy, 2002, p. 59.

- Continue with the central task of monitoring government respect for human rights.
- Report in greater detail violence by non-state actors.
- Highlight entitlement to security enjoyed by everyone and explain the responsibilities of different agencies in ensuring this.
- Recognise the claims of victims and where necessary conduct advocacy to ensure that their right to redress is fulfilled.
- Uphold the rights of religious and ethnic minorities and monitor counter-terrorist policies for their potentially discriminatory impact.
- Explain the responsibilities of government under the different legal regimes that may apply in situations where terrorism occurs.

## VII. TALKING WITH VIOLENT GROUPS AND THEIR SYMPATHISERS

Over four decades of work, human rights organisations have developed a range of tools and strategies designed to persuade states and (more recently) armed groups to curb abusive behaviour. They have focused primarily on state violations, partly because government actions pose the greatest threat to human rights (in terms of scale), and partly because human rights law itself focuses primarily on the responsibilities of states. Nevertheless, as noted, in recent years human rights organisations have reported abuses by armed groups more regularly and in more detail. To do so, they have usually based their analysis on international humanitarian law (IHL) and have distinguished the legal responsibilities of states from those of non-state actors, by using "violation" (implying breach of a legal norm) to denote acts by the former and "abuse" to denote acts by the latter.[103]

Like states, armed groups are diverse, however. Whereas some are sympathetic to human rights arguments, others are extremely difficult to influence, and a few are positively dangerous to engage with. It is very difficult to attempt to categorise such groups, since all contain a unique combination of attributes that may make them more or less predisposed to adopt terrorist tactics, as well as more or less open to some sort of dialogue with human rights groups. The following are some of the characteristics that might be particularly relevant:

- Is the organisation "quasi-governmental"? Does it control territory and aim at national self-determination and recognition as a government? Examples might include the Liberation Tigers of Tamil Eelam (LTTE – Sri Lanka), the Sudan People's Liberation Army (SPLA – Sudan), the Moro Liberation Front (MLF – Philippines), Hamas (Palestine), and the Communist Party of Nepal (Maoist) (CPNM – Nepal). This desire for international recognition may make an organisation more open to dialogue with human rights organisations.
- Does the organisation seek national self-determination, even if does not control territory? Contemporary examples might include Euskadi Ta Askatasuna (ETA – (Spain), and some Kashmiri groups. Again, this may predispose them to dialogue.
- Does the organisation have an ideology that is hostile to conventional international conceptions of human rights? Examples might include the Muslim Brotherhood (Egypt), Hamas (Palestine), Hizb'allah (Lebanon), Sendero Luminoso (Peru), LTTE (Sri Lanka), and Partiya Karkerên Kurdistan (PKK – Turkey). It is more difficult for human rights groups to engage with

103 Whilst groups like Amnesty International, B'Tselem and Human Rights Watch have adopted an IHL analysis to assess the actions of armed groups, other human rights organisations, like the Committee on the Administration of Justice (CAJ) in Northern Ireland, have avoided using IHL, concerned that it might thereby legitimise violence against police and military targets.

these groups, but they may do so through interlocutors, such as religious and traditional authorities from whom the groups derive their legitimacy and ideology.

- Does the organisation appear to operate without any clear ideology or aims? Examples might include the Aum Shinrikiyo sect (Japan) and the Lord's Resistance Army (Uganda).

This is not exactly a spectrum of accessibility to human rights organisations. Some organisations will tick cross-cutting boxes. Hamas, for example, is not ideologically predisposed to identify with what it perceives to be a "Western" conception of human rights; but it seeks international recognition and self-determination. It may therefore be more amenable to negotiation than is commonly supposed. It certainly has been open to discussion with human rights groups. By contrast, the LTTE in Sri Lanka, despite craving international recognition, has been politically intolerant and disinclined to dialogue.

This indicates that it would be a mistake to assume, in a simple manner, that organisations which espouse an Islamist jihadist ideology necessarily lie in the category of groups that are resistant, or explicitly opposed, to human rights arguments. It is true that the rhetoric of such groups, and their particular form of religious logic, make it difficult for human rights organisations to engage intellectually with them. (Similar problems may arise with certain Maoist organisations.) They are nevertheless diverse. While some certainly espouse (and practise) an ideology of global jihad, many are inspired by local grievances, even if they speak of solidarity with Muslims in other parts of the world. The positions of such groups may also change over time. Internal debates over aims and tactics, closed to outsiders, may cause long-term changes of direction. After years of intellectual isolation, groups may engage after a change of leadership, battlefield setbacks or changes in the political environment. Movements of opinion within Muslim communities that sympathise with jihadist Salafi ideals may also influence their conduct.

