

HANDBOOK ON **Human Rights Compliance** **While Countering Terrorism**

BY ALEX CONTE

JANUARY 2008



Center on Global
Counterterrorism
Cooperation

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About the Author

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The views expressed in this handbook represent those of the author and not necessarily those of the Center on Global Counterterrorism Cooperation.

The Center on Global Counterterrorism Cooperation gratefully acknowledges the Ford Foundation for its generous support for this project.

Executive Summary

In September 2006, the Center on Global Counterterrorism Cooperation published the *Report on Standards and Best Practices for Improving States' Implementation of UN Security Council Counter-Terrorism Mandates*.¹ The report provided an assessment of core standards and best practices for implementing relevant Security Council counterterrorism resolutions. For the purpose of assisting policymakers and practitioners in understanding and implementing the multiple requirements of Security Council Resolution 1373, the report identified three broad areas of counterterrorism implementation: combating terrorist financing, improving legal practice and law enforcement, and enhancing territorial control. It also identified three cross-cutting categories that apply to all implementation requirements: international cooperation, the provision of technical assistance, and compliance with human rights standards.

This *Handbook on Human Rights Compliance While Countering Terrorism* provides practical guidance on one of the three cross-cutting topics applicable to all aspects of implementation: human rights compliance while countering terrorism. This topic is particularly relevant given the adoption of the *United Nations Global Counter-Terrorism Strategy* by the UN General Assembly in September 2006, which underlines the mutually reinforcing relationship between the promotion and protection of human rights and counterterrorism measures. Through the Strategy, all UN member States have committed to adopting measures to ensure respect for human rights and the rule of law as the fundamental basis of the fight against terrorism. They further resolve to take measures aimed at addressing conditions conducive to the spread of terrorism, including violations of human rights and lack of rule of law, and ensure that any measures taken to counter terrorism comply with their obligations under international law, in particular human rights law, refugee law, and international humanitarian law.²

Although sometimes portrayed as an obstacle to an effective response to the threat of terrorism, human rights are a key component of any successful counterterrorism strategy. International human rights instruments are structured to respond to conflict and to provide mechanisms to ensure peace and stability. In fact, a commitment to comply with international human rights standards ensures that measures taken to combat terrorism are sustainable, effective, and proportionate. Counterterrorism measures that violate human rights standards may instead give rise to adverse effects. Perceived as unjust and discriminatory, they may increase support for militant parts of society and thus diminish rather than enhance security in the long run.

¹ See http://www.globalct.org/pdf/060831_CT_report_1.pdf (last accessed December 12, 2007).

² UN General Assembly, *The United Nations Global Counter-Terrorism Strategy*, A/RES/60/288, September 20, 2006.

The objectives of this Handbook are twofold: first, to provide practical and functional assistance to decision-makers on the subject; and second, to do so in a manner that is able to give proper account to a State's international human rights obligations, while recognizing the duty of States to protect their societies from terrorism and to contribute to the maintenance of international peace and security. To that end, this Handbook identifies five conditions applicable to human rights compliance while countering terrorism. These conditions are cumulative in nature and are presented in a chronological manner, enabling the decision-maker to progressively examine the validity of existing or proposed counterterrorism law and practice.

1. Counterterrorism law and practice must comply with human rights law.
2. The right or freedom to be restricted by counterterrorism measure must allow for limitation.
3. Counterterrorism law and practice must be established by due process.
4. Counterterrorist measures seeking to limit rights must be necessary.
5. Counterterrorist measures seeking to limit rights must be proportional.

In setting out and explaining these conditions, reference is made to international human rights treaties, norms of customary international law, and various guidelines and documents that have been adopted or issued concerning or relevant to the subject of counterterrorism and human rights. Key documents³ include:

- the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*;⁴
- Human Rights Committee's *General Comment 29, States of Emergency*;⁵
- guidelines of the UN Commissioner for Human Rights in *Criteria for the Balancing of Human Rights Protection and the Combating of Terrorism* (Commissioner's Guidelines);⁶
- the Council of Europe's *Guidelines on Human Rights and the Fight Against Terrorism* (Council of Europe's Guidelines);⁷

³ Although not legally binding, these documents and guidelines provide useful references for a generally recognized interpretation of international human rights norms and obligations.

