INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY

Talking about Terrorism
Risks and Choices for Human Rights Organisations

Summary

ACKNOWLEDGEMENTS AND RESEARCH PROCESS

TERRORISM

Terrorism is generally understood to refer to the deliberate killing of civilians (and hostage-taking) in order to spread fear through populations and force the hand of political leaders. 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 (this report only addresses non-state terrorism).

Terrorism is not therefore a new problem. It has consistently created challenges and dilemmas for human rights advocates in many countries.

However, the events of September 2001 and the counter-terrorist policies that were introduced in response triggered a profound, often disturbing debate about how societies and governments should respond to terrorist acts while respecting human rights and the rule of law. In some countries human rights advocates were forced to defend anew principles of human rights that they believed had been firmly established in law; in many countries, governments introduced anti-terrorism legislation that impinged on civil liberties.

In this new context, human rights organisations – and particularly non-governmental organisations (NGOs), to which this report primarily refers – were challenged to be relevant. Critics claimed they had misread the profound threat that modern terrorism poses and spent too much time defending the rights of people accused of terrorist offences and too little advocating the rights of victims. Such 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.

The report summarised here examines those criticisms and the impact of terrorism on the work of human rights organisations and asks how human rights advocates can most effectively shape public policy and influence public attitudes on this subject (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.

HOW HAVE HUMAN RIGHTS GROUPS RESPONDED TO TERRORISM?

In the past, many human rights groups have been reluctant to adopt or apply the term "terrorism".

Most have taken a traditional legal approach, which asserts that international human rights standards apply only to the actions of states, not those of non-state actors, including armed groups. When it was necessary to address the behaviour of non-state armed groups, they have generally made use of international humanitarian law (IHL), which applies in situations of armed conflict. The core standards of IHL bind all recognised parties to a conflict, whether state or non-state.

Terrorism presented particular difficulties for other reasons. The word is often used in a highly political and partisan manner. In addition, terrorism by non-state actors tends to be a weapon of the weak against the strong in asymmetrical conflicts. Car and suicide bombs, for example, are usually the resort of the desperate who believe they lack other methods of struggle. These factors – combined with the complicating question of "state terrorism" – caused many human rights groups to be reluctant even to use the term "terrorism", let alone engage with it as a policy issue.

The need for new thinking on this subject is therefore not a presentational concern. It is not a question of selecting arguments that will be persuasive to sceptical governments and publics. It is much more about how human rights advocates can engage with the complex issues terrorism and counter-terrorism pose in a way that is consistent and compatible with human rights principles and law.

WHAT IS TERRORISM?

States have tried unsuccessfully to agree a definition of terrorism in international law since at least 1937. Many sectoral conventions have outlawed specific terrorist acts, but the search for a comprehensive definition has been elusive. Reflecting this, the United Nations Security Council responded to the September 2001 attacks by calling on states to act in various ways against terrorism, but did not define what terrorism is.

Three main obstacles stand in the way of a comprehensive definition:

- Drawing the line between terrorism and legitimate acts of resistance to domination or tyranny.

- Agreeing how far states can be held legally responsible for acts of terrorism.

- Distinguishing the legal regime that would be established by a comprehensive convention from the provisions of IHL, which apply specifically to armed conflicts.

Some have argued that a comprehensive definition of terrorism is unnecessary or even dangerous. They fear that broader definitions in national law, some of which criminalise legitimate dissent, will find their way into a comprehensive international definition. The opposite is probably more likely, however: a sound comprehensive definition would limit overbroad national definitions and allow a more cooperative approach to terrorism across criminal justice systems.

From a human rights perspective, a sound definition should focus on acts of violence against civilians that aim to spread terror. This is the direction adopted by the United Nations High-level Panel on Threats, Challenges and Change, which proposes that, to be considered terrorism, a violent act must simultaneously satisfy three tests:

- The violence must be "intended to cause death or serious bodily harm";

- Victims are "civilians or non-combatants"; and

- The motivation of the act is "to intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act".

WHAT LAW APPLIES TO TERRORISM?

International humanitarian law contains no definition of terrorism and refers to "terror" only in passing, but it is clear that all acts that might be considered terrorist (under the above definition) are prohibited. IHL applies in situations of armed conflict and is relevant to many contemporary situations involving terrorism. But does it apply to all cases of modern terrorism?