The difficulty lies, however, in the fact that some groups, including most jihadists, stand in opposition to human rights principles in many respects, not merely on account of their willingness to commit terrorist acts. Such groups may oppose religious freedom and non-discrimination. They may oppose women's rights or favour cruel, inhuman or degrading punishments. The human rights movement risks applying a double standard if it turns a blind eye to these factors. A government that exhibited similar characteristics would be regarded as irreconcilably hostile to human rights

Where one stands on this question is a matter of considerable importance, because it determines the kinds of political responses that are considered appropriate. Those who disagree with Islamist jihadi groups, for example, and believe they are irreducibly closed to negotiation will tend to conclude that only a military or law enforcement option will be effective. Those who consider

that such groups can eventually (to a degree or over time or under pressure) be brought into political negotiation with groups that do not resemble them will tend to recognise the value of non-military approaches or a mix of military and non-military approaches. In several cases, disagreement on this matter currently drives or disables international diplomacy.

Groups can also be categorised in terms of the way they use violence. Some organisations use acts of terror as one tool among others in the context of a broader armed struggle against a government. This is true of many groups fighting for self-determination, resisting an occupation force or trying to overturn governments perceived to be repressive. The fact that such groups seek to advance a political agenda does not excuse their use of terrorism; but it does create possibilities for influencing their behaviour. In many cases, such groups have already been subject to scrutiny by human rights organisations.

Even so, "influencing" is rarely straightforward, as the example of the Palestinian organisation Hamas illustrates. Hamas' operational wings recruit and train suicide bombers to target civilians. The group also engages in a wide range of activities that fall within the norms of IHL. It competes, for example, in elections and manages a range of welfare programmes. Characterising Hamas as a "terrorist group" simplifies the identity of an organisation that was recently elected to run the Palestinian Authority; but Hamas does commit terrorist acts, and does run suicide bombers.

Hamas leaders themselves would defend their use of political violence on the grounds that they are fighting an asymmetrical war of national liberation and have no choice but to use the weapons available to them.

Human rights organisations that have dealt with organisations such as Hamas, Hizb'allah and the Muslim Brotherhood have taken a position of not setting preconditions for contact and dialogue. This is analogous with the way in which human rights advocates address government. The fact that such dialogue takes place does not in itself presuppose any convergence of views. Indeed human rights organisations conduct dialogue with governments that have very poor human rights records and that, in some cases, are also highly critical of the international human rights framework.

Even where a common legal or intellectual framework is absent, showing consistency will be an asset for the human rights advocates. Armed groups, or their political representatives, may be more inclined to talk with human rights groups if the latter have been consistent in their stance against government violations. This has been an avenue for dialogue in the past and arguably provides the precondition for contemporary armed groups to be prepared to listen to the arguments of human rights advocates.

Some human rights organisations have found that when they report human rights violations by the "other side" or address grievances that underlie conflict, they

gain credibility and leverage with groups that carry out terrorist acts. This has been the case with Palestinian groups, for example, for whom documentation of Israeli abuses establishes the good faith of human rights organisations. Objective documentation should in any case be a basic principle for human rights practitioners.

This said, it would clearly be inappropriate to tailor a programme of research and documentation to quasi-diplomatic objectives rather than to uphold the rights of those affected by human rights violations, committed by whichever party.

When human rights organisations embrace the grievances of armed groups, they run other risks too. Armed groups take up their cause for political (or perhaps religious) reasons; they may have no dispassionate commitment to human rights. It will never be the role of human rights organisations to endorse a political programme. Maintaining a principled independence and defending the rights of all will be of particular importance.

The most complex situations arise where armed groups commit terrible acts, lack a political programme of articulated grievances, but nevertheless reflect in a real way the political aspirations of the community from which they spring. Examples might arguably include RENAMO (Resistência Nacional Moçambicana) in Mozambique or the Lord's Resistance Army (LRA) in Northern Uganda. In both instances human rights organisations have been ready to condemn abuses and, in the latter case at least, to actively document and report on them. In the case of Mozambique, human rights advocates were extremely uneasy when a political compromise was negotiated under which RENAMO's leaders were integrated into the political establishment, and were never held accountable for the many human rights abuses for which they were responsible.

