

Chapter 7

The Promotion and Protection of Human Rights While Countering Terrorism

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

This chapter considers and explains a framework document developed by the author as part of the New Zealand Law Foundation International Research Fellowship in a project undertaken at the International Policy Institute on Counter-Terrorism (ICT) in Israel, with the assistance of the founder of the Institute, Dr Boaz Ganor. The document, which has developed somewhat since its initial inception, is entitled “A Guide to Legislators, Policy-Makers and Judges on Human Rights Compliance When Countering Terrorism” (Appendix 1 to this text). It seeks to address the issue of what human rights compliance means and how it is to be achieved in the context of counter-terrorism law and practice. Particular emphasis is placed upon the development of a test to determine the balance between counter-terrorism and human rights claims and the identification of relevant factors to be considered in the application of that test.

Four years on from 9/11, the 2005 ICT *Project on Human Rights Compliance When Countering Terrorism* sought to take stock of international and regional commentary on the subject, and the move from various quarters to establish an international framework for human rights compliance when countering terrorism.¹ The first substantive part of the Project was to consider the general issue of the interface between counter-

¹ Alex Conte and Boaz Ganor, *Legal and Policy Issues in Establishing an International Framework for Human Rights Compliance When Countering Terrorism* (Herzlia: International Policy Institute on Counter-Terrorism, 2005).

terrorism and human rights: the relevance of human rights when countering terrorism; what human rights compliance demands (in either absolute or qualified terms); the general approaches to the latter question within various international and regional guidelines (which essentially advocate a qualified approach to human rights compliance when countering terrorism); whether the nature of terrorism justifies such a qualified methodology; and how treaty-monitoring bodies are likely to respond to this. Little comparison of the guidelines mentioned had otherwise been undertaken, nor consideration given to whether the qualified approach called for within those guidelines is appropriate in the context of countering terrorism. More importantly, while the various guidelines offer general advice on when limitations upon rights are justifiable (with some helpful rights-based analyses), they suffer from a lack of specific and practical advice on how to strike a proper balance between counter-terrorism and the unlimited enjoyment of human rights. Thus, the second substantive part of the Project was to give careful consideration to the means by which counter-terrorist measures should be evaluated when such measures seek to impose rights limitations. Particular attention was paid to an issue that has lacked constructive deliberation: how to assess proportionality between the two objectives of countering terrorism and maintaining human rights standards.

Against the background of these analyses, the Project drew up the Guide (now refined to a four-step process for assessing the permissibility of counter-terrorist measures). The Guide is outlined and explained in this chapter by identifying each of the advocated steps and providing commentary upon them. The preparation of this Guide was motivated by recognition that legislators and policy-makers are faced with difficult choices in determining the proper boundary between the two pressing public objectives of countering terrorism and maintaining human rights. At the international level, States are told that they must do both and, domestically, the public demands no less. Decision-makers will be easily criticised for adopting legislative or other action that fails to find a proportional balance between the two aspirations. When called to rule upon the legality of counter-terrorist measures, judges are similarly placed in a position of balancing due deference to national interest decisions and considerations of the State against their role to uphold constitutionally protected rights and applicable standards of international human rights.

An important point about language should be noted. Deliberate reference is made to the balancing of counter-terrorism with the 'unlimited enjoyment of human rights' (or with 'human rights claims'), rather than of a balance between counter-terrorism and human rights. The distinction might seem semantic but its consequences are significant. To speak of a

'balance between counter-terrorism and human rights' might be seen to imply that there is still room for balancing after an all-things-considered human rights analysis. This is not the intention of the Guide. As a whole, it is based upon the fact that the balancing of objectives is *part* of a human rights analysis, rather than something consequent to it. Counter-terrorism objectives are fully taken into account in this process. The result can therefore be described as an all-things-considered human rights assessment, which leaves no room for any further 'balancing'.

The desired benefits of the Guide are two-fold. First, to provide practical and functional assistance to decision-makers on the subject. Second, to do so in a manner that is able to give proper account to a State's international human rights obligations, while at the same time recognising the duty of States to protect their societies and to contribute to the maintenance of international peace and security,² and to ensure that an accurate and balanced account is taken of the imperatives of, and difficulties in, countering terrorism.

Compliance with Human Rights While Countering Terrorism

The Guide, as revised, is divided into two parts. The first address the general issue of the need to comply with human rights obligations and what, in practical and legal terms, human rights 'compliance' means. The second part of the Guide addresses the particular requirements of necessity and proportionality: the requirement that any limitation of rights must be necessary in the pursuit of a pressing and substantial objective in a free and democratic society and that this must be effected by proportional means.

As to the first part of the Guide, and before considering the actual steps involved in the interface process, the starting point is to explain *why* States must comply with human rights when countering terrorism. There are three points to be made in this regard. First, in his 2006 report setting out recommendations for a global counter-terrorism strategy, the UN Secretary-General emphasised that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing ones.³ He identified the defence of human rights as essential to the fulfilment of all aspects of an effective counter-terrorism

² The latter obligation is set out, for example, within the purposes and principles of the *Charter of the United Nations*, Articles 1 and 2. See further, *infra*, chapter 6.

³ Report of the Secretary-General, *Uniting Against Terrorism: Recommendations for a Global Counter-terrorism Strategy*, UN Doc A/60/825 (2006), para 5. See also Part VI of the Report.

strategy and identified human rights as having a central role in every substantive section of his report. The Secretary-General identified that: “Only by honouring and strengthening the human rights of all can the international community succeed in its efforts to fight this scourge”.⁴ Secondly, an obvious point should be made about the nature of international law obligations.⁵ Not only are human rights essential to the countering of terrorism, but States are obliged by law to comply with their international human rights obligations when countering terrorism. This is due to the fact that States have obligations under customary international law (applicable to all States)⁶ and international treaties (applicable to States parties to such treaties).⁷ Notably, in this regard, the Guide talks of *applicable* human rights law (whether in the form of customary norms that are opposable to the State giving consideration to the Guide, or in the form of obligations under human rights treaties to which the State is a party). International lawyers, and human rights advocates in particular, must remember that not all human rights standards translate into binding obligations upon States, although they might certainly possess moral weight that should be borne in mind by a State.

The third point to be made is that this first-stated principle is based not just upon a State’s international obligations, but also upon directions of the United Nations Security Council, General Assembly, and Commission on Human Rights. It was also a clear message of the 2005 World Summit Outcome on the question of respect for human rights while countering terrorism that:⁸

...international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter and relevant international conventions and protocols. States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.

Resolutions of the UN General Assembly

Mention has already been made in chapter 3 of the adoption by the UN General Assembly of a series of resolutions concerning terrorism since 1972, initially taking the form of resolutions concerning measures to

⁴ Ibid, para 118.

⁵ See further, *infra*, chapter 6.

⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Reports, paras 172-201.

⁷ See the *Vienna Convention on the Law of Treaties* (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 34.

eliminate international terrorism, and then addressing more directly the topic of terrorism, counter-terrorism and human rights. This second series of General Assembly resolutions began in late December 1993, with the adoption of resolution 48/122, entitled “Terrorism and Human Rights”.⁹ Some analysis of those resolutions has already been provided in chapter 6. Of importance to this chapter, both sets of resolutions contain various statements about the need, when implementing counter-terrorist measures, to comply with international human rights standards. A common phrasing of this idea is seen in General Assembly resolution 50/186 (1995):¹⁰

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

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

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

A slightly less robust expression of these ideas was seen in resolution 56/88 (2001) following the events of September 11, although still requiring measures to be taken consistently with human rights standards.¹¹ That should not, however, be taken as a signal that the General Assembly was

⁸ 2005 *World Summit Outcome*, GA Res 60/1, UN GAOR, 69th Sess, 8th Plen Mtg, UN Doc A/Res/60/1 (2005), para 85.

⁹ GA Res 48/122, UN GAOR, 48th Sess, 85th Plen Mtg, UN Doc A/Res/48/122 (1993).

¹⁰ See also GA Res 50/186, UN GAOR, 50th Sess, 99th Plen Mtg, UN Doc A/Res/50/186 (1995), preambular paras 13 and 14, and operative para 3; GA Res 52/133, UN GAOR, 52nd Sess, 70th Plen Mtg, UN Doc A/Res/52/133 (1997), preambular paras 12 and 13, and operative para 4; GA Res 54/164, UN GAOR, 54th Sess, 83rd Plen Mtg, UN Doc A/Res/54/164 (1999), preambular paras 15 and 16, and operative para 4; GA Res 56/160, UN GAOR, 56th Sess, 88th Plen Mtg, UN Doc A/Res/56/160 (2001), preambular paras 22 and 23, and operative paras 5 and 6; and GA Res 58/174, UN GAOR, 58th Sess, 77th Plen Mtg, UN Doc A/Res/58/174 (2003), preambular paras 20 and 21, and operative para 7.

¹¹ GA Res 56/88, UN GAOR, 56th Sess, 85th Plen Mtg, UN Doc A/Res/56/88 (2001), preambular para 9 and operative para 3. The preambular paragraph returned to the language of combating terrorism “in accordance with the principles of the Charter”, and operative paragraph 4 talked of combating terrorism in accordance with international law “including international standards of human rights”. See also similar statements within GA Res 57/27, UN GAOR, 57th Sess, 52nd Plen Mtg, UN Doc A/Res/57/27 (2002), preambular para 8 and operative para 6; GA Res 58/81, UN GAOR, 58th Sess, 72nd PLen Mtg, UN Doc A/Res/58/81 (2003), preambular para 9 and operative para 6; GA Res 58/136, UN GAOR, 58th Sess, 77th Plen Mtg, UN Doc A/Res 58/136 (2003), preambular para 10 and operative para 5; and GA Res 59/46, UN GAOR, 59th Sess, 65th Plen Mtg, UN Doc A/Res/59/46 (2004), preambular para 10 and operative para 3.

minded to turn a blind eye to adverse impacts of counter-terrorism upon human rights. To the contrary, the issue became the subject of annual resolutions on that subject alone, entitled “Protection of Human Rights and Fundamental Freedoms While Countering Terrorism”.¹² The first operative paragraphs of these resolutions affirm that:

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

These directions on the part of the General Assembly are reasonably strong in the language they use. It must be recalled, however, that resolutions of the General Assembly do not hold the same weight as international conventions, or binding resolutions of the Security Council. Indeed, Article 10 of the Charter of the United Nations specifically provides that resolutions and declarations of the General Assembly are recommendatory only.¹³ This principle is equally applicable to resolutions of the Commission on Human Rights, as a subsidiary organ of the Economic and Social Council (which is only empowered to make recommendations),¹⁴ and those of the new Human Rights Council (a subsidiary organ of the General Assembly).¹⁵ Thus, the resolutions just discussed, and those of the Commission to be discussed, represent guiding principles and non-binding recommendations (what might be termed ‘soft law’), rather than binding resolutions, treaty provisions or norms of customary international law

¹² GA Res 57/219, UN GAOR, 57th Sess, 77th Plen Mtg, UN Doc A/Res/57/219 (2002); GA Res 58/187, UN GAOR, 58th Sess, 77th Plen Mtg, UN Doc A/Res/58/187 (2003); and GA Res 59/191, UN GAOR, 59th Sess, 74th Plen Mtg, UN Doc A/Res/59/191 (2004). See also: GA Res 59/46, UN GAOR, 59th Sess, 65th Plen Mtg, UN Doc A/Res/59/46 (2004), preambular para 10 and operative para 3; GA Res 59/153, UN GAOR, 59th Sess, 74th Plen Mtg, UN Doc A/Res/59/153 (2004), preambular paras 11 and 12; GA Res 59/195, UN GAOR, 59th Sess, 74th Plen Mtg, UN Doc A/Res/59/195 (2004), preambular para 5, 23 and 24 and operative paras 8 and 10; and GA Res 60/158, UN GAOR, 60th Sess, 64th Plen Mtg, UN Doc A/Res/60/158 (2005), preambular paras 2, 3 and 7, and operative para 1.