⁴ UN Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/4 Annex (1985).

⁵ UN Human Rights Committee, *General Comment 29, States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11 (2001), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.6 (2003) at 186.

⁶ UN Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights*, E/CN.4/2002/18 Annex (2002) ("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") [hereinafter Commissioner's Guidelines].

⁷ Council of Europe, *Guidelines on Human Rights and the Fight Against Terrorism* (Council of Europe Publishing, 2002) [hereinafter Council of Europe's Guidelines].

- the Inter-American Commission on Human Rights' *Report on Terrorism and Human Rights*.⁸

⁸ Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 (October 22, 2002).



CONDITION 1:

Counterterrorist Law and Practice Must Comply with Human Rights Law

1.1 The Duty to Comply with Human Rights

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

The UN Global Counter-Terrorism Strategy recognizes the protection and promotion of human rights as an essential component of a sustainable and effective response to the threat of terrorism. In addition to this imperative of public policy, States must comply with their international human rights obligations when countering terrorism. These legal obligations stem from customary international law (applicable to all States)⁹ as well as from international treaties (applicable to States parties to such treaties).¹⁰ As confirmed by world leaders during the 2005 World Summit:

international cooperation to fight terrorism must be conducted in conformity with international law, including the [UN] 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.¹¹

This position is reflected within resolutions of the UN Security Council, General Assembly, the Commission on Human Rights and its successor the Human Rights Council, as well as in reports of the UN Security Council's Counter-Terrorism Committee (CTC).

RESOLUTIONS OF THE UN SECURITY COUNCIL

Security Council resolutions concerning terrorism have confined their attention to the threat of terrorism to international peace and security, reflecting the role of the Security Council as the organ of the United Nations charged with the

⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Reports, 76 ILR 349, paras. 172-201 [hereinafter *Nicaragua v. United States of America*].

¹⁰ See *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, art. 34.

¹¹ UN General Assembly, *2005 World Summit Outcome*, A/RES/60/1 (2005), para. 85.





primary responsibility for the maintenance of international peace and security.¹² 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. The Security Council's resolutions generally address the adverse impacts of terrorism on the security of States and the maintenance of peaceful relations only, while the General Assembly and Commission on Human Rights take a much broader approach to the subject given their plenary roles.

Apart from two notable exceptions, the main inference that can be taken from Security Council resolutions about counterterrorism measures and their need to comply with human rights law arises from general statements that counterterrorism is an aim that should be achieved in accordance with the UN Charter and international law.¹³ This means that such measures must be compliant with the principles of the Charter (which include the promotion and maintenance of human rights) and human rights law as a specialized subset of international law. Notable is the fact that members of the United Nations have undertaken, under Article 55(c) of and through the preamble to the 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. The Declaration directs its attention to the question of compliance with human rights, paragraph 6 providing 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.

Although persuasive in its wording, the status of the Declaration should be noted. The contents of Security Council resolutions, when couched in mandatory language, are binding upon members of the United Nations.¹⁴ In the context of the Declaration adopted under Resolution 1456, the text of the Declaration is preceded by the sentence, "The Security Council therefore *calls for* the following steps to be taken" (emphasis added). Such an expression, although influential,

¹² Under Article 24 of the UN Charter, the Security Council is charged with the maintenance of international peace and security, paragraph 1 providing that, "[i]n 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."

¹³ See, for example, Security Council Resolution (SC Res.) 1373 (2001), preambular para. 5; SC Res. 1438 (2002), preambular para. 2; SC Res. 1440 (2002), preambular para. 2; SC Res. 1450 (2002), preambular para. 4; SC Res. 1455 (2003), preambular para. 3; SC Res. 1456 (2003), preambular para. 8; SC Res. 1535 (2004), preambular para. 4; SC Res. 1540 (2004), preambular para. 14; SC Res. 1566 (2004), preambular paras. 3 and 6; SC Res. 1611 (2005), preambular para. 2; SC Res. 1618 (2005), preambular para. 4; SC Res. 1624 (2005), preambular para. 2 and operative paras. 1 and 4.