In Uganda, too, there is considerable ambivalence among human rights organisations. When peace talks began in July 2006 between LRA representatives and the government, they raised familiar dilemmas – whether to trade accountability and perhaps redress in return for an end to hostilities. The International Criminal Court had already issued the first of its arrest warrants against LRA leaders accused of crimes against humanity. There are no equivalent warrants against commanders on the government side. Some human rights activists see the warrants as having prompted LRA participation in the talks. Others see the issuing of warrants against one side and not the other as being partial and an obstacle to final agreement.

In some instances the problem goes deeper. In certain cases it is not only espousal of terrorist tactics that causes armed groups to object to human rights standards. Their entire programme may be actively hostile to the values that human rights embody – a problem not merely of different vocabularies, but of fundamentally different world views. Sendero Luminoso might arguably be included in this category. The neo-fascist terrorist groups of the 1970s and

1980s in Europe and Latin America certainly can be. These groups, ostensibly defending "Christian civilisation" against Communism, used terror tactics as part of a "strategy of tension" that sought the collapse of democratic political systems. In Italy this strategy failed – some would argue only narrowly – while in Argentina, for example, it succeeded, with profoundly damaging consequences for human rights.

Some contemporary jihadist groups can be seen in similar terms. On what terms could human rights groups discuss al-Qaeda's "grievances"? When an organisation, or set of like-minded groups, proselytises in favour of discrimination, intolerance and theocracy, and adopts terror tactics to achieve its ends, it is evident that any approach that agreed to make concessions in order to end violence would put human rights interests at risk, as well as being naïve and dangerous.

This does not mean, however, that human rights groups can do nothing when confronted by such organisations. Armed groups draw upon the support of sections of the civilian population, whether in their own country or in a diaspora. Human rights groups can seek to influence and educate members of these communities.

## Influencing armed groups

A previous report by the Council examined a number of civil conflicts to understand how, in practice, human rights organisations had influenced the conduct of armed groups.[104] It examined organisations along the spectrum identified above, but did not look closely at the difficulties of influencing groups that are likely to be more antagonistic to the values and logic of human rights. This report is not in a position, either, to provide a detailed analysis of how organisations could engage, or try to influence, groups associated with al-Qaeda, the Lord's Resistance Army, the LTTE or Sendero Luminoso. Attempts to engage with such organisations are fraught with risk – from the groups themselves, but also from states that feel strongly that such groups should not be accorded any form of recognition.

In recent years, many human rights groups have included recommendations in their reports that specifically address armed groups, including Hizb'allah, Hamas and the LTTE. Addressing recommendations to groups like al-Qaeda or Sendero Luminoso raises many more dilemmas, however.

It is not merely that such groups are very difficult to reach. They also have a distinctive world view that differs markedly from the assumptions that underpin human rights. A human rights dialogue could probably be conducted with a

104 International Council on Human Rights Policy, 2006a.

jihadist Islamist, for example, only by individuals who possessed a detailed understanding and knowledge of the Koran; even then, the way they tend to read the Koran would make such a dialogue arduous to pursue.

This is not meant to imply that debate over appropriate tactics, including the use of violence, is not occurring; but it tends to do so within such movements, and within the terms of their world view. Outsiders may need to understand "that reasoned debates take place within jihadi circles and that such reasoning can change minds – and should refrain from interfering in this evolving debate".[105] In this regard it is important to promote space for such debates and human rights organisations that urge governments not to shut down jihadi web sites or expel the movement's dissenters are probably right to do so for this reason.[106]

Divisions over the use of extreme violence against civilians have even occurred between men considered to be core al-Qaeda leaders. After a public outcry against the hotel bombings in Amman in 2005 – particularly the targeting of a Jordanian wedding party – Abu Musab al Zarqawi appeared to backtrack on earlier statements that the wedding party was the target, claiming instead that Israeli intelligence had been meeting at the hotel and that many of those who died had been killed when part of a roof collapsed.[107] The concern about the rising death toll among Iraqis may be turning many Iraqis against jihadists. As Bernard Heykel writes, "[t]he movement's leadership is sensitive to Muslim public opinion".[108] Although the same people denouncing the killing of Iraqi civilians may well support attacks on Westerners, a debate on the limits to violence is nevertheless taking place.