¹³ Article 10 provides that the: “General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters”.

¹⁴ *Charter of the United Nations*, Article 62(2).

¹⁵ The Human Rights Council was established by the United Nations General Assembly in 2006 under its resolution 60/251 as a subsidiary body of the General Assembly: GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, UN Doc A/Res/60/251 (2006). The resolution establishing the Human Rights Council was adopted by a vote of 170 in favour to four against (voting against the resolution were Israel, the Marshall Islands, Palau and the United States), with three abstentions (abstaining were Belarus, Iran and Venezuela).

(‘hard law’). Notwithstanding this, having regard to their repeated and consistent approach, these resolutions are very influential and, importantly, representative of international comity. It is also relevant to recall that resolutions may constitute evidence of customary international law, if supported by State conduct that is consistent with the content of the resolutions and with the accompanying *opinion juris* required to prove the existence of customary law.¹⁶

Resolutions of the former Commission on Human Rights

Not surprisingly, the United Nations Commission on Human Rights has paid considerable attention to the issue of the adverse consequences that counter-terrorism can have upon the maintenance and promotion of human rights. It did so even before the flurry of anti-terrorist legislation that followed Security Council resolution 1373 (2001). In the pre-9/11 resolutions of the Commission, and its Sub-Commission on the Protection and Promotion of Human Rights, it was affirmed that all States have an obligation to promote and protect human rights and fundamental freedoms, and that all measures to counter terrorism must be in strict conformity with international law, “including international human rights standards”.¹⁷ Post-September 11, resolutions of the Commission became more strongly worded. Two resolutions on the subject were adopted in 2004 alone. First, the issue was addressed within the Commission’s annual resolution on human rights and terrorism.¹⁸ In a resolution later that month, the Commission again reaffirmed that States must comply with international human rights obligations when countering terrorism.¹⁹ The Commission’s resolution 2005/80, pursuant to which it appointed a Special Rapporteur on

¹⁶ An example of the use of resolutions of the General Assembly to determine the content of customary rules can be seen in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits (1986) ICJ Rep, 76 ILR 349, where the International Court of Justice gave consideration to two resolutions of the Assembly as evidence of the content of the principle of non-intervention: those being the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States*, UNGA Res 213 (XX) (1965) GAOR (20th Sess, 1408th Plen Mtg) UN Doc A/Res/2131; and the *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States*, UNGA Res 2625 (XXV) (1970) GAOR (25th Sess, 1883rd Plen Mtg) UN Doc A/Res/2625.

¹⁷ CHR Res 2001/37, UN ESCOR, 57th Sess, 72nd Mtg, UN Doc E/CN.4/Res/2001/37 (2001), preambular paras 18 and 19 and operative paras 7 and 8. Preambular para 19 was later reflected in UN Sub-Commission on Human Rights Res 2001/18, UN ESCOR, 53rd Sess, 26th Mtg, UN Doc E/CN.4/Sub.2/2001/18 (2001), preambular para 13.

¹⁸ CHR Res 2004/44, UN ESCOR, 60th Sess, 55th Mtg, UN Doc E/CN.4/Res/2004/44 (2004), preambular para 24 and operative paras 10, 11 and 12.

the promotion and protection of human rights while countering terrorism, stated at paragraphs 1 and 6 that it:²⁰

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

Reaffirms that it is imperative that all States work to uphold and protect the dignity of individuals and their fundamental freedoms, as well as democratic practices and the rule of law, while countering terrorism [...].

The 2005 report of the Sub-Commission's Special Rapporteur on the Promotion and Protection of Human Rights also addressed the matter.²¹ Although the original mandate of the Special Rapporteur was to consider the impact of terrorism on human rights,²² she commented in her 2004 report that a State's over-reaction to terrorism can itself also impact upon human rights. The Sub-Commission Rapporteur's mandate was therefore extended to develop a set of draft principles and guidelines concerning human rights and terrorism (which are to be discussed further in this part of the paper). Of note at this point, the first-stated principle under the heading "Duties of States Regarding Terrorist Acts and Human Rights" reads:²³

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

Also of relevance, a digest of jurisprudence on the protection of human rights while countering terrorism was prepared by the UN Office of the High Commissioner for Human Rights in September 2003.²⁴ Its declared

¹⁹ CHR Res 2004/87, UN ESCOR, 60th Sess, 58th Mtg, UN Doc E/CN.4/Res/2004/87 (2004), paras 1 and 2.

²⁰ CHR Res 2005/80, UN ESCOR, 61st Sess, 60th Mtg, UN Doc E/CN.4/Res/2005/80 (2005).

²¹ Sub-Commission Special Rapporteur on terrorism and human rights, Kalliopi Koufa, *Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism. A Preliminary Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism*, UN Doc E/CN.4/Sub.2/2005/39 (22 June 2005).

²² This mandate was consequent to the request of the General Assembly for the Commission to do so (see GA Res 49/185, UN GAOR, 49th Sess, 94th Plen Mtg, UN Doc A/Res/49/185 (1994), para 6) and through the Commission's own decision to consider the issue: see CHR Res 1994/46, UN ESCOR, 50th Sess, 56th Mtg, UN Doc E/CN.4/Res/1994/46 (1994).

²³ Sub-Commission Special Rapporteur (n 21) para 25.

²⁴ *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism* (United Nations Office of the High Commissioner for Human Rights, September 2003). The Office of the High Commissioner is currently working on an updated edition of the Digest.

aim was to assist policy makers and other concerned parties to develop counter-terrorist strategies that respect human rights, introducing itself by stating:²⁵

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

The Digest considers decisions of UN treaty-monitoring bodies, such as the Human Rights Committee, and those of other regional bodies, including the European Court of Human Rights and the Inter-American Court of Human Rights. It looks at general considerations, states of emergency and specific rights. On the subject of general considerations, two types of jurisprudence are relevant here. The first is that which emphasises the duty of States to protect those within their territories from terrorism.²⁶ The second is the identification of jurisprudence observing that the lawfulness of counter-terrorism measures depends upon their conformity with international human rights law.²⁷

Resolutions of the UN Security Council

In general terms, Security Council resolutions concerning terrorism have confined their attention upon the threat of terrorism to international peace and security, reflecting the role of the Council as the organ of the United Nations charged with the maintenance of peace and security.²⁸ That role is reflected in the language and scope of Security Council resolutions on terrorism which, compared with General Assembly and Commission on Human Rights resolutions on the subject, are much narrower in focus. In

²⁵ Ibid 3.

²⁶ Ibid 11-12. See, for example, *Delgado Paez v Colombia*, Human Rights Committee communication 195/1985, views adopted 12 July 1990, para 5.5.

²⁷ Ibid 13-15.

²⁸ Under Article 24 of the *Charter of the United Nations*, the Security Council is charged with the maintenance of international peace and security, paragraph 1 providing that: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf".

general terms, the Security Council's resolutions concern themselves with the adverse impacts of terrorism upon the security of States and the maintenance of peaceful relations,²⁹ while the General Assembly Commission took a much broader approach to the subject given their plenary roles and mandates.

Apart from two notable exceptions, the main inference that can be taken from Security Council resolutions about counter-terrorism measures and their need to comply with human rights arises from general statements that counter-terrorism is an aim that should be achieved in accordance with the Charter of the United Nations and international law.³⁰ This means that such measures must themselves be compliant with the principles of the Charter (which seeks to promote and maintain human rights) and human rights law as a specialised subset of international law. Notable is the fact that members of the United Nations have undertaken, under Article 55(c) and through the preamble to the UN Charter, to observe human rights and fundamental freedoms for all without distinction as to race, language or religion.

The first more express exception mentioned is the 2003 Declaration of the Security Council meeting with Ministers of Foreign Affairs, adopted under resolution 1456.³¹ The Resolution directs its attention to the question of compliance with human rights. Paragraph 6 of the Declaration provides that:

States must ensure that any measure [sic] taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law; [...].

²⁹ Discussed in chapter 6, *infra*.

³⁰ See, for example, SC Res 1373, UN SCOR, 4385th Mtg, UN Doc S/Res/1373 (2001), preambular para 5; SC Res 1438, UN SCOR, 4624th Mtg, UN Doc S/Res/1438 (2002), preambular para 2; SC Res 1440, UN SCOR, 4632nd Mtg, UN Doc S/Res/1440 (2002), preambular para 2; SC Res 1450, UN SCOR, 4667th Mtg, UN Doc S/Res/1450 (2002), preambular para 4; SC Res 1455, UN SCOR, 4686th Mtg, UN Doc S/Res/1455 (2003), preambular para 3; SC Res 1456, UN SCOR, 4668th Mtg, UN Doc S/Res/1456 (2004), preambular para 8; SC Res 1535, UN SCOR, 4936th Mtg, UN Doc S/Res/1535 (2004), preambular para 4; SC Res 1540, UN SCOR, 4956th Mtg, UN Doc S/Res/1540 (2004), preambular para 14; SC Res 1566, UN SCOR, 5053rd Mtg, UN Doc S/Res/1566 (2004), preambular paras 3 and 6; SC Res 1611, UN SCOR, 5223rd Mtg, UN Doc S/Res/1611 (2005), preambular para 2; SC Res 1618, UN SCOR, 5246th Mtg, UN Doc S/Res/1618 (2005), preambular para 4; and SC Res 1624, UN SCOR, 5261st Mtg, UN Doc A/Res/1624 (2005), preambular para 2 and operative paras 1 and 4.