¹⁴ UN member States have agreed to be bound by "decisions" of the Security Council. See UN Charter, art. 25.

is exhortatory and therefore not a binding “decision” within the meaning of Article 25 of the Charter.¹⁵

The second resolution to be considered is Security Council Resolution 1624, adopted in 2005. It is largely focused on the steps States are to take to prevent the incitement to terrorism. Included in the resolution, however, is a provision that repeats the language in Resolution 1456, providing that:

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.¹⁶

UN COUNTER-TERRORISM COMMITTEE

In its comprehensive review report of December 2005, which was endorsed by the Security Council, the CTC 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.¹⁷ It also stressed that the CTC’s Executive Directorate should take this into account in the course of its activities.

RESOLUTIONS OF THE UN GENERAL ASSEMBLY

The General Assembly has adopted a series of resolutions concerning terrorism since 1972, initially taking the form of resolutions concerning measures to eliminate international terrorism, then addressing more directly the topic of terrorism and human rights, as well as counterterrorism and human rights. The latter series of General Assembly resolutions began in late December 1993, with the adoption of Resolution 48/122, entitled *Terrorism and Human Rights*.¹⁸ Both series of resolutions contain various statements about the need to comply with international human rights standards when implementing counterterrorist measures. A common formulation of this principle is contained in General Assembly Resolution 50/186 (1995):

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,

¹⁵ In the Namibia Advisory Opinion, the International Court of Justice (ICJ) took the position that a resolution couched in nonmandatory 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 Reports 53.

¹⁶ SC Res. 1624 (2005), para. 4.

¹⁷ UN 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*, S/2005/800 (2005).

¹⁸ General Assembly Resolution (GA Res.) 48/122 (1993).

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

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.¹⁹

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 consistent with human rights standards.²⁰ Its language should not be taken as a signal that the General Assembly was minded to turn a blind eye to the adverse impacts of counterterrorism 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*.²¹ 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 their language. 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 specifically provides that resolutions and declarations of the General Assembly are recommendatory only.²² This principle is equally applicable to resolutions of the Commission on Human Rights, as a subsidiary organ of the Economic and Social Council,²³ and those of the new Human Rights Council, a subsidiary organ of the General Assembly.²⁴ Thus, the resolutions just discussed, and those of the Human Rights Commission to be discussed, represent guiding principles and nonbinding recommendations (what might be termed “soft law”) rather

¹⁹ See GA Res. 50/186 (1995), preambular paras. 13 and 14 and operative para. 3; GA Res. 52/133 (1997), preambular paras. 12 and 13 and operative para. 4; GA Res. 54/164 (1999), preambular paras. 15 and 16 and operative para. 4; GA Res. 56/160 (2001), preambular paras. 22 and 23 and operative paras. 5 and 6; GA Res. 58/174 (2003), preambular paras. 20 and 21 and operative para. 7.

²⁰ GA 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.” For similar statements, see GA Res. 57/27 (2002), preambular para. 8 and operative para. 6; GA Res. 58/81 (2003), preambular para. 9 and operative para. 6; GA Res. 58/136 (2003), preambular para. 10 and operative para. 5; GA Res. 59/46 (2004), preambular para. 10 and operative para. 3.

²¹ GA Res. 57/219 (2002); GA Res. 58/187 (2003); GA Res. 59/191 (2004). See GA Res. 59/46 (2004), preambular para. 10 and operative para. 3; GA Res. 59/153 (2004), preambular paras. 11 and 12; GA Res. 59/195 (2004), preambular paras. 5, 23, and 24 and operative paras. 8 and 10; GA Res. 60/158 (2005), preambular paras. 2, 3, and 7 and operative para. 1.

²² Article 10 of the UN Charter 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.”

²³ UN Charter, art. 62(2).

²⁴ The UN Human Rights Council was established by the General Assembly in 2006 under Resolution 60/251 as a subsidiary body of the General Assembly. GA Res. 60/251 (2006).

than binding resolutions, treaty provisions, or norms of customary international law (“hard law”). Nonetheless, these resolutions are influential and, importantly, representative of international comity. They may also constitute evidence of customary international law, if supported by State conduct that is consistent with the content of the resolutions and with the accompanying *opinio juris* required to prove the existence of customary law.²⁵