Jemaah Islamiyah (JI) provides another example. From the outset, Jemaah Islamiyah's leaders were divided over the use of violence against civilians. After the 2002 Bali bombing, the organisation was weakened by government counter-insurgency measures and internal rifts that arose in part over the use of violence against civilians. This will not necessarily mean that JI's influence will disappear, nonetheless. Ready cash, the mobility of key operatives and a seemingly ready supply of individuals willing to kill themselves means that campaigns against terrorist violence cannot be focused solely on known organisations.[109]

105 Ibid.

106 Abu Basir's critics reportedly claimed that he had published his statement on the London bombings for his own security and to win the favour of the British government lest it deport him. Ibid.

107 Experts in the region have denied any possibility of Israeli intelligence meeting in an Amman hotel. In July 2005, Ayman al-Zawahiri, considered to be Osama bin Laden's chief deputy, reportedly warned Zarqawi that attacks that killed civilians in Iraq endangered "the greater cause" for which they are fighting. Although experts have cast doubt on the authenticity of the communication, it is clear that the debate over killing Muslim civilians is occurring at high levels within these organisations.

108 Heykel, 2005.

109 Jones, 2005.

It may be more effective to reach out and engage with the larger audience that sympathises with such armed groups and gives them legitimacy. Sympathisers, religious leaders, and exile and immigrant communities can sometimes exercise significant influence or at least subject armed groups to the pressure of public opinion.

The profile of support will be different in each case. For the LTTE, the Tamil expatriate community has been an important actor, not least because of the scale of its financial contributions. In Peru, Sendero Luminoso had strong roots in Indian peasant communities. In the case of jihadi Salafists, the wider Muslim community can influence thinking (as the quote above suggests), as can individuals who have close ties to the armed group concerned but disagree with specific aspects of policy – for example, the killing of civilians.

The attitude of the civilian population to armed groups is likely to be complex. In situations where groups exercise a quasi-governmental control, civilians may have grievances analogous to those that a population might have in relation to a government. This does not imply a lack of political support, necessarily, but it means that the armed group and its popular support are not a homogeneous block. The 2005 murder of Robert McCartney, a supporter of the political wing of the IRA (Sinn Fein), apparently by members of the Provisional IRA, provides an interesting example. The staunchly nationalist community from which he came expressed revulsion at the crime, and forced local political leaders to take action and acknowledge some accountability.

In some cases a civilian population that might be supposed to support an armed group is simply too frightened to engage with human rights organisations, at least on the question of abuses by that group. The current situation in southern Thailand is a case in point.

Where an armed group forcibly recruits or indiscriminately terrorises a civilian population they control, the gap may be even wider. Into this category might fall Sendero Luminoso, the Lord's Resistance Army and RENAMO in Mozambique. Yet human rights organisations would be advised not to slip into the opposite misunderstanding. Violence against civilian populations is rarely random and irrational. Armed groups that survive for as long as the above movements generally succeed in winning a surprising degree of popular support – surprising though this may be in view of their brutality and failure to develop any constructive programme for the betterment of communities on which they rely for support.

Commonly, however, human rights organisations are likely to find that civilian support networks offer their first and best chance of communicating with the armed group itself. Where there are solidarity and support groups or an armed group has a "political wing", these often provide a lawful presence that offers the possibility of communication, if not necessarily dialogue.

Division between those who advocate and those who oppose extreme violence targeting civilians appears to be growing wider. As an example of this, in the days just before and after the London bombings of 7 July 2005, two statements appeared on jihadi web sites and in the Arab media by two senior clerics associated with jihadist Salafi circles. Speaking on al-Jazira on July 31, Abu Muhammad al-Maqdasi, a Jordanian-Palestinian, criticised insurgents operating with Abu Musab al-Zarqawi in Iraq for killing Muslims. He repeated the criticism on July 5, in the Jordanian paper al-Ghad, saying that such "indiscriminate attacks might distort the true Jihad".[110] Two days after the London attacks, the Syrian scholar, Mustafa al-Mun'im Abu Halima (a.k.a. Abu Basir al-Tartusi) published a fatwa on his web site protesting against the bombings. He said the killing of British civilians was a "disgraceful and shameful act, with no manhood, bravery or morality. We cannot approve or accept it, and it is denied Islamically and politically". He added that if the act was carried out by British Muslims, it did not mean that "Islam" or the Muslim community in Britain approved. He also cast doubts on the attackers' alleged links to al-Qaeda.