³¹ *Ibid.*

While persuasive in its wording in this regard, the status of the Declaration should be noted. Security Council resolutions, when couched in mandatory language, are binding upon members of the United Nations.³² In the context of the Declaration adopted under resolution 1456 (2003), the text of the Declaration (including the mentioned paragraph 6) is preceded by the sentence: “The Security Council therefore calls for the following steps to be taken” [emphasis added]. Such an expression, although influential, is exhortatory and therefore not a binding “decision” within the contemplation of Article 25 of the Charter.³³

The second resolution to be considered is, however, both direct and binding in its terms. Security Council resolution 1624 of 2005 provides, after setting out the obligations of States to counter various aspects of terrorism, that:³⁴

...States must ensure that any measures taken to implement paragraphs 1, 2 and 3 of this resolution comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law.

The latter provision is not preceded by exhortatory language, but instead constitutes a clearly binding decision of the Security Council.

Counter-Terrorism Committee

In its comprehensive review report of 16 December 2005, which was endorsed by the Security Council, the Counter-Terrorism Committee reiterated that States must ensure that any measure taken to combat terrorism should comply with all their obligations under international law and that they should adopt such measures in accordance with international law, in particular human rights law, refugee law and humanitarian law.³⁵ It also stressed that the Counter-Terrorism Committee Executive Directorate should take this into account in the course of its activities.

³² Member States of the United Nations have agreed to be bound by “decisions” of the Security Council: see *Charter of the United Nations*, Article 25.

³³ In the *Namibia Advisory Opinion*, the International Court of Justice took the position that a resolution couched in non-mandatory language should not be taken as imposing a legal duty upon a member State: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1990)* (Advisory Opinion) [1971] ICJ Rep 53.

³⁴ SC Res 1624 (n 30) para 4.

³⁵ Counter-Terrorism Committee, *Report of the Counter-Terrorism Committee to the Security Council for its consideration as part of its comprehensive review of the Counter-Terrorism Committee Executive Directorate*, UN Doc S/2005/800 (2005).

International Guidelines

Numerous international guidelines and reports on the relationship between human rights and counter-terrorism have been issued since the advent of September 11 and the proliferation of counter-terrorist legislative action that followed. Unlike Security Council decisions, such guidelines and reports are clearly not binding. Nor do they hold the same status as General Assembly or Commission on Human Rights resolutions, which have been adopted by a consensus of State representatives. Notwithstanding this, the consistent approach of these guidelines is telling.

As part of its series of occasional papers, the International Commission of Jurists (ICJ) commissioned a paper on terrorism and human rights in 2002.³⁶ The paper concluded with a list of minimum criteria that States must observe in the administration of justice when countering terrorism, including: the observance of the primacy of the rule of law and of international human rights obligations; and maintaining and guaranteeing at all times rights and freedoms that are non-derogable.³⁷ At the its biennial conference in August 2004, the ICJ was also instrumental in the adoption of the Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism.³⁸ The Berlin Declaration recognises the need to combat terrorism and the duty of States to protect those within their jurisdiction.³⁹ It also expresses that contemporary human rights law allows States a reasonably wide margin of flexibility to combat terrorism without contravening the essence of rights.⁴⁰

In July 2002, the Committee of Ministers to the Council of Europe also adopted guidelines on human rights and the fight against terrorism.⁴¹ In the preface to its guidelines, Secretary General Walter Schwimmer warned that although the suppression of terrorism is an important objective, States must not use indiscriminate measures to achieve that objective.⁴² For a State to react in such a way, he said, would be to fall into the trap set by terrorists for democracy and the rule of law. He urged that situations of crisis, such

³⁶ International Commission of Jurists, *Terrorism and Human Rights*, (International Commission of Jurists, 2002).

³⁷ *Ibid* 248-251.

³¹ International Commission of Jurists, *Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, adopted 28 August 2004, available online: <http://www.icj.org/IMG/pdf/Berlin_Declaration.pdf> (last accessed 27 July 2005).

³⁹ *Ibid* preambular para 2 and operative para 1.

⁴⁰ *Ibid* preambular para 5.

⁴¹ Council of Europe, *Guidelines on Human Rights and the Fight Against Terrorism* (Council of Europe Publishing, 2002).

⁴² *Ibid* 5.

as those brought about by terrorism, called for even greater vigilance in ensuring respect for human rights. Drawing from the jurisprudence of the European Court of Human Rights,⁴³ and the UN Human Rights Committee, the Council's guidelines set out general rules on the interaction between counter-terrorism and human rights, as well as addressing specific rights and freedoms, with commentary on each stated guideline. Five of the more specific guidelines warrant mention. The first reflects the idea that counter-terrorism is an important objective in a free and democratic society. Guideline I accordingly talks of a positive obligation upon States to protect individuals within their territory from the scourges of terrorism, pointing to decisions of the European Court in which it recognised this duty and the particular problems associated with the prevention and suppression of terrorism.⁴⁴ In *Klass v Germany*, for example, the Court agreed with the European Commission that: "some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention".⁴⁵

The second and third Guidelines of the Council are directly relevant to the question of compliance with human rights. Guideline II prohibits the arbitrary limitation of rights,⁴⁶ and Guideline III requires limiting measures to be lawful, precise, necessary and proportional:⁴⁷

Article II

All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as

⁴³ Which has compulsory jurisdiction over States parties to the (*European*) *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), Article 46.

⁴⁴ See, for example, *Ireland v the United Kingdom*, ECHR, 18 January 1978, para 11; *Askoy v Turkey*, ECHR, 18 December 1996, paras 70 and 84; *Zana v Turkey*, ECHR, 25 November 1997, paras 59 and 60; *Incal v Turkey*, ECHR, 9 June 1998, para 58; *United Communist Party of Turkey and Others v Turkey*, ECHR, 20 November 1998, para 59; and *Brogan and Others v the United Kingdom*, ECHR, 29 November 1999, para 48.

⁴⁵ *Klass and Others v Germany*, ECHR, 6 September 1978, para 59

⁴⁶ Compare Article II with paras 3 and 4(i) and (j) of Guidelines issued by the UN High Commissioner for Human Rights: Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, *Human Rights: A Uniting Framework*, ESCOR (58th Sess) UN Doc E/CN.4/2002/18 (2002), Annex entitled *Proposals for "further guidance" for the submission of reports pursuant to paragraph 6 of Security Council resolution 1373 (2001). Compliance with international human rights standards*, I General Guidance: Criteria for the Balancing of Human Rights Protection and the Combating of Terrorism.

⁴⁷ Compare Article III with para 4(a), (b), (e), (f), and (g) of the Commissioner's Guidelines (*ibid*).

well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

Article III

1. All measures taken by States to combat terrorism must be lawful.
2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

Further guidance on possible derogations is found in Guideline XV, concerning derogations during situations of war or states of emergency threatening the life of a nation. Finally, Guideline XVI underlines that States may never act in breach of peremptory norms of international law.

A report of the Inter-American Commission on Human Rights (IACHR) on terrorism and human rights was issued in late 2002, shortly after the adoption of the Inter-American Convention Against Terrorism.⁴⁸ Article 15 of the latter Convention specifically requires all States parties to comply with human rights standards:⁴⁹

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

The IACHR report undertakes a right-based approach, focussing upon the scope and potential limitation of particular rights.⁵⁰ It also emphasises the general need for any limitation to comply with the doctrines of necessity, proportionality and non-discrimination.⁵¹ As one of its annexes, the report recalls resolution 1906 (2002) of the Organization of American States General Assembly, the first operative paragraphs resolving:⁵²

1. To reiterate that the fight against terrorism must be waged with full respect for the law, human rights, and democratic institutions, so as to preserve the rule of law, freedoms, and democratic values in the Hemisphere.

⁴⁸ Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Doc OEA/Ser.L/V/II.116 (22 October 2002), online: <<http://www.cidh.org/Terrorism/Eng/toc.htm>> (last accessed 6 September 2005).

⁴⁹ *Inter-American Convention against Terrorism*, opened for signature 3 June 2002, OAS Treaty A-66 (2003) 42 ILM 19, Article 15.

⁵⁰ The report considers the right to life (part III.A), the right to personal liberty and security (part III.B), the right to humane treatment (part III.C), rights to due process and a fair trial (part III.D), the freedom of expression (part III.E), non-discrimination (part III.F), refugee and asylum rights (part III.H), and other civil rights (part III.G): Inter-American Commission on Human Rights report (n 52).

⁵¹ *Ibid* paras 51 and 55.

⁵² OAS General Assembly Resolution 1906, *Human Rights and Terrorism*, 4th Plen Sess, 4 June 2002, OAS Doc AG/Res 1906 (XXXII-O/02).

2. To reaffirm the duty of the member states to ensure that all measures taken to combat terrorism are in keeping with obligations under international law.

The latest report of the Sub-Commission Special Rapporteur while still under the auspices of the UN Commission on Human Rights, setting out the 2005 *Preliminary Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism*, adopts both a rights-specific and more general approach.⁵³ On the question of permissible limitations, the document adopts a more absolute approach than do the other guidelines, paragraph 34 providing that:

Any exceptions or derogations in human rights law in the context of counter-terrorism measures must be in strict conformity with the rules set out in the applicable international or regional instruments. A State may not institute exceptions or derogations unless that State has been subjected to terrorist acts that would justify such measures. States shall not invoke derogation clauses to justify taking hostages or to impose collective punishments.

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

Appointed as an independent expert, Dr Robert Goldman of the American University completed a very useful report to the Commission on Human Rights in February 2005.⁵⁴ This report also adopts a rights-based approach, and again emphasises the need to uphold the rule of law while confronting

⁵³ Report of the Sub-Commission Special Rapporteur on Counter-Terrorism (n 21). 2006 saw the Special Rapporteur issue a further version of the *Preliminary Framework Draft of Principles and Guidelines*, this time under the auspices of the Human Rights Council, UN Doc A/HRC/Sub.1/58/30 (2006).

⁵⁴ Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert Goldman, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism* ESCOR (61st Sess) UN Doc E/CN.4/2005/103. Dr Goldman was appointed under UNCHR Res 2004/87 (2004) ESCOR (60th Sess) UN Doc E/CN.4/Res/2004/87.

terrorism, Dr Goldman stating that: “Properly viewed, the struggle against terrorism and the protection of human rights are not antithetical, but complementary responsibilities of States”.⁵⁵ Consequent to the report, the Commission established a Special Rapporteur to monitor counter-terrorism measures worldwide that might threaten human rights.⁵⁶ In September 2005, the Special Rapporteur presented his first preliminary report to the General Assembly, setting out the conceptual framework for his work.⁵⁷ His first substantive report to the Commission on Human Rights included consideration of the issue of the human rights implications of the definition of terrorism, a matter considered in more detail in chapter 16.⁵⁸

These various and reasonably general statements are useful and support the notion that “compliance” with human rights means that any limitations upon rights when countering terrorism are to be effected by necessary and proportional means. The difficulty, from a pragmatic perspective, is that they do not express *how* such limitations are to be formulated (hence the development of the Guide as part of the ICT Project). A document which identifies some specific requirements in achieving a proper balance between counter-terrorist objectives and human rights claims is a seemingly little-known one. In her report and follow-up to the 2001 World Conference on Human Rights, the then United Nations High Commissioner for Human Rights, Mary Robinson, prepared guidelines for the use of the Security Council Counter-Terrorism Committee (the Commissioner’s Guidelines).⁵⁹ The Counter-Terrorism Committee, established under the Council’s Resolution 1373 of 2001, was charged with receiving reports from UN member States on their compliance with the counter-terrorist obligations specified within that Resolution.⁶⁰ The Commissioner sought to have the Committee issue the Guidelines to States, so that they might be directed in specific and useful terms on how to counter-terrorism in a manner consistent with human rights. The Committee ultimately declined to issue the Commissioner’s Guidelines, something anticipated from the remarks of

⁵⁵ Ibid para 7.