RESOLUTIONS OF THE UN COMMISSION ON HUMAN RIGHTS

The Commission on Human Rights paid considerable attention to the issue of the adverse consequences that counterterrorism can have upon the maintenance and promotion of human rights. It did so even before the flurry of antiterrorism legislation that followed Security Council Resolution 1373 (2001). Pre-9/11 resolutions of the Commission and its Sub-Commission on the Protection and Promotion of Human Rights 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.”²⁶ Post-9/11 resolutions of the Commission became more strongly worded. Two such resolutions were adopted in 2004 alone. The issue was first addressed within the Commission’s annual resolution on human rights and terrorism.²⁷ In a resolution later that month, the Commission again reaffirmed that States must comply with international human rights obligations when countering terrorism.²⁸ The Commission’s Resolution 2005/80, pursuant to which it appointed a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, stated at paragraphs 1 and 6 that it:

[r]eaffirms 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...

[r]eaffirms 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 terrorism and human rights also addressed the matter.²⁹ Although the original mandate of this Special Rapporteur was to consider the impact of terrorism on human

²⁵ For an example of the use of General Assembly resolutions to determine the content of customary rules, see *Nicaragua v. United States of America*, note 9 above (where the ICJ gave consideration to two General Assembly resolutions as evidence of the content of the principle of nonintervention: the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States*, GA Res. 213 [XX] [1965]; and the *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States*, GA Res. 2625 [XXV] [1970]).

²⁶ UN Commission on Human Rights Resolution (CHR Res.) 2001/37, preambular paras. 18 and 19 and operative paras. 7 and 8. Preambular para. 19 was later reflected in preambular para. 13 of UN Sub-Commission on Human Rights Resolution 2001/18.

²⁷ CHR Res. 2004/44, preambular para. 24 and operative paras. 10–12.

²⁸ CHR Res. 2004/87, paras. 1 and 2.

²⁹ Kalliopi Koufa, *Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism*, E/CN.4/Sub.2/2005/39 (June 22, 2005) (working paper).

rights,³⁰ she commented in her 2004 report that a State's overreaction to terrorism can itself also impact upon human rights. The Sub-Commission Special Rapporteur's mandate was therefore extended to develop a set of draft principles and guidelines concerning human rights and terrorism. Of note, the first-stated principle under the heading "Duties of States Regarding Terrorist Acts and Human Rights" reads:

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.³¹

Also of relevance, in September 2003 the UN Office of the High Commissioner for Human Rights produced a digest of jurisprudence on the protection of human rights while countering terrorism.³² Its declared aim was to assist policymakers and other concerned parties to develop counterterrorist strategies that respect human rights, stating that:

[n]o 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.³³

The Human Rights Digest considers decisions of UN treaty-monitoring bodies, such as the Human Rights Committee, and those of 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 emphasizes the duty of States to protect those within their territories from terrorism.³⁴ The second emphasizes the jurisprudence observing that the lawfulness of counterterrorism measures depends upon their conformity with international human rights law.³⁵

³⁰ This mandate was consequent to the request of the General Assembly for the Commission to do so and through the Commission's own decision to consider the issue. See GA Res. 49/185 (1994), para. 6; CHR Res. 1994/46.

³¹ Koufa, note 29 above, para. 25.

³² UN Office of the High Commissioner for Human Rights (OHCHR), *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism*, September 2003 [hereinafter *Human Rights Digest*]. The OHCHR is currently working on an updated edition of the Digest.

³³ *Ibid.*, p. 3.

³⁴ *Ibid.*, pp. 11–12. See, for example, UN Human Rights Committee, *Delgado Paez v. Colombia*, Communication No. 195/1985, July 12, 1990, para. 5.5.

³⁵ OHCHR, *Human Rights Digest*, pp. 13–15.

1.2 Applicable Human Rights Law

States are bound by international human rights treaties to which they are party, as well as by human rights norms reflected within customary international law. These obligations have extraterritorial application and continue to apply during armed conflict.

It has been mentioned in the preceding section that States have international human rights obligations under customary international law (applicable to all States) and international treaties (applicable to States parties to such treaties). This pertains to the enjoyment of rights and freedoms by all within the territory of the State, not only nationals of the State. Two aspects concerning the application of human rights law should be clarified at this point, since these are matters that may be of particular importance to counterterrorism.