After September 2001, the United States (US) maintained that it is in a state of global armed conflict with "al-Qaeda and associated groups". Yet this loose network of terrorist groups does not meet the criteria of a party to an armed conflict under IHL. Nor does the "conflict" itself reach the threshold of intensity that would allow it to be classified as an armed conflict. Moreover, to categorise the "war on terror" as an armed conflict would have other, perhaps undesirable, legal consequences. (It would mean, for example, that al-Qaeda and associated groups would be entitled to attack US military targets.)

What about international criminal law? Terrorism was initially considered for inclusion in the mandate of the International Criminal Court (ICC), but was finally omitted from the Rome Statute largely because no consensus on definition could be found. This said, a terrorist act can still fall within the ICC's jurisdiction if it is judged to be a crime against humanity or a war crime. The ICC issued its first warrants against leaders of the Lord's Resistance Army in Uganda, an organisation responsible for acts of terrorism.

A further problem with applying international criminal law to terrorism is that the capacity of international tribunals to investigate and hear such cases is likely to be limited. In practice, *domestic criminal law* will remain the key legal forum, alongside human rights law.

Human rights law provides important checks on actions that states can take to counter terrorism. Because terrorism creates acute anxiety, it encourages official over-reaction and public tolerance of that over-reaction. Monitoring violations of civil liberties and due process is therefore rightly at the heart of human rights work in this area. Human rights organisations fulfil an essential function when they monitor the behaviour of states in order to expose human rights violations that may be committed in the course of combating terrorism.

NEED FOR NEW THINKING

Should some criticisms that human rights advocacy is unbalanced and unrealistic nevertheless be taken seriously? Critics argue that human rights groups punctiliously hold states to account for excesses in counter-terrorist programmes but, beyond condemnation, have little to say about terrorist acts; and that they are naïve to rely on law, when terrorist themselves are contemptuous of legal standards. They assert that, to combat terrorism, constraints on liberties and rights are inevitable; human rights advocates should accommodate "lesser evils". They also accuse human rights groups of seriously misjudging the threat that terrorism poses.

The question of threat is difficult to assess. Terrorism is not a new phenomenon and caused great loss of life before the attacks in New York, Madrid and Bali – in Algeria, Mozambique, Peru, Sierra Leone, Sri Lanka and elsewhere. However, it is not adequate to make this point, or say that other contemporary threats to humanity are more dangerous. Terrorism is a serious threat in many societies.

A purely state-centred approach might usefully be supplemented by one that focuses on the rights of victims or survivors. Such an approach would not privilege victims of state violence over victims of terrorism and might enable human rights organisations to speak consistently, in more detail and more cogently, about arbitrary violence of all kinds.

A growing body of scholarly and legal opinion affirms that non-state actors can or should be held responsible for breaches of human rights. At the very least people have a right to be protected from actual or threatened arbitrary violence, whoever is responsible. It is clear that governments have an obligation to provide such protection. Arguably, human rights obligations fall on all persons who are responsible for acts of terrorism (non-state as well as state). Though human rights treaties are adopted by states, certain crimes and a large body of customary human rights law apply more broadly, to all kinds of organisation and to individuals. If the main obligation to protect human rights clearly rests with states, it is increasingly recognised that non-state actors can breach these rights.

TALKING TO GOVERNMENTS

Human rights organisations in different countries stand in very different relationships to their government. National NGOs will thoroughly analyse their government's stance on political violence and acts of terrorism before taking a position themselves, 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.

In broad terms, the well-understood responsibility of human rights organisations to hold governments accountable for the human rights impact of their counter-terrorist measures will remain paramount. This is not only because grave violations of human rights have occurred in the context of "the war on terror"; a new security discourse has emerged that challenges fundamental human rights, including the prohibition on torture. Human rights advocates are needed more than ever to defend the basic values and standards of human rights.

At the same time, governments may face genuine dilemmas when they respond to terrorism. Advocates may need to acknowledge this, and the fact that people and communities have a right to security. The latter includes both a right not to be victim of terrorist violence and a right not to be penalised by arbitrary and unlawful state responses to terrorism. Refocusing human rights advocacy to include both perspectives would enable advocates to address a wider range of issues in human rights terms. It might lead them, for example, to press for compensation or assistance for victims of terrorism, and oppose discriminatory treatment of minorities.