⁵⁶ UNCHR Res 2005/80 (n 20). Professor Martin Scheinin of Abo Akademi University in Finland was appointed to the role of Special Rapporteur by the Chairman of the Commission on Human Rights, pursuant to UNCHR Res 2005/80.

⁵⁷ Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Promotion and Protection of Human Rights*, GAOR (60th Sess) UN Doc A/60/370 (2005).

⁵⁸ Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Promotion and Protection of Human Rights*, ESCOR (62nd Sess) UN Doc E/CN.4/2006/98 (2005).

⁵⁹ High Commissioner for Human Rights (n 46).

⁶⁰ UNSC Res 1373 (n 30) para 6.

the then Chair of the Counter-Terrorism Committee in his briefing of the Security Council in January 2002:⁶¹

The Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate. But we will remain aware of the interaction with human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organizations to study States' reports and take up their content in other forums.

This does not, however, do away with the utility of the content of the Guidelines for present purposes. The Guidelines are consistent with the premises of other guidelines mentioned, and with the notions of the rule of law and the social contract. They emanate from the highest political office of the United Nations concerned with the issue of human rights. Their content is, in the author's view, influential.

The Commissioner's Guidelines begin by making statements that go to answering an important ideological question: are the objectives of countering terrorism and maintaining human rights compatible? The Guidelines recognize the counter-terrorist obligations imposed upon States by the Security Council and reaffirms that such action must be in compliance with human rights principles contained in international law.⁶² They confirm the notion that human rights law allows for a balance to be struck between the unlimited enjoyment of rights and freedoms and legitimate concerns for national security through the limitation of some rights in specific and defined circumstances.⁶³ Paragraphs 3 and 4 of the Guidelines then set out some instructions on how to formulate counter-terrorist measures that might seek to limit human rights:

3. Where this is permitted, the laws authorizing restrictions:
 - (a) Should use precise criteria;
 - (b) May not confer an unfettered discretion on those charged with their execution.
4. For limitations of rights to be lawful they must:
 - (a) Be prescribed by law;
 - (b) Be necessary for public safety and public order, i.e. the protection of public health or morals and for the protection of the rights and freedoms of others, and serve a legitimate purpose;

⁶¹ Sir Jeremy Greenstock, *Threats to International Peace and Security Posed by Terrorism*, 18 January 2002, UN Doc S/PV.4453, 5.

⁶² High Commissioner for Human Rights (n 46) para 1.

⁶³ *Ibid* para 2.

- (c) Not impair the essence of the right;
- (d) Be interpreted strictly in favour of the rights at issue;
- (e) Be necessary in a democratic society;
- (f) Conform to the principle of proportionality;
- (g) Be appropriate to achieve their protective function, and be the least intrusive instrument amongst those which might achieve that protective function;
- (h) Be compatible with the object and purposes of human rights treaties;
- (i) Respect the principle of non-discrimination;
- (j) Not be arbitrarily applied.

Having regard to their substantive similarities with the other guidelines discussed, and the practical benefits of concrete factors against which counter-terrorist legislation and policies may be measured, the Commissioner's Guidelines form a very useful tool for decision-makers. Although outside the scope of guidelines on the specific subject of counter-terrorism and human rights, attention is also paid to two generally-applicable and very useful documents on the subject of human rights limitations: the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights; and General Comment 29 of the Human Rights Committee.⁶⁴ The latter document is particularly instructive since none of the States parties to the International Covenant on Civil and Political Rights have lodged any objection to General Comment 29 under art 40(5) of the Covenant. One might argue that the document has thereby gained the status of representing subsequent practice in the application of the Covenant which establishes the agreement of the parties regarding its interpretation.⁶⁵

PART ONE OF THE GUIDE

Against the background of the latter obligations, directions and soft law guidance on the need for compliance with human rights when countering

⁶⁴ United Nations Economic and Social Council Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (1985). Human Rights Committee, *States of Emergency (Article 4)*, CCPR General Comment 29 of 2001, reprinted UN Doc HRI/GEN/1/Rev.6 at 186 (2003).

⁶⁵ See *Vienna Convention on the Law of Treaties* (n 7) Article 31(3).

terrorism, Part One of the Guide considers the general question of compliance. Part One of the Guide offers the following advice:

Part One:

Counter-Terrorist Measures Must Comply with Human Rights Standards

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

1. It must first be determined whether the right that is impacted upon by the counter-terrorist measure or legislative provision is capable of limitation. If it is not, then the counter-terrorist measure is impermissible. If the right is capable of limitation, this must be to the extent permitted by the expression of the right, and to the extent necessary by proportional means (as to necessity and proportionality, see Part Two of this Guide). Four possibilities exist:
 - (a) The counter-terrorist measure impacts upon a right that is a peremptory norm of customary international law. If so, the counter-terrorist measure cannot impose any limitations upon the right or freedom.
 - (b) The counter-terrorist measure impacts upon a right that is not derogable under an applicable human rights treaty. This will normally mean that the counter-terrorist measure cannot impose any limitations upon the right, although this depends upon the particular expression of the right. Where the expression permits a limitation upon the right, such limitation must be within those terms and to the extent necessary and proportionate.
 - (c) The counter-terrorist measure impacts upon a right that is only derogable during a state of emergency threatening the life of the nation. In that case, the State must determine whether such an emergency exists, within the meaning of the applicable human rights treaty. If so, the State must:
 - (i) lodge a proclamation of derogation (in accordance with the requirements of the particular treaty);
 - (ii) continually review its circumstances to ensure that the derogation lasts only as long as the state of emergency exists; and
 - (iii) ensure that the derogation is necessary and proportionate.
 - (d) The counter-terrorist measure impacts upon a right that is neither peremptory nor derogable only in states of emergency. If so, the State must ensure that:
 - (i) the limitation is within the permissible range of limits provided within the treaty or customary definition of the right; and
 - (ii) the limitation is necessary and proportionate.

2. From a procedural perspective, a number of rules are applicable to ensure that the counter-terrorist measure is established by proper means, requiring that:
 - (a) Counter-terrorist measures seeking to impose limitations upon rights and freedoms must be prescribed by law, requiring such prescriptions to be adequately accessible and formulated with sufficient precision so that citizens may regulate their conduct.
 - (b) Prescriptions must respect the principle of non-discrimination and equality before the law.
 - (c) Prescriptions may not confer an unfettered discretion, they must not be arbitrarily applied, and they must be implemented by means that establish adequate checks and balances against the potential misuse or arbitrary application of counter-terrorist powers.
 - (d) Prescriptions must be confined to countering terrorism.

**Part One, Step 1:
Is the Right Capable of Limitation?**

The discussion to this point leads to an unambiguous conclusion that States must comply with their international human rights obligations when countering terrorism. The United Nations has made it clear, through resolutions of three of its principal bodies, that counter-terrorism is not a motive that justifies overriding those obligations. This position can lead to an adverse reaction on the part of counter-terrorist practitioners, claiming that counter-terrorism can not be effectively achieved without the limitation of human rights, at which point it is important to consider what 'compliance' with human rights means. It does not mean that all human rights cannot be limited, since human rights law does contain a level of flexibility which is aimed at accommodating challenges such as those posed by counter-terrorism.

The first step in the Guide calls for identification of the nature of the right upon which a proposed, or actual, counter-terrorist provision or measure impacts. Under the international human rights framework, rights are universal and indivisible. Although there is no hierarchy of rights and freedoms, human rights norms and treaty provisions fall within one of the following four categories:

- peremptory rights at customary international law (in respect of which no limitation is permissible – Guide, 1(a));

- non-derogable rights under human rights treaties (in respect of which no derogation is permissible – Guide, 1(b));
- rights only derogable in states of emergency (which may only be limited in times of an emergency threatening the life of the nation – Guide, 1(c)); or
- other rights (which, depending on their definition, may be limited when necessary so long as this is proportionate – Guide, 1(d)).

Peremptory Rights at Customary International Law

In determining what human rights compliance means, the first important point to be made is that there is a distinction to be made between rights that are capable of limitation and those that are not. The isolation of particular rights into the category of peremptory norms (those in respect of which no limitation is permitted) was an issue that the ICT Project did not delve into too deeply, since this can be a controversial issue which went beyond the central aim of the Project.⁶⁶ The Project recognised, however, that certain rights can hold this absolute status. Least controversial is the status of the prohibition against torture (the commission of which is also an international crime)⁶⁷ as falling within this category.⁶⁸ The International Law Commission has identified this, together with the prohibition against slavery, as a norm of *jus cogens*.⁶⁹ The Committee on the Elimination of

⁶⁶ See, however, efforts to identify fundamental rights applicable in all circumstances: Richard Lillich, 'The Paris Minimum Standards of Human Rights Norms in a State of Emergency' (1985) 79 *American Journal of International Law* 1072; and the *Siracusa Principles* (n 68). See also the identification by the Human Rights Committee of rights within the *International Covenant on Civil and Political Rights* that reflect norms of general (customary) international law: General Comment 29 (n 64) para 13.

⁶⁷ See, generally, *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [1999] 2 WLR 827.

⁶⁸ See, amongst others: Matthew Lippman, 'The Protection of Universal Human Rights: The Problem of Torture' (1979) 1(4) *Universal Human Rights* 25; Bruce Barenblat, 'Torture as a Violation of the Law of Nations: An Analysis of 28 U.S.C. 1350 *Filartiga v. Pena-Irala*' (1981) 16 *Texas International Law Journal* 117; Eyal Benvenisti, 'The Role of National Courts in Preventing Torture of Suspected Terrorists' (1997) 8 *European Journal of International Law* 596; Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford University Press, 2000) 381-382; and Erika de Wet, 'The Prohibition of torture as an International Norm of *Jus Cogens* and its Implications for National and Customary Law' (2004) 15(1) *European Journal of International Law* 97.