THE EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS LAW

Particularly important to transnational counterterrorist operations, whether involving military action or the transfer of persons from one jurisdiction to another, is the fact that human rights are legally binding upon a State when it acts outside its internationally recognized territory. At a minimum, a State is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State.³⁶ A State is also obliged to respect and ensure the rights and freedoms of persons within its power or effective control, even if not acting within its own territory.³⁷

THE INTERACTION BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW

It is also a well-established principle that regardless of issues of classification, international human rights law continues to apply in armed conflict. This is a point made clear, for example, by the Human Rights Committee in its *General Comment 31* and confirmed by the International Court of Justice (ICJ).³⁸ As explained in its Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, the ICJ stated that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in

³⁶ See *Agiza v. Sweden*, CAT/C/233/2003 (2005); *Alzery v. Sweden*, CCPR/C/88/D/1416/2005 (2006).

³⁷ See UN Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (2004), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.8 (2006) at 235, para. 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion* (2004) ICJ Reports 136, at 179, para. 109.

³⁸ See *General Comment 31*, note 37 above, para. 11; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) ICJ Reports 226, at 240, para. 25.

article 4” of the International Covenant on Civil and Political Rights (ICCPR).³⁹ The conduct of States involved in armed conflicts must therefore comply not only with international humanitarian law, but also with applicable international human rights law.

³⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, note 37 above, at 178, para. 106. The ICJ more recently applied both human rights law and international humanitarian law to the armed conflict between the Congo and Uganda. See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, (Merits) [2005] ICJ Reports, paras. 216–220 and 345(3).

CONDITION 2:

The Right or Freedom to Be Restricted by a Counterterrorism Measure Must Allow for Limitation

In determining the availability of any measure taken to counter terrorism that seeks to limit a right or freedom, it must be determined whether the right in question is capable of limitation.

Most counterterrorism measures are adopted on the basis of ordinary legislation. In a limited set of exceptional circumstances, some restrictions upon the enjoyment of certain human rights may be permissible. Ensuring both the promotion and protection of human rights and effective counterterrorism measures can raise serious practical challenges for States, including, for example, the protection of intelligence sources. These challenges are not insurmountable. States can meet their obligations under international law through the use of the accommodations built into the international human rights law framework. Human rights law allows for the possibility of recourse to limitations in relation to certain rights and, in a very limited set of exceptional circumstances, to derogate from certain human rights provisions.

Where it is understood that certain measures to counter terrorism must go beyond ordinary legislation that permits the full enjoyment of rights, the first matter to consider is whether the right being impacted is capable of limitation. If it is not, then the counterterrorist measure is impermissible. This question depends on the nature of the right being affected. Although all rights and freedoms are universal and indivisible, they can be classified into four categories:

1. The right is a peremptory norm of customary international law.
2. The right is nonderogable under applicable human rights treaties.
3. The right is only derogable during a state of emergency threatening the life of the nation.
4. The right falls outside one of the three latter categories.

2.1 Peremptory Rights at Customary International Law (*Jus Cogens* Rights)

Counterterrorist measures may not impose any limitations upon rights or freedoms that are peremptory norms of customary international law.

Rights or freedoms that fall into the category of peremptory norms of customary international law (*jus cogens* rights) cannot be restricted or limited in any circumstances. The question of whether or not a specific right qualifies as a peremptory norm can be controversial and will not be examined in greater detail in this Handbook.⁴⁰ It is generally accepted, however, that certain rights hold this absolute status. Least controversial is the status of the prohibition against torture (the commission of which is also an international crime).⁴¹ The prohibition against torture falls within the category of peremptory norms of international law that may not be subject to any form of limitation (*jus cogens*).⁴² The Committee on the Elimination of Racial Discrimination has also identified the principle of nondiscrimination on the grounds of race as a norm of this character.⁴³

2.2 Nonderogable Rights Under Human Rights Treaties

Where a counterterrorist measure seeks to limit a right that is nonderogable under an applicable human rights treaty, this will normally mean that the measure cannot be adopted, although this will depend upon the particular expression of the right.

The distinction between peremptory rights at customary international law and nonderogable rights under applicable human rights treaties is a fine but

⁴⁰ For efforts to identify fundamental rights applicable in all circumstances, however, see Richard Lillich, “The Paris Minimum Standards of Human Rights Norms in a State of Emergency,” (1985) 79 *American Journal of International Law* 1072; UN Commission on Human Rights, *Siracusa Principles*, note 4 above. For identification by the Human Rights Committee of rights within the International Covenant on Civil and Political Rights (ICCPR) that reflect norms of general (customary) international law, see *General Comment 29*, note 5 above, para. 13.