Both statements reportedly generated considerable discussion among jihadi forums, much of it hostile toward Abu Basir's views. He then published another statement on July 11 titled, *The Love of Revenge, or the Legal Ruling*, in which he argued that there is no place for revenge between Muslims and their oppressors in Islamic doctrine. In the ensuing debate, another fatwa was issued, this time anonymously. The fatwa was distributed as a booklet, *The Base of Legitimacy for the London Bombings, and Response to the Disgraceful Statement by Abu Basir al-Tartusi,* whose title was virtually identical to a statement by the Salafi Sheikh Abd al-Aziz bin Saleh al Jarbu' that justified the September 11 attacks. The fatwa called on Muslims to welcome terrorist attacks.[111] Among other things, it argued that the distinction between civilians and combatants is a modern one and has no basis in Islamic law, and that public support for the Iraq war negated civilian immunity.[112]

The author also expressed dismay at the fact that Muslim organisations, scholars and clerics and even some Islamist groups condemned the bombings, and called on them to stop criticising the mujahidin, "especially these days".[113]

This controversy exposes some fault-lines within the jihadist movement over the legitimacy of attacks on civilians. While a number of the senior clerics of the jihadi Salafi movement have been critical of the violent tactics adopted by some groups, those who advocate an increased use of violence appear to have growing appeal among younger Muslims. "A key question is whether we are going to witness a crisis in the relations between the older generation of Jihadi-Salafi clerics and scholars and their operative *protégés*." Clerics associated with Arab governments are likely to be especially suspect in the eyes of the jihadis.

110 Paz, 2005.

111 Ibid. Many jihadist Salafis embrace the term terrorist; some have gone so far as to say there is no jihad without terrorism.

112 Ibid.

113 Ibid.

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In conclusion, many human rights groups already have some experience of dialogue with armed groups, including groups that commit acts of terrorism. It is folly to suppose that such dialogue is easy. Engaging with such groups, and particularly with those that are accused of terrorism, involves dealing with many dilemmas, as well as personal risks. Physical threats do not necessarily come from the groups themselves, in addition; armed organisations that oppose them, or elements in the government or armed forces, may also strongly object.

But, while the risks are high, so too are the potential benefits.[114] This is an area where human rights advocates can potentially learn a great deal from one another's experience – in Sri Lanka, Kashmir, Colombia, and Northern Ireland for example. It is also an area where dialogue and close coordination between national and international groups is key.

It is very difficult to give general advice about talking to groups that carry out terrorist acts. Very specific analysis is necessary, based on the risk to the human rights organisation, as well as on the characteristics of the armed group.

- Does the group have quasi-governmental characteristics?
- Does the aim of the group include national self-determination?
- Does the group have an ideology that is explicitly hostile to conventional conceptions of human rights?
- Does the group appear to operate without any clear ideology or aims?

A consistent and principled position on the part of the human rights organisation will be essential. Dialogue will be greatly facilitated if the human rights organisation is seen to be principled in its documentation and opposition to state violations, notwithstanding its position on abuses by the armed group.

This principled position will have to extend to other aspects of the ideology and practice of the armed group that may be inimical to human rights values, such as their attitude towards religious freedom, non-discrimination and women's rights. None of these issues is necessarily a precondition for dialogue, but differences on such questions, as well as on the use of terrorist violence, may in practice preclude dialogue.

The most effective approach is likely to be one that addresses the political supporters of armed groups, or the civilian population or diaspora on which they depend.

114 For example, establishing a dialogue with Hamas might ease dialogue with Indonesian Salafi groups that look upon Hamas as a role model. Comment by Sidney Jones, Meeting of the International Council, 20-22 May 2005.

## CONCLUSION

In the preceding chapters we looked at whether recent politically-motivated violence and terrorism have changed in nature; and at the legal tools available for discussing acts of terrorism. Later chapters examined the criticisms that are sometimes made of the positions that human rights advocates take when they address this subject, and suggested some additional arguments that they might use.