⁶⁹ International Law Commission, "Commentary on the Vienna Convention on the Law of Treaties" (1966) 2 *Yearbook of the International Law Commission* 248.

Racial Discrimination has said that the principle of non-discrimination on the grounds of race has also become a norm of *jus cogens*.⁷⁰

Non-derogable Rights under Human Rights Treaties

The distinction between peremptory rights at customary international law and non-derogable rights under applicable human rights treaties is a fine, but important, one.⁷¹ In the case of the International Covenant on Civil and Political Rights (ICCPR), Article 4(2) sets out a list of rights that may not be derogated from even when a public emergency is declared by a State party to the Covenant. These non-derogable rights are identified in the ICCPR as the right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, the prohibition against slavery and servitude, freedom from imprisonment for failure to fulfil a contract, freedom from retrospective penalties, the right to be recognised as a person before the law, and freedom of thought, conscience and religion.⁷² Article 4(1) requires that any derogating measures must not be inconsistent with a State's other international law obligations, and must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

1. The list of non-derogable rights

As just mentioned, Article 4(2) sets out a list of rights that may not be derogated from, even during a state of emergency. This list is not, however, exhaustive. The Human Rights Committee has made the point that provisions of the ICCPR relating to procedural safeguards can never be made subject to measures that would circumvent the protection of these non-derogable rights.⁷³

The Committee has also pointed out that, because Article 4(1) of the ICCPR specifies that any derogating measures must not be inconsistent with obligations under international law, the full complement of 'non-derogable rights' therefore includes rights applicable as part of obligations

⁷⁰ Committee on the Elimination of Racial Discrimination, "Statement on Racial Discrimination and Measures to Combat Terrorism", in *Report of the Committee on the Elimination of Racial Discrimination*, UN Doc A/57/18, 107.

⁷¹ See General Comment 29 (n 68) para 11.

⁷² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Articles 6, 7, 8(1) and (2), 11, 15, 16, and 18 respectively.

⁷³ General Comment 29 (n 64) para 15.

under international human rights law, international humanitarian law, and international criminal law.⁷⁴ Expanding upon this position, the Committee identified certain rights under customary international law (applicable to all States) as being non-derogable: the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; the prohibitions against taking of hostages, abductions or unacknowledged detention; the international protection of the rights of persons belonging to minorities; the deportation or forcible transfer of population without grounds permitted under international; and the prohibition against propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.⁷⁵

2. The limitation of non-derogable rights

The status of a substantive right as non-derogable does not mean that limitations or restrictions upon such a right could not be justified. In its General Comment 29, the Human Rights Committee makes this point and gives the example of the freedom to manifest one's religion or beliefs, expressed in Article 18 of the ICCPR.⁷⁶ Article 18 is listed within Article 4(2) and cannot therefore be derogated from under the Article 4 procedure. This listing does not, however, remove the permissible limitation upon the right expressed within paragraph (3) of Article 18 (such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others). Thus, whereas a peremptory right may not be the subject of any limitation at all, a non-derogable treaty right may be capable of limitation depending on the particular expression of the right. Such a limitation must, however, be proportional to the exigencies of the situation.⁷⁷

Rights Derogable only in States of Emergency

The third category of rights under international human rights treaties are those that are only derogable in times of emergency threatening the life of

⁷⁴ Ibid, paras 9 and 10.

⁷⁵ Ibid, para 13.

⁷⁶ General Comment 29 (n 64) para 7. See also para 11.

⁷⁷ See: the international guidelines discussed earlier, and General Comment 29 (n 64) paras 4 and 5.

the nation (Guide, 1(c)).⁷⁸ By way of illustration, Article 4 of the International Covenant on Civil and Political Rights provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant 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.

Assuming that such a state of emergency exists, and that the right in question is one that can be derogated from, four requirements must be noted:

1. Determining the existence of a public emergency

The ability to derogate under Article 4(1) of the ICCPR is triggered only “in a time of public emergency which threatens the life of the nation”. The Human Rights Committee has characterised such an emergency as being of an exceptional nature.⁷⁹ Not every disturbance or catastrophe qualifies as such. The Committee has commented that, even during an armed conflict, measures derogating from the ICCPR are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.⁸⁰ Whether or not terrorist acts or threats establish such a state of emergency must therefore be assessed on a case by case basis.

Interpreting the comparable derogation provision within the European Convention on Human Rights and Fundamental Freedoms, the European Court of Human Rights has spoken of four criteria to establish that any given situation amounts to “a time of public emergency which threatens the life of the nation”.⁸¹ First, it should be a crisis or emergency that is actual or imminent. Secondly, it must be exceptional, such that ‘normal’ measures are inadequate. Next, the emergency must threaten the continuance of the organized life of the community. Finally, it must affect the population of

⁷⁸ See: the *International Covenant on Civil and Political Rights*, Article 4; the [*European*] *Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 15; and the *American Convention on Human Rights*, 1144 UNTS 123 (entered into force 18 July 1978) Article 27(1).

⁷⁹ General Comment 29 (n 64) para 2.

⁸⁰ *Ibid*, para 3.

⁸¹ See: *Lawless v Ireland (No 3)* (1961) ECHR Series A, para 28; and *The Greek Case* (1969) 12 *Yearbook of the European Court of Human Rights* 1, para 153.

the State taking measures. On this fourth point, early decisions of the Court spoke of an emergency needing to affect the whole population. The Court appears to have subsequently accepted that an emergency threatening the life of the nation might only materially affect one part of the nation at the time of the emergency.⁸²

Outside the immediate aftermath of a terrorist attack, or in the situation where clear intelligence exists of an imminent threat of a terrorist act, it is debatable whether a continual state of emergency caused by the threat of terrorism can exist for the purpose of these derogating provisions.⁸³ Ultimately, however, this will normally involve a factual question calling for consideration of the particular circumstances at hand. Given that New Zealand has not lodged a notice of derogation under the ICCPR, and that there are no signs that such steps would be taken by it, this issue is not considered further within this text.

⁸² *Brannigan and McBride v United Kingdom* (1993) ECHR Series A, although contrast this with the dissenting opinion of Judge Walsh, para 2.

⁸³ See, generally, the *Siracusa Principles* (n 64) paras 39-41. In the context of states of emergencies said to be caused by the threat of terrorism (under the framework of the *International Covenant on Civil and Political Rights*, see Human Rights Committee, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, UN Doc CCPR/C/79/Add.18 (1993), para 25, where the Committee recommended: "Given the significant decline in terrorist violence in the United Kingdom since the cease-fire came into effect in Northern Ireland and the peace process was initiated, the Committee urges the Government to keep under the closest review whether a situation of "public emergency" within the terms of Article 4, paragraph 1, of the Covenant still exists and whether it would be appropriate for the United Kingdom to withdraw the notice of derogation which it issued on 17 May 1976, in accordance with Article 4 of the Covenant". See also: Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, UN Doc CCPR/C/79/Add.93 (1998), para 11, where the Committee stated: "The Committee expresses its deep concern at the continued state of emergency prevailing in Israel, which has been in effect since independence. It recommends that the Government review the necessity for the continued renewal of the state of emergency with a view to limiting as far as possible its scope and territorial applicability and the associated derogation of rights. In this regard, the Committee draws attention to Article 4 of the Covenant, which permits no derogation from Articles 6, 7, 8 (paras. 1 and 2), 11, 15, 16 and 18, and requires that permitted derogations be limited to the extent strictly required by the exigencies of the situation". See further: Alex Conte, 'A Clash of Wills: Counter-Terrorism and Human Rights' (2003) 20 *New Zealand Universities Law Review* 338, 350-354; Justice [a non-governmental law reform and human rights organisation], *Response to the Joint Committee on Human Rights Inquiry into UK Derogations from Convention Rights*, (Justice, 2002); and James Oraa, *Human Rights in States of Emergency in International Law*, (Clarendon Press, 1992).

2. Proclamation and notice of a state of emergency

Upon establishment that an emergency exists, a proclamation of derogation must be lodged in accordance with the requirements of the particular treaty.⁸⁴ In the case of the ICCPR a State party must, before it can implement any derogating measure(s), officially proclaim the existence within its territory of a public emergency which threatens the life of the nation.⁸⁵ Through the intermediary of the UN Secretary-General, a derogating State must also immediately inform other States parties to the ICCPR of the provisions from which it has derogated and of the reasons by which it has done so.⁸⁶ The Human Rights Committee has emphasised that notification should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached concerning the relevant law.⁸⁷ A further communication is required on the date on which the State terminates such derogation.⁸⁸ In practice, very few States have declared a state of emergency in relation to acts of terrorism.

3. Review

Linked to the first requirement that the situation within the derogating State must amount to a public emergency threatening the life of the nation, it will be important for the derogating State to continually review the situation faced by it to ensure that the derogation lasts only as long as the state of emergency exists. In the context of the ICCPR derogations provisions, the Human Rights Committee has repeatedly stated that measures under Article 4 must be of an exceptional and temporary nature, and may only continue only as long as the life of the nation concerned is threatened.⁸⁹ The restoration of a state of normalcy where full respect for the ICCPR can again be secured, the Human Rights Committee has said, must be the predominant objective of a State party derogating from the Covenant.⁹⁰

⁸⁴ As an example, see the *International Covenant on Civil and Political Rights*, Article 4(3). See, in that regard, General Comment 29 (n 64) paras 2 and 17. See also the *Siracusa Principles* (n 64) paras 42-47.

⁸⁵ *International Covenant on Civil and Political Rights*, Article 4(1).

⁸⁶ *International Covenant on Civil and Political Rights*, Article 4(3).

⁸⁷ General Comment 29 (n 64) paras 5, 16 and 17.

⁸⁸ *International Covenant on Civil and Political Rights*, Article 4(3).

⁸⁹ General Comment 29 (n 64) para 2; and the *Siracusa Principles* (n 64) paras 48-50.

⁹⁰ *Ibid*, paras 1 and 2.