⁴¹ See generally *R v. Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 3)* [1999] 2 WLR 827.

⁴² The International Law Commission has identified this, together with the prohibition against slavery, as a norm of *jus cogens*. International Law Commission, “Commentary on the Vienna Convention on the Law of Treaties,” (1966) 2 *Yearbook of the International Law Commission* 248. See also 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), pp. 381–382; 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.

⁴³ 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*, A/57/18 (2002), 107.

important one.⁴⁴ Peremptory rights may not be limited at all. Nonderogable rights, on the other hand, may in certain circumstances be capable of limitation, depending on the particular expression of the right.

Article 4(2) of the ICCPR sets out a list of rights from which no State may derogate, even when a public emergency is declared by a State party to the Covenant. Similar provisions exist within regional human rights treaties, including Article 15 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and Article 27 of the American Convention on Human Rights.

THE LIST OF NONDEROGABLE RIGHTS

The ICCPR identifies several nonderogable rights and freedoms, including the:

- right to life;
- freedom from torture or cruel, inhuman, or degrading treatment or punishment;
- prohibition against slavery and servitude;
- freedom from imprisonment for failure to fulfill a contract;
- freedom from retrospective penalties;
- right to be recognized as a person before the law;
- freedom of thought, conscience, and religion.⁴⁵

This list is not 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 the nonderogable rights just identified.⁴⁶ Thus, for example, any trial leading to the imposition of the death penalty must conform to all the procedural requirements of Articles 14 and 15 of the ICCPR.

Referring to Article 4(1) of the ICCPR, which provides 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, color, sex, language, religion, or social origin, the Human Rights Committee has also pointed out that the full complement of "nonderogable rights" includes rights applicable as part of obligations under international human rights law, international humanitarian law, and international criminal law.⁴⁷ Expanding upon this position, the Committee identified certain rights under customary international law (applicable to all States) as being nonderogable. These include the:

⁴⁴ See *General Comment 29*, note 5 above, para. 11.

⁴⁵ ICCPR, 999 UNTS 171, arts. 6, 7, 8(1), 8(2), 11, 15, 16, and 18 (opened for signature December 16, 1966; entered into force March 23, 1976).

⁴⁶ *General Comment 29*, note 5 above, para. 15.

⁴⁷ *Ibid.*, paras. 9 and 10.

- right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person;
- prohibition against taking of hostages, abductions, or unacknowledged detention;
- international protection of the rights of persons belonging to minorities;
- deportation or forcible transfer of population without grounds permitted under international law;
- prohibition against propaganda for war or in advocacy of national, racial, or religious hatred that would constitute incitement to discrimination, hostility, or violence.⁴⁸

THE LIMITATION OF NONDEROGABLE RIGHTS

In its *General Comment 29*, the Human Rights Committee explains that the status of a substantive right as nonderogable does not mean that limitations or restrictions upon such a right cannot be justified. The Committee gives the example of the freedom to manifest one's religion or beliefs (Article 18 of the ICCPR).⁴⁹ 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 limitations upon the right expressed within Article 18(3) (limitations as are prescribed by law that are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others). Thus, whereas a preemptory right may not be the subject of any limitation at all, a nonderogable treaty right may be capable of limitation depending upon its particular expression. Such a limitation must be both necessary and proportional to the exigencies of the situation (see Conditions 4 and 5 herein).⁵⁰

2.3 Rights Derogable Only in States of Emergency

Where a counterterrorist measure seeks to limit a right that is only derogable during a state of emergency threatening the life of the nation, the State must determine whether such an emergency exists and invoke the applicable derogation mechanisms.

The third category of rights are those that are only derogable in times of emergency threatening the life of the nation. By way of illustration, Article 4 of the ICCPR provides that:

[i]n 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

⁴⁸ Ibid., para. 13.

⁴⁹ Ibid., para. 7. See also *ibid.*, para. 11.

⁵⁰ See the international guidelines discussed earlier; and *General Comment 29*, note 5 above, paras. 4 and 5.