No single approach is likely to suit the needs of all human rights advocates who confront the task of dealing with the victims and perpetrators of acts of terror. There are likely to be variations from country to country and significant differences between national and international organisations. Nevertheless, some general points can be made.

First of all, human rights organisations need to recognise that both the threat of terrorism and public perceptions of that threat are real. This fear has become so great in some societies that public support for state action and tolerance of state abuse have both risen, sharply narrowing the space in which human rights organisations operate. That said, human rights organisations need to ensure that they do not themselves become victim of that fear, and continue to recognise the differences of experience and perception that exist between "publics" and media in different societies. In each context, they need to develop messages that are consistent, whether they speak to the public or government.

As a starting point, it is vital to reassert the importance of the core mission of human rights organisations – to rigorously monitor the activities of states and to ensure that they respect and protect human rights. Even basic principles banning torture and inhumane treatment, or protecting the right not to be arbitrarily detained, can no longer be taken for granted. Human rights groups should therefore continue to focus on state responses to political violence, and in particular on the protection of the basic rights of detainees. This report has suggested that human rights organisations could broaden their monitoring to include a closer examination of collateral damage inflicted by state actors.

At international level, this report suggests that human rights advocates should now engage with debates about terrorism. Human rights groups need to influence discussion of the definition of terrorism, not only for the traditional reason of ensuring that counter-terrorist measures do not violate human rights, but also to ensure that there is an effective response to terrorist acts.

International law is shifting its focus. States are no longer the sole subjects of international law and human rights obligations apply not only to states, but also – to some degree – to non-state actors. The extent of the shift remains a matter of dispute, but a growing body of opinion accepts that terrorist atrocities constitute violations of human rights.

Some human rights organisations have begun to adopt a victim-centred approach and focus on the impact that terrorist acts (and counter-terrorist acts) have on people and communities. The report suggests that this can be a fruitful approach to take.

In parallel, the report suggests that human rights groups should continue to develop and apply their monitoring skills to terrorist acts. This would imply providing factually precise analysis of the impact of terrorist violence on victims.

This is by no means a simple task and it may not be appropriate for all organisations to pursue it. Complex questions are likely to arise regarding selection, allocation of resources, security and presentation. Nevertheless, developing a truly victim-centred approach in response to politically-motivated violence will potentially broaden and enrich the range of human rights work, and increase its credibility and authority.

Moreover, in an area of policy that is both polarised and peculiarly subject to misinformation, human rights organisations can play a vital public information role. By discussing dispassionately the groups that use violence, as well as the violence itself, they can provide objective information that does not blur the differences between groups that engage in violence and violent forms of dissent. Such analyses are essential to understanding both the political choices that are available to governments and their responsibilities before society.

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## USEFUL WEB SITES

American Civil Liberties Union
www.aclu.org/safefree/index.html

Amnesty International
www.amnesty.org/en/counter-terror-with-justice

Crimes of War
www.crimesofwar.org

Human Rights First
www.humanrightsfirst.org/us_law/us_law.asp

Human Rights Watch
www.hrw.org/doc/?t=ct

International Commission of Jurists Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights
http://ejp.icj.org/

International Committee of the Red Cross
www.icrc.org/web/eng/siteeng0.nsf/html/terrorism?opendocument

International Crisis Group
www.crisisgroup.org/home/index.cfm?id=1279&l=1
(free registration required)

Jurist
http://jurist.law.pitt.edu/terrorism.htm

Rand Corporation
www.rand.org/research_areas/terrorism/

UN Counter-Terrorism Task Force
www.un.org/terrorism/cttaskforce.shtml

UN Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism
www2.ohchr.org/english/issues/terrorism/rapporteur/reports.htm

UN Terrorism
www.un.org/terrorism/

UN Treaties on terrorism
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Have human rights organisations responded adequately to the threat of international terrorism and official responses to that threat? This report reaffirms that the core mission of human rights advocates is to make sure that governments respect human rights and the rule of law. But fresh thinking is also needed. Human rights organisations should participate in efforts to agree a sound definition of terrorism in international law. A victim-centred approach might enable them to apply human rights to a wider range of issues, making their advocacy more relevant to those who suffer because of terrorist violence. The report discusses how advocates might develop principled but also more understandable positions when they talk about terrorism to officials and the public or those who sympathise with it.

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