4. Permissible extent of derogating measures

Finally, the extent to which any right is derogated from must be limited “to the extent strictly required by the exigencies of the situation”. Any derogating measure must therefore be both necessary and proportionate (thus calling into consideration the second part of the Guide).⁹¹ The General Assembly, in its 2004 and 2005 resolutions on the protection of fundamental freedoms and human rights while countering terrorism, has also reaffirmed that any derogating measures are to be of an exceptional and temporary nature.⁹²

Other Rights

The final category of rights are those that are neither peremptory, non-derogable, nor subject to limitation only in states of emergency (Guide, 1(d)). The Human Rights Committee has acknowledged, in this regard, that the limitation of rights is allowed even in ‘normal times’ under various provisions of the International Covenant on Civil and Political Rights.⁹³ The permissible scope of the limitation of such rights will primarily depend upon their expression within the human rights treaty. This will give rise to two possible means of limitation: (1) by a definitional mechanism; and/or (2) by a rights-specific limitations clause.⁹⁴

Definitional limitations are ones that fall within the meaning of the words contained in the expression of the right itself. For example, the right to a fair and open hearing doesn’t provide a person with the right to a hearing which favours the person in all respects. Rather, it guarantees that a person be afforded a ‘fair’ and open hearing.⁹⁵ A counter-terrorist measure

⁹¹ See the international guidelines discussed earlier. The Human Rights Committee has also emphasised that any derogation must be shown to be required by, and proportionate to, the exigencies of the situation: Human Rights Committee General Comment 29 (n 64) paras 4 and 5. When considering States parties’ reports the Committee has expressed concern over insufficient attention being paid to the principle of proportionality: see, for example, *Concluding Observations of the Human Rights Committee: Israel* (n 83) para 11. See also the *Siracusa Principles* (n 64) para 51.

⁹² GA Res 59/191 (n 12) para 2; and GA Res 60/158 (n 12) para 3. See also CHR Res 2005/80 (n 20) para 3.

⁹³ General Comment 29 (n 64).

⁹⁴ See further, *inrra*, chapter 9.

⁹⁵ See, for example, the *International Covenant on Civil and Political Rights*, Article 14(1), which provides that: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...” [emphasis added].

imposing limitations upon the disclosure of information, based upon the need to protect classified security information, might for example be ‘fair’ if the person’s counsel (with appropriate security clearance) is permitted access to the information.⁹⁶

Rights-specific limitations are those that are authorised by a subsequent provision concerning the circumstances in which the right in question may be limited. In the context of the ICCPR, and again using the example of the right to a fair and open hearing, the first two sentences of Article 14(1) express the substance of the right (as just discussed). The next sentence then sets out the circumstances in which it is permissible to limit the right to an ‘open’ hearing, allowing the exclusion of the press for reasons of morals, public order, or national security.⁹⁷

Part One, Step 2: The Counter-Terrorist Measure Must be Established by Proper Means

The second step in the Guide directs its attention to the subject of the means by which the counter-terrorist provision, or the authority for the counter-terrorist measure, is established: by a prescription of law; respecting the principle of non-discrimination; not conferring an unfettered discretion; and limited to countering terrorism.

Prescription by Law

As to the first matter identified, it is no accident that the former Commissioner’s Guidelines used the term “prescribed by law”, this having been subject to examination by both domestic and international courts and tribunals with clear pronouncements on its meaning. The expression was

⁹⁶ This is the means by which classified information is protected in judicial proceedings by the United Kingdom, through its *Special Immigration Appeals Commission Act 1997*. In a judgment considering a decision made using this mechanism, the House of Lords implicitly accepted the validity of such a limitation: see *Secretary of State for the Home Department v Rehman* [2001] UKHL 47 (see, in particular, the postscript of Lord Hoffman, para 62).

⁹⁷ The third sentence of the *International Covenant on Civil and Political Rights*, Article 14(1), provides: “The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children”.

considered, for example, by the European Court of Human Rights in the *Sunday Times* case of 1978 where the Court concluded that two requirements flowed from it: (1) that the law must be adequately accessible so that the citizen has an adequate indication of how the law limits his or her rights; and (2) that the law must be formulated with sufficient precision so that the citizen can regulate his or her conduct (Guide, 3.1).⁹⁸ This test was later reaffirmed by the European Court in the case of *Silver v UK*.⁹⁹ The same language is found in the Commissioner's Guidelines, the guidelines of the Council of Europe and the report of the Inter-American Commission on Human Rights.¹⁰⁰ It is likewise reflected in the Human Rights Committee's General Comment 29 and the Siracusa Principles.¹⁰¹

In the particular context of the criminalisation of conduct in pursuit of counter-terrorism, the Special Rapporteur on Human Rights and Counter-Terrorism has commented upon the proper characterisation of 'terrorism' and definitional requirements of such proscription. This is a matter considered in more detail in chapter 16.

Non-Discrimination and Equality Before the Law

Although not expressly dealt with by the European Court of Human Rights in determining what is "prescribed by law" it should be remembered that any legal prescription, to comply with the rule of law, must also respect the principle of non-discrimination and equality before the law (Guide, 2(b)).¹⁰² Similarly, paragraph 4(i) of the Commissioner's Guidelines demand that any limitation respect the principle of non-discrimination, as does General Comment 29 of the Human Rights Committee.¹⁰³ It is relevant to note that Article 4 of the ICCPR provides that any derogation of rights in times of emergency may not involve discrimination solely on the ground of race,

⁹⁸ *Sunday Times v United Kingdom* (1978) 58 ILR 491, 524-527.

⁹⁹ *Silver v UK* [1983] 5 EHRR 347.

¹⁰⁰ See: the Commissioner's Guidelines (n 46) paras 3(a) and 4(a); the Council of Europe guidelines (n 41) Guideline III; and the Inter-American Commission on Human Rights report (n 58) para 53.

¹⁰¹ General Comment 29 (n 64) para 16; and the *Siracusa Principles* (n 64) paras 15 and 17.

¹⁰² Consider Albert Venn Dicey's notion of the rule of law, requiring: (1) the regulation of government action, so that the government can only act as authorized by the law, having the consequence that one can only be punished or interfered with pursuant to the law; (2) the equality of all persons before the law (which is the context in which the rule of law is referred to in this article); and (3) the requirement of procedural and formal justice. See Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (London: MacMillan, 1885) 175-184.

¹⁰³ General Comment 29 (n 64) paras 8 and 16.

colour, sex, language, religion or social origin.¹⁰⁴ It is also significant that recent resolutions of the General Assembly and Commission on Human Rights have stressed that the enjoyment of rights must be without distinction upon such grounds, and that the Committee on the Elimination of Racial Discrimination has declared that the prohibition against racial discrimination is a peremptory norm of international law from which no derogation is permitted.¹⁰⁵

Scope of the Prescription

The final two requirements of step 2 concern the scope of the prescription.

1. Discretionary powers

Step 2(c) concerns itself with the conferral of any discretion by the prescription. This in turn brings two matters into consideration. Primarily, any law authorising a restriction upon rights and freedoms must not confer an *unfettered* discretion on those charged with its execution. This goes to the framing of the discretion. Secondly, any discretion must not be arbitrarily applied. Both requirements call for the imposition of adequate safeguards to ensure that the discretion is capable of being checked, with appropriate mechanisms to deal with any abuse or arbitrary application of the discretion. These two restrictions on the conferral of discretions are reflected within the former Commissioner's guidelines and those of the Council of Europe, as well as the Siracusa Principles.¹⁰⁶

2. Confinement to countering terrorism

Step 2(d) looks at the potential scope of application of any counter-terrorist prescription or authorising provision. The point to be made here is that the objective of countering terrorism must not be used as an excuse by the State to broaden its powers in such a way that those powers are applicable to other matters. This is something expressly dealt with by both the Commission and Sub-Commission Special Rapporteurs.¹⁰⁷ It is also reflected within the guidelines advocated by both the Committee of Ministers to the Council of

¹⁰⁴ *International Covenant on Civil and Political Rights*, Article 4(1). See also Article 26.

¹⁰⁵ See: GA Res 59/191 (n 12) preambular para 12; CHR Res 2005/80 (n 20) preambular para 15; and Committee on the Elimination of Racial Discrimination, "Statement on Racial Discrimination and Measures to Combat Terrorism" (n 70) 107.

¹⁰⁶ See: the Commissioner's Guidelines (n 46) paras 3(b) and (j); the Council of Europe guidelines (n 41) Guideline II; and the *Siracusa Principles* (n 64) paras 16 and 18.

Europe and the Inter-American Commission on Human Rights, each directing that where measures taken by States to combat terrorism restrict human rights, those restrictions must be defined as precisely as possible and be necessary for the objective of countering terrorism.¹⁰⁸ Application of this principle, posits the author, is relevant at both the creation and application of the prescription. In other words, the State must ensure that legislative prescriptions enacted for the purpose of countering terrorism do just that, and no more. Secondly, such measures must only be applied for the purpose of countering terrorism, rather than being ‘stretched’ to fit other objectives of the State.

PART TWO OF THE GUIDE

Once it has been established that a counter-terrorist measure impacts upon a right or freedom that may be limited (Part 1, step 1) and that the means of establishing or authorising the measure is by a proper prescription (Part 1, step 2), Part 2 of the Guide then calls for the decision-maker to consider the issue of necessity and proportionality:

Part Two: Necessity and Proportionality

3. The counter-terrorism measure or legislative provision must be necessary, such that:
 - (a) It is in pursuit of a pressing objective. In principle, the objective of countering terrorism is one that is pressing and substantial in a free and democratic society and one that may therefore justify the limitation of derogable human rights. Notwithstanding the importance of counter-terrorism per se, it is the particular objective of the legislative provision or counter-terrorist policy/measure in question that must be assessed. It will be instructive in this regard to identify how the measure or provision links with:
 - (i) The countering of an actual threat of terrorism against the State;
 - (ii) The countering of a potential threat of terrorism against the State;
 - (iii) Its contribution to the international framework on counter-terrorism; and
 - (iv) Its contribution to other national interests.

¹⁰⁷ Special Rapporteur’s report (n 58), para 47; and Sub-Commission Rapporteur’s report (n 21) para 33.

¹⁰⁸ See: the Council of Europe guidelines (n 41) Guideline III(2); the Inter-American Commission on Human Rights report (n 48) paras 51 and 55; and the *Siracusa Principles* (n 64) para 17.

- (b) It is rationally connected to the achievement of the objective being pursued, requiring the counter-terrorist measure being examined to logically further the objective of countering terrorism.
4. The counter-terrorism measure or legislative provision must be proportional.
- (a) The measure or provision must effect a “limitation” upon rights, rather than an exclusion of them, or such a sever limitation that would impair the essence of the right or freedom being affected.
 - (b) The human rights impact of the counter-terrorist measure must be determined by considering the following questions:
 - (i) What is the importance of, or the degree of protection provided by, the right or freedom affected?
 - (ii) What are the effects of the limiting provision (or measure) upon the right or freedom?
 - (c) The value to be accorded to the counter-terrorist measure must be determined by considering the following questions:
 - (i) What is the importance of the objective being pursued by the counter-terrorist provision or measure?
 - (ii) How effective is the counter-terrorist measure in achieving its objective (what is its ameliorating effect)?
 - (d) With the aim of producing the least reasonably intrusive means of achieving the counter-terrorist objective, balance the two scales by asking the following substantive question:

Having regard to the importance of the right or freedom [4(b)(i)], is the effect of the measure or provision upon the right [4(b)(ii)] proportional to the importance of the objective, and the effectiveness, of the legislative provision or measure [4(c)]?