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 the right in question is one from which a State can derogate (see Condition 2.2), four requirements must be noted, each dealt with next.

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 characterized such an emergency as being of an exceptional nature.⁵¹ 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.⁵² Whether 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 in Article 15 of the European Convention on Human Rights, the European Court of Human Rights has identified four criteria to determine whether any given situation amounts to “a time of public emergency which threatens the life of the nation”:

1. It should be a crisis or emergency that is actual or imminent.
2. It must be exceptional, such that “normal” measures are inadequate.
3. It must threaten the continuance of the organized life of the community.
4. It must affect the entire population of the State taking measures.⁵³

On the latter point, early decisions of the European 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 a nation might only materially affect one part of the nation at the time of the emergency.⁵⁴

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 doubtful that

⁵¹ *General Comment 29*, note 5 above, para. 2.

⁵² *Ibid.*, para. 3.

⁵³ See *Lawless v. Ireland (No. 3)* (1961) ECHR Series A, para. 28; *The Greek Case* (1969) 12 *Yearbook of the European Court of Human Rights* 1, para. 153.

⁵⁴ *Brannigan and McBride v. United Kingdom* (1993) ECHR Series A. For contrast, see *ibid.* (dissenting opinion of Judge Walsh, para. 2).

a continual state of emergency caused by the threat of terrorism can exist for the purpose of these derogating provisions.⁵⁵

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.⁵⁶ In the case of the ICCPR, before it can implement any derogating measure(s), a State party must officially proclaim the existence within its territory of a public emergency that threatens the life of the nation.⁵⁷ 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 the reasons for which it has done so.⁵⁸ The Human Rights Committee has emphasized 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.⁵⁹ A further communication is required on the date on which a State terminates such derogation.⁶⁰

REVIEW

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 continue only as long as the life of the nation concerned is actually threatened. Thus, 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.⁶¹ The Committee has added that the restoration of a state of normalcy where full respect for the provisions of the ICCPR can again be secured must be the predominant objective of a State party derogating from the Covenant.⁶² This position was reflected in the 1993 concluding observations of the Committee concerning the derogation of the United Kingdom under the ICCPR, where it recommended that:

[g]iven 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

⁵⁵ See generally UN Commission on Human Rights, *Siracusa Principles*, note 4 above, paras. 39–41. See also Alex Conte, “A Clash of Wills: Counter-Terrorism and Human Rights,” (2003) 20 *New Zealand Universities Law Review* 338, 350–354; James Oraa, *Human Rights in States of Emergency in International Law* (Clarendon Press, 1992); UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, CCPR/C/79/Add.93 (1998), para. 11.

⁵⁶ For an example, see ICCPR, art. 4(3); *General Comment 29*, note 5 above, paras. 2 and 17. See also UN Commission on Human Rights, *Siracusa Principles*, note 4 above, paras. 42–47.

⁵⁷ ICCPR, art. 4(1).

⁵⁸ *Ibid.*, art. 4(3).

⁵⁹ *General Comment 29*, note 5 above, paras. 5, 16, and 17.

⁶⁰ ICCPR, art. 4(3).

⁶¹ *General Comment 29*, note 5 above, para. 2; *Siracusa Principles*, note 4 above, paras. 48–50.

⁶² *General Comment 29*, note 5 above, paras. 1 and 2.

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.⁶³

PERMISSIBLE EXTENT OF DEROGATING MEASURES

The extent to which a State derogates from any right 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 Conditions 4 and 5 in this Handbook.⁶⁴ The General Assembly has reaffirmed that any derogating measures are to be of an exceptional and temporary nature.⁶⁵ Considering States parties’ reports, the Human Rights Committee has expressed concern over insufficient attention being paid to the principle of proportionality.⁶⁶

2.4 Other Rights

Where a counterterrorist measure seeks to limit a right that is not a peremptory norm of international law, the limitation upon the right must be within the permissible range of limits provided within the applicable treaty or customary definition of the right.

The final category of rights are those that are neither peremptory, nonderogable, nor subject to limitation only in states of emergency. 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 ICCPR.⁶⁷ 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, by a definitional mechanism⁶⁸ and/or by a rights-

⁶³ UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, CCPR/C/79/Add.18 (1993), para. 25.

⁶⁴ *General Comment 29*, note 5 above, paras. 4 and 5; *Siracusa Principles*, note 4 above, para. 51.