When addressing governments, human rights organisations argue that the normal laws of criminal procedure have evolved as they have in different societies because they provide the least worst tools for establishing the truth about crimes and holding individuals accountable. Violating human rights and the rule of law is likely to make counter-terrorist measures less effective, and it makes no sense to jettison these standards when confronted by a serious crime, such as terrorism. When the wrong person is imprisoned for a terrorist bombing, it is not just that individual's rights that are violated; the security of every member of that community is compromised.

Similarly, although torture is prohibited on grounds of principle, strong pragmatic arguments can be made against its use. Torture victims often give inaccurate information that they believe their interrogators wish to hear; such information is not admissible as evidence in a court; and use of torture and other abusive methods both corrupt the behaviour of law enforcement agencies and hinder the adoption of more effective methods of investigation.

Derogation

Governments have no need to jettison human rights in the struggle against terrorism for another reason: the international human rights system permits governments to limit or suspend (derogate) certain rights in the event of serious emergency.

Governments frequently abuse this option by restricting rights inappropriately or to an excessive degree, or by extending states of emergency for long periods of time. Nevertheless, in certain situations (when it is reasonable to suppose that a government is acting in good faith), human rights organisations may consider discussing the possibility of derogation. The risks of such a discussion are evident; the adoption of an approach that focuses on the entitlements of all those who are threatened by terrorism, or policies to combat it, might nevertheless mean that it is a responsible option.

TALKING TO THE PUBLIC

The public messages that human rights organisations convey should naturally reflect their understanding of human rights values and should be consistent with what the same organisations say to government officials. The two audiences are nevertheless different and need slightly different approaches.

For one thing, "the public" is not a single or homogeneous body and, across different societies and within countries, sections of the public will perceive terrorism, government and those responsible for terrorism in very different ways. Human rights organisations need to consider how to address their varied concerns.

A number of steps might be explored:

Analyse the audience. Disaggregate "the public" and consider what are the interests and predispositions of its different elements. Within any society, different sections of the community will view the conduct of both government and non-state armed groups differently. This may help advocates to present the issues in ways that remain consistent but take account of attitudes and perceptions.

Analyse the context. Public attitudes will be shaped by experience. In countries like Britain and Spain, which have a long history of domestic separatist armed groups, the public will have adapted in certain ways to terrorist acts. Public reactions are likely to be very different in a country like the United States, with little such experience. Elsewhere, where terrorism occurs in the context of protracted armed conflict, attitudes will be different again.

Monitor the government. There should be no retreat from the central task of monitoring government respect for human rights. Even where counter-terrorism programmes have popular support (as in the United States), the public generally understands that this is the prime role of human rights groups and will respect their integrity.

Report on terrorist violence. Human rights groups may need to go beyond condemnation of terrorist acts, which can appear perfunctory or even insincere. Efforts to document and publicly report on atrocities by non-state groups can achieve several objectives. Advocates show that threats to human rights are treated equally seriously, whoever is responsible; they demonstrate the impartiality of human rights monitors; and, by reporting victims' stories, they promote empathy, which lies at the heart of human rights values.

Highlight entitlement to security. Governments have an obligation to protect members of the public from threats to their safety, wherever they originate. If human rights organisations assert this clearly, they also show they understand

that governments may face difficult dilemmas. In some contexts (such as Pakistan), the assertion will help to generate public pressure on governments to meet this obligation fully.

Recognise the claims of victims. Though governments may publicise the threat of terrorism to promote their political interests, they are often slow to protect or compensate victims of terrorist acts. Advocacy on behalf of victims not only demonstrates impartiality but advances the legitimate claims of victims to redress.

Uphold minority rights. Counter-terrorist policies are often discriminatory in intention or effect. Wherever minorities are likely to suffer discrimination because the public associates them with terrorist groups, or they become targets of government counter-terrorism policies, human rights groups should uphold the rights of such minorities and monitor counter-terrorist policies for their potentially discriminatory impact.

TALKING TO ARMED GROUPS AND THEIR SUPPORTERS

Armed groups that carry out terrorist acts, and their sympathisers, are an important audience for human rights groups.