Part Two, Step 3:

The Counter-Terrorist Measure Must be Necessary

To legitimate a limitation of a right or freedom, any such limitation must be necessary for the achievement of a pressing objective. Step 3 considers this requirement in two parts: the objective of the provision effecting the limitation; and ensuring that there is a rational link between that provision and the objective.

The Objective of Countering Terrorism

The State has an undeniable duty to protect its nationals and it cannot be doubted that counter-terrorism is a sufficiently important objective in a free and democratic society to warrant, in principle, measures to be taken which might place limits upon rights and freedoms. The fear-inducing nature of terrorist acts has far-reaching consequences. Likewise, the means through which terrorist activities are facilitated have links to other negative conduct and impacts upon the individual, municipal societies, and international security. This is clearly recognised within the international guidelines mentioned, and within resolutions of the Security Council, General Assembly and Commission on Human Rights.¹⁰⁹

The Objective of the Particular Counter-Terrorist Measure

There is clear recognition, then, that terrorism impacts upon both individuals and society as a whole, so that the countering of those adverse effects must constitute an important objective in and of itself. Care should be taken, however, not to over-simplify this position. Paragraph 4 of the former Commissioner's Guidelines advocates that limits: must be necessary for public safety and public order (limiting this to the protection of public health or morals and for the protection of the rights and freedoms of others); that they serve a legitimate purpose; and be necessary in a democratic society. One should also bear in mind that this position only applies to rights that are derogable and capable of limitation in the first place.

These are matters that go to both the objective of countering terrorism in the abstract, and to the particular means by which that objective is put into effect. The latter aspect demands that the means are proportional to the objective. It will be instructive to this balancing exercise to determine what the objective of the counter-terrorist provision or measure is, and how it may contribute to other pressing objectives. The Guide points, in that regard, to the identification of the link between the provision or measure being examined and four often inter-linked matters (step 3(a)). It should be noted that, when speaking of threats of terrorism "against the State", the author is using that expression in its broadest sense to speak of threats of terrorist acts being perpetrated within the territory of the State.

¹⁰⁹ See, *infra*, chapter 6.

1. The countering of an actual threat of terrorism against the State

Due to the manner in which terrorist organisations operate, it is a very difficult thing to assess the existence and level of the threat of terrorism, whether actual or potential. It is an imprecise science. If it was not so, countering terrorism would not be as great a concern as it is to the international community. Determining the *actual* threat of terrorist acts against the State is a natural starting point for determining the threat of terrorism to the State, and the importance of the objective of a counter-terrorist measure directed to assuaging such a threat. Albeit the obvious place to begin, evidence of actual threats is not so palpable. Establishing the existence of actual threats relies upon intelligence which, while very important, has its own set of complications.¹¹⁰ Intelligence is not always available, said to be the case in the Bali bombings of October 2002 and 2005, and the London bombings in July 2005.¹¹¹ It is not always reliable, as was the case with the intelligence failures concerning the presence of weapons of mass destruction in Iraq in the lead-up to the 2003 invasion of Iraq.¹¹² Finally, intelligence information may not always be properly assessed, as is alleged to be the case prior to the September 11, 2001 attacks in the United States of America.¹¹³ Further complicating matters, it should also be remembered that the absence of intelligence does not mean an absence of a threat.

¹¹⁰ As acknowledged by John Lewis, Deputy Director of the FBI Counter-Terrorism Division: "Intelligence is an imperfect business at best" (from a paper presented at the 'Intelligence Challenges in Counter-Terrorism' workshop at the *Terrorism's Global Impact Conference*, Interdisciplinary Center Herzlyia, 13 September 2005).

¹¹¹ Concerning the 2002 Bali Bombings, see Mark Forbes, 'No Warning of Bali Bombing' (The Age, 11 December 2002), online: <<http://www.theage.com.au/articles/2002/12/10/1039379835160.html>> (last accessed 21 August 2005). Compare this with assertions that intelligence agencies did indeed have information pointing to such an event: see, for example, Laura Tiernan, 'Australian Intelligence Inquiry into Bali Warnings "a Whitewash"' (World Socialist Web Site, 7 January 2003), online: <<http://www.wsws.org/articles/2003/jan2003/igis-j07.shtml>> (last accessed 21 August 2005). Concerning the London Bombings on 7 July 2005, compare: Wikipedia, '7 July 2005 London Bombings', online: <http://en.wikipedia.org/wiki/7_July_2005_London_bombings> (last accessed 21 August 2005); and Wikinews, 'Coordinated Terrorist Attack Hits London' (7 July 2005), online: <http://en.wikinews.org/wiki/Explosions,_serious_incidents_occurring_across_London> (last accessed 21 August 2005).

¹¹² See, for example, CNN.com, 'Report: Iraq intelligence "dead wrong"' (1 April 2005), online: <<http://www.cnn.com/2005/POLITICS/03/31/intel.report>> (last accessed 21 August 2005).

¹¹³ Subcommittee on Terrorism and Homeland Security, House Permanent Select Committee on Intelligence, *Counterterrorism Intelligence Capabilities and Performance*

2. The countering of a potential threat of terrorism against the State

Assessing the threat of terrorist acts against the State, which is to be measured against both the probability of that potential being actualised and the probable consequences of such acts, also relies upon intelligence, but to a lesser extent.¹¹⁴ Potential threats are to be assessed by having regard to the motivation and operational capacity of terrorist networks. In this regard, “operational capacity” refers to the ability of terrorist networks to gain access to the territory, or to facilities of the State, and perpetrate terrorist acts therein. While border security is a matter that almost all States have paid increased attention to in the new millennium, it must be acknowledged that trans-boundary activity and the relatively simple and inexpensive means of perpetrating terrorist acts means that the operational capacity of most terrorist entities should be viewed as being reasonably high.¹¹⁵ Concerning the second factor in assessing the potential threat of terrorism, “motivation” refers (in simple terms) to the question of whether the State is a likely or possible target of terrorist networks. It is here that one should have particular regard to the ideology and motivations of the “global jihad”, which was considered in chapter 2.

3. The contribution of the measure to the international anti-terrorist framework

This next consideration is one that will be common to all States: the question of the State’s contribution to the international framework on anti-terrorism and how the measure being examined contributes to this. As considered in chapter 3, former US Ambassador to the United Nations, John Danworth, made this point in an address to the Security Council’s Counter-Terrorism Committee in 2004:¹¹⁶

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

Prior to 9-11, July 2002, online: <[http://www.fas.org/irp/congress/2002_rpt/hpsci_ths0702.html](http://www.fas.org/irp/congress/2002_rpt/hpisci_ths0702.html)> (last accessed 21 August 2005).

¹¹⁴ On the issue of assessing potential threats of terrorism see, for example: University of Arizona, Eller College of Management, and Artificial Intelligence Lab, *Terrorism Knowledge Discovery Project. A Knowledge Discovery Project to Addressing the Threats of Terrorism* (September 2004).

¹¹⁵ See, for example, Marc Nicholson, ‘An Essay on Terrorism’, 2003 *AmericanDiplomacy.org*, online: <http://www.unc.edu/depts/diplomat/archives_roll/2003_07-09/nicholson_terr/nicholson_terr.html> (last accessed 10 August 2005).

New Zealand's role in the countering of international terrorism is considered in more detail in chapter 3.

4. The contribution of the measure to other national interests

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

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

Rational Connection

The final component of step 3, requiring limiting measures to be rationally connected to the achievement of the objective being pursued, is relatively simple in its application. It is drawn from both the international guidelines on counter-terrorism and human rights and from the jurisprudence of the Supreme Court of Canada on the application of Canada's "justified limitations" qualification in the Charter of Rights and Freedoms. Rational connection will require that the counter-terrorist measure being scrutinised logically furthers the objective of countering terrorism. The Court, in *Lavigne v Ontario Public Service Employees Union*, explained that the inquiry into "rational connection" between objectives and means "requires nothing more than a showing that the legitimate and important goals of the legislature are logically furthered by the means the government has chosen

to adopt”.¹¹⁷ Evidence of this connection might be necessary where such a link is not plainly evident.¹¹⁸ This first requirement links with the former Commissioner’s guidelines, and those of the Council of Europe and Inter-American Commission on Human Rights.¹¹⁹

Part Two, Step 4: Achieving Proportionality

The final step in the Guide is to achieve proportionality. The starting point is that limitations imposed by counter-terrorist measures must not impair the *essence* of the right being limited (step 4(a)).¹²⁰ It is envisaged that this

¹¹⁶ United Nations Foundation, ‘Counterterrorism Cooperation Improving, Security Council Told’, *UN Wire*, 20 July 2004, online: <<http://www.unwire.org/UNWire>> (last accessed 20 July 2004).

¹¹⁷ *Lavigne v Ontario Public Service Employees Union* [1991] SCR 211, 219. The Supreme Court Directions on the Charter of Rights notes that the Court has seldom found that legislation fails this part of the test, although there are instances where this has occurred: David Stratas *et al*, *The Charter of Rights in Litigation. Directions from the Supreme Court of Canada* (Canada Law Book Inc, 1990-), 6:06. In *R v Oakes*, for example, section 8 of the Narcotic Control Act 1970 was found to lack rational connection. Section 8 (which had certain criminal process implications and thereby impacted upon criminal process rights) contained a statutory presumption that possession of even small amounts of narcotics meant that the offender was deemed to be trafficking in narcotics. There was no rational connection, said the Court, between the possession of small amounts of narcotics and the countering of trafficking: *R v Oakes* [1986] 1 SCR 103.

¹¹⁸ *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912. The Supreme Court of Canada was critical here of aspects of the Canada Elections Act 1985 concerning the registration of political parties and the tax benefits that flow from such registration. The Act required that a political party nominate candidates in at least 50 electoral districts to qualify for registration. While the Court held that it was a pressing objective to ensure that the tax credit scheme was cost-efficient, it found that there was no rational connection between that objective and the 50-candidate threshold requirement. Iacobucci J for the majority was particularly critical of the fact that the government had provided no evidence that the threshold actually improved the cost-efficiency of the tax credit scheme.

¹¹⁹ See paras 4(b) and (d) of the former Commissioner’s Guidelines (n 46) requiring limitations to be necessary for public safety and public order, and necessary in a democratic society. See also: the Inter-American Commission on Human Rights report (n 48) paras 51 and 55; and the Council of Europe guidelines (n 41) Guideline III(2).