⁶⁵ GA Res. 59/191 (2005), para. 2; GA Res. 60/158 (2006), para. 3. See CHR Res. 2005/80, para. 3.

⁶⁶ See, for example, *Concluding Observations of the Human Rights Committee: Israel*, note 55 above, para. 11.

⁶⁷ *General Comment 29*, note 5 above.

⁶⁸ 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 does not provide a person with the right to a hearing that favors the person in all respects. Rather, it guarantees that a person be afforded a “fair” and open hearing. A counterterrorist measure imposing limitations on 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 and restrictions on the sharing of that information) is permitted access to the information.

specific limitations clause.⁶⁹ Where it is determined that a specific right allows for limitation or restriction, legislators and decision-makers must examine four key questions in order to comply with international human rights law:

1. Is the limitation set out within a “prescription by law” (see Condition 3.1 herein)?
2. Does the measure pursue one of the objectives permitted within the expression of the right or freedom (see Conditions 4.1 and 4.2)?
3. Is the interference necessary and proportionate (see Conditions 4 and 5)?
4. Is the interference nondiscriminatory (see Condition 3.2)?

⁶⁹ Rights-specific limitations are those that are authorized 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. The third sentence of Article 14(1) provides that:

[t]he 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 [sic] 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.

CONDITION 3:

Counterterrorism Law and Practice Must Be Established by Due Process

A number of procedural requirements are applicable to ensure that counterterrorist measures are established and undertaken by proper means.

Consideration of Conditions 1 and 2 of this Handbook will lead to the following conclusions: (1) counterterrorism law and practice must comply with human rights law, and (2) “compliance” with human rights law, by virtue of the flexibility incorporated within that body of law, can permit the limitation of certain rights in limited circumstances. Where it is determined that a counterterrorist measure must limit the enjoyment of a right or freedom to achieve its objective(s) and that the right in question is capable of limitation, it is next necessary to determine compatibility of the measure with the procedural requirements of due process. That is, the counterterrorist measure must:

1. be prescribed by law,
2. respect the principles of nondiscrimination and equality before the law,
3. impose appropriate restrictions upon discretionary powers,
4. be confined to the objective of countering terrorism.

3.1 Establishing Counterterrorism Measures Through Legal Prescriptions

Counterterrorist 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.

Common to all instruments authorizing the limitation of rights, any measure seeking to limit a right or freedom must be prescribed by law. The expression “prescribed by law” has been subject to examination both by domestic and international courts and tribunals with clear pronouncements on its meaning. The term was considered, for example, by the European Court of Human Rights in the *Sunday Times* case of 1978, where the Court concluded that two requirements flow from it:

1. The law must be adequately accessible so that the citizen has an adequate indication of how the law limits his or her rights.
2. The law must be formulated with sufficient precision so that the citizen can regulate his or her conduct.⁷⁰

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.⁷¹ It is likewise reflected in the Human Rights Committee’s *General Comment 29* and the *Siracusa Principles*.⁷²

3.2 Respect for the Principles of Nondiscrimination and Equality Before the Law

Counterterrorist measures must respect the principles of nondiscrimination and equality before the law.

To comply with the rule of law, any legal prescription must respect the principles of nondiscrimination and equality before the law.⁷³ As a general principle, a distinction will be considered discriminatory if it has no objective and reasonable justification, it does not have a very good reason for it, or it is disproportionate. In the counterterrorism context, particular attention has to be given to ensure that measures are not adopted or applied that discriminate on grounds of race, religion, nationality, or ethnicity.⁷⁴ Recent resolutions of the General Assembly and Commission on Human Rights have also stressed that the enjoyment of rights must be without distinction upon such grounds.⁷⁵

⁷⁰ *Sunday Times v. United Kingdom* (1978) 58 ILR 491, 524–527. This test was later reaffirmed by the European Court. See *Silver v. UK* [1983] 5 EHRR 347.

⁷¹ See Commissioner’s Guidelines, note 6 above, paras. 3(a) and 4(a); Council of Europe’s Guidelines, note 7 above, Guideline III; Inter-American Commission on Human Rights report, note 8 above, para. 53.

⁷² *General Comment 29*, note 5 above, para. 16; *Siracusa