Many already have experience of dialogue with armed groups, including groups that commit acts of terrorism. Such dialogues are not easy. Engaging with armed groups, particularly with those that are accused of terrorism, involves the management of many dilemmas as well as personal risks. Physical threats do not necessarily come from the groups themselves; armed organisations that oppose them, or elements in the government or armed forces, may also strongly object.

Nevertheless, while the risks are high, the benefits are potentially substantial. In this area human rights advocates can potentially learn a great deal from one another's experience – in Sri Lanka, Kashmir, Colombia and Northern Ireland, for example. Dialogue and close coordination between national and international groups is also vital.

It is difficult to draw general conclusions about talking to groups that carry out terrorist acts. It will be necessary to assess in detail the risks the human rights organisation runs, and the characteristics of the armed group (as well the characteristics of the government). Questions might include:

▪ Does the group act or have ambition to act like a government?

▪ Does the group have an ideology that is explicitly hostile to the values and principles of human rights?

▪ Does the group appear to operate without any clear ideology or aims?

To sustain dialogue, a human rights organisation is likely to have to hold clear and consistent positions. Dialogue will also be facilitated if its documentation is seen to be no less critical of state violations than abuses by the armed group.

Dialogue becomes even more problematic when aspects of the ideology and practice of an armed group are inimical to human rights values. Groups may advance incompatible attitudes to other religions, other communities or societies, and women's rights, for example. Agreement on such issues is not necessarily a precondition for dialogue, but deep differences on such questions, as well as on the use of terrorist violence, may in practice preclude it.

Certain armed groups have a fundamental hostility to the assumptions that underlie human rights – an obstacle that goes beyond differences about use of violence. Examples of such organisations range from Sendero Luminoso in Peru, through the Lord's Resistance Army in Uganda, to al-Qaeda and connected

Salafi jihadi groups. In practice, dialogue with such groups is unlikely to be possible – even though attitudes and political circumstances may change over time.

For human rights organisations, an approach that addresses the political supporters of such armed groups, or the civilian population or diaspora on which they depend, is likely to be more productive than attempts to dialogue with the group's leadership directly.

CONCLUSIONS

It is vital to reassert the importance of the core mission of human rights organisations: rigorous monitoring of state activities to ensure that governments respect and protect human rights. Recent counter-terrorist policies have shaken adherence to some of the most basic principles of human rights, including adherence to the prohibition on torture and inhumane treatment and protection of the right not to be detained arbitrarily.

At international level, at least some human rights advocates should now engage with debates about terrorism. They need to influence discussion of its definition, not only to ensure that counter-terrorist measures do not violate human rights, but to ensure that the response to terrorist acts is effective.

International law is shifting its focus. States are no longer the sole subjects of international law; human rights obligations apply not only to states, but to some degree to non-state actors as well. The extent of this shift is still the subject of debate; but a growing body of opinion accepts that acts of terrorism 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.

In parallel, 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. Nevertheless, developing a truly victim-centred approach in response to politically-motivated violence would potentially both broaden and enrich the range of human rights work, and increase its credibility and authority.

Human rights organisations can play a vital public information role. By describing 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 dissent. Such analyses are essential to understanding both the political choices that are available to governments and the state's responsibilities before society.

ABOUT THE COUNCIL

The International Council on Human Rights Policy was established in 1998 following an international consultation that started after the 1993 World Conference on Human Rights in Vienna. It conducts practical research into problems and dilemmas that confront organisations working in the field of human rights.

The Council starts from the principle that successful policy approaches will accommodate the diversity of human experience. It co-operates with all that share its human rights objectives, including voluntary and private bodies, national governments and international agencies.

The Council's research agenda is set by the Executive Board. Members of the International Council meet annually to advise on that agenda. Members help to make sure that the Council's programme reflects the diversity of disciplines, regional perspectives, country expertise and specialisations that are essential to maintain the quality of its research.

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Have human rights organisations responded adequately to the threat of international terrorism and official responses to that threat? The report summarised here 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.

"A thoughtful and considered piece of work."
Eric Metcalfe
Human Rights Policy Director, JUSTICE

"The work is clearly a valuable contribution to the intellectual/conceptual side of the discourse on human rights which has faced new challenges especially since 2001."
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