¹²⁰ This is demanded of para 4(c) of the Commissioner’s Guidelines (n 46). Although decided only once by the Supreme Court of Canada, and controversially so, a similar position was arrived at under the Canadian Charter of Rights and Freedoms. In *Attorney General for Quebec v Quebec Protestant School Boards*, [1984] 2 SCR 66, the Supreme Court had to consider the validity of the “Quebec clause” of the *Charter of the French Language* (Quebec Bill 101), which limited admission to English-language schools to children of persons who themselves had been educated in English in Quebec. In accepting that the Quebec clause was inconsistent with s 23(1)(b) of the *Charter*, the Court held that it

is a matter that will be achieved through the proper application of step 1 the Guide (determining the permissible scope of limitations upon the right or freedom). From that point, it is then a case of quantifying the value to be afforded to each side of the scale to be balanced (countering terrorism versus the unlimited enjoyment of human rights), and then making the inevitably subjective determination of where the balance lies.

The Human Rights 'Scale'

The second scale demands an assessment of the impact of counter-terrorist provision or measure upon human rights, bearing in mind not just the level to which the measure limits a right but also what level of importance the right itself holds (step 3(b)). This will require some further analysis and is again drawn from very helpful decisions of the Supreme Court of Canada on the question of the limitation of rights. Although the Court has properly taken the approach of assessing each case having regard to the particular legislative provision being examined and upon the facts, it has provided some guidance on how to go about this. In the well-known decision of *R v Oakes*, the Court spoke of the need to ensure that the law which restricts the right is not so severe or so broad in its application as to outweigh the objective, adding in *R v Lucas* that this requires consideration of the importance and degree of protection offered by the human right being limited.¹²¹ This distinction between the importance of the right versus the impact upon the right recognises that a minor impairment of an important right, for example, might be more significant than a major impairment of a trivial right.

amounted to a denial of the *Charter* right and therefore refused to be drawn into the question of any justification under the general limitations provision. Professor Peter Hogg criticizes the distinction between “limits” and “denials” due to the fact that there is no legal standard by which *Charter* infringements can be sorted into the two categories: see Peter W Hogg, *Constitutional Law of Canada*, Student Edition (Thomson Carswell, 2005), 799. In a later Canadian case, *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, at 773, the Supreme Court described the *Quebec School Boards* case as a “rare case of a truly complete denial of a guaranteed right or freedom” and, in doing so, recognized that most (if not all) legislative qualifications of a right or freedom will amount to a denial of the right or freedom to that limited extent. On the other hand, it observed, a limit that permits *no* exercise of a guaranteed right or freedom in a limited area of its potential exercise is not justifiable (733-734).

¹²¹ *R v Oakes* [1986] 1 SCR 103, 106; and *R v Lucas* [1998] 1 SCR 439, para 118.

The Counter-Terrorism ‘Scale’

The first scale involves an assessment of the importance of the counter-terrorist objective being pursued as well as the efficacy of it, recognising that different counter-terrorist measures will not just impact upon rights in a different way, but will also have different levels of effectiveness. The importance of the counter-terrorist measure has already been assessed when determining whether the measure is necessary (step 3(a)).

Also of great importance, having regard to the repeated reference to proportionality and appropriateness, will be the question of effectiveness (step 3(c)(ii)).¹²² Not only is the nature of the objective being pursued by the counter-terrorist measure important, so is the effectiveness of the counter-terrorist measure in achieving that objective. To be proportional, a counter-terrorist measure be rationally connected to a legitimate objective and must also (to warrant the limitation of rights) be effective. To impose a limitation upon rights for the purpose of countering terrorism, but by ineffective means, is unlikely to be justifiable. Such means would in all probability be neither necessary, proportional, nor appropriate.

Balancing the Scales

A further proportionality requirement under the Canadian Charter of Rights and Freedoms, and the former Commissioner’s Guidelines, is that the limiting measures must impair the right or freedom as little as reasonably possible (Guide, 5.1).¹²³ The Supreme Court of Canada has at times displayed a degree of deference here, reluctant to examine the availability of alternative means of achieving an objective where the impairment upon the right is not serious. If the particular human rights limitation is trivial, then the availability of alternatives that might lessen that impact have tended to be seen as falling within the appropriate exercise of legislative choice, rather than one demanding intervention by the judiciary.¹²⁴ Other

¹²² See, for example, paras 4(b), 4(e), 4(f) and 4(g) of the Commissioner’s Guidelines (n 46).

¹²³ See: *R v Oakes* [1986] 1 SCR 103, 106; and *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 772-773.

¹²⁴ In *R v Schwartz* [1988] 2 SCR 443, for example, it was suggested that the statutory provision (which provided for a presumption that a person did not have a firearms licence if s/he failed to produce one upon request) unnecessarily infringed the presumption of innocence. Counsel for Schwartz argued that police could simply check their computerised records to ascertain whether a licence had indeed been obtained. McIntyre J stated that: “Even if there is merit in the suggestion... Parliament has made a reasonable choice in the matter and, in my view, it is not for the Court, in circumstances where the impugned provision clearly involves, at most, minimal - or even trivial - interference with the right

than this understandable and reasonably minor degree of deference, this requirement fits with paragraph 4(g) of the former Commissioner's Guidelines (being the least intrusive means of achieving the protective function of the limitation). In doing so, this also appears to fit with the reasonably broad requirement in paragraph 4(h) that any limitation must be compatible with the objects and purposes of human rights treaties. Arising from the latter requirements, but expressly stated within paragraph 4(d) of the former Commissioner's Guidelines, is the important point that any counter-terrorist provisions must be interpreted and applied in favour of rights.

With these points in mind, one must balance the human rights and counter-terrorist scales with the aim of producing the least reasonably intrusive means of achieving the counter-terrorist objective. To that end, step 4(d) formulate the following substantive question for determination by the decision-maker:

Having regard to the importance of the right or freedom [3(b)(i)], is the effect of the measure or provision upon the right [3(b)(ii)] proportional to the importance of the objective, and the effectiveness, of the legislative provision or measure [3(c)]?

It should be pointed out that the issues raised by the question formulated will not normally be black and white and its consideration is likely to require debate and the complex interaction of value judgments. Dispute remains over the peremptory versus qualified status of some human rights. Cultural ideals, and political persuasions, will likewise result in different values being attached to certain rights (a matter that is inherently recognised in the margin of appreciation jurisprudence of the European Court of Human Rights).¹²⁵ What the Guide ensures, however, is that such debate reflects upon all relevant factors germane to both countering terrorism and complying with international human rights obligations.

guaranteed in the Charter, to postulate some alternative which in its view would offer a better solution to the problem..." (pp 492-493).

¹²⁵ The margin of appreciation doctrine involves the idea that each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests, or among different moral convictions: see Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *International Law and Politics* 843, 843-844. For a comprehensive discussion of the doctrine, see Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002).

Conclusion

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

Appendix 1

A Guide to Legislators, Policy-Makers and the Judiciary on Human Rights Compliance When Countering Terrorism

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

Part One: Counter-Terrorist Measures Must Comply with Human Rights Standards

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

1. It must first be determined whether the right that is impacted upon by the counter-terrorist measure or legislative provision is capable of limitation. If it is not, then the counter-terrorist measure is impermissible. If the right is capable of limitation, this must be to the extent permitted by the expression of the right, and to the extent necessary by proportional means (as to necessity and proportionality, see Part Two of this Guide). Four possibilities exist:
 - (a) The counter-terrorist measure impacts upon a right that is a peremptory norm of customary international law. If so, the counter-terrorist measure cannot impose any limitations upon the right or freedom.
 - (b) The counter-terrorist measure impacts upon a right that is not derogable under an applicable human rights treaty. This will normally mean that the counter-terrorist measure cannot impose any limitations upon the right, although this depends upon the particular expression of the right. Where the expression permits a limitation upon the right, such

limitation must be within those terms and to the extent necessary and proportionate.

- (c) The counter-terrorist measure impacts upon a right that is only derogable during a state of emergency threatening the life of the nation. In that case, the State must determine whether such an emergency exists, within the meaning of the applicable human rights treaty. If so, the State must:
 - (i) lodge a proclamation of derogation (in accordance with the requirements of the particular treaty);
 - (ii) continually review its circumstances to ensure that the derogation lasts only as long as the state of emergency exists; and
 - (iii) ensure that the derogation is necessary and proportionate.
 - (d) The counter-terrorist measure impacts upon a right that is neither peremptory nor derogable only in states of emergency. If so, the State must ensure that:
 - (i) the limitation is within the permissible range of limits provided within the treaty or customary definition of the right; and
 - (ii) the limitation is necessary and proportionate.
2. From a procedural perspective, a number of rules are applicable to ensure that the counter-terrorist measure is established by proper means, requiring that:
- (a) Counter-terrorist measures seeking to impose limitations upon rights and freedoms must be prescribed by law, requiring such prescriptions to be adequately accessible and formulated with sufficient precision so that citizens may regulate their conduct.
 - (b) Prescriptions must respect the principle of non-discrimination and equality before the law.
 - (c) Prescriptions may not confer an unfettered discretion, they must not be arbitrarily applied, and they must be implemented by means that establish adequate checks and balances against the potential misuse or arbitrary application of counter-terrorist powers.
 - (d) Prescriptions must be confined to countering terrorism.

Part Two: Necessity and Proportionality

3. The counter-terrorism measure or legislative provision must be necessary, such that:
 - (a) It is in pursuit of a pressing objective. In principle, the objective of countering terrorism is one that is pressing and substantial in a free and democratic society and one that may therefore justify the limitation of derogable human rights. Notwithstanding the importance of counter-terrorism per se, it is the particular objective of the legislative provision or counter-terrorist policy/measure in question that must be assessed. It will be instructive in this regard to identify how the measure or provision links with:
 - (i) The countering of an actual threat of terrorism against the State;
 - (ii) The countering of a potential threat of terrorism against the State;
 - (iii) Its contribution to the international framework on counter-terrorism; and
 - (iv) Its contribution to other national interests.
 - (b) It is rationally connected to the achievement of the objective being pursued, requiring the counter-terrorist measure being examined to logically further the objective of countering terrorism.
4. The counter-terrorism measure or legislative provision must be proportional.
 - (a) The measure or provision must effect a “limitation” upon rights, rather than an exclusion of them, or such a severe limitation that would impair the essence of the right or freedom being affected.
 - (b) The human rights impact of the counter-terrorist measure must be determined by considering the following questions:
 - (i) What is the importance of, or the degree of protection provided by, the right or freedom affected?
 - (ii) What are the effects of the limiting provision (or measure) upon the right or freedom?
 - (c) The value to be accorded to the counter-terrorist measure must be determined by considering the following questions:
 - (i) What is the importance of the objective being pursued by the counter-terrorist provision or measure?
 - (ii) How effective is the counter-terrorist measure in achieving its objective (what is its ameliorating effect)?

- (d) With the aim of producing the least reasonably intrusive means of achieving the counter-terrorist objective, balance the two scales by asking the following substantive question:

Having regard to the importance of the right or freedom [4(b)(i)], is the effect of the measure or provision upon the right [4(b)(ii)] proportional to the importance of the objective, and the effectiveness, of the legislative provision or measure [4(c)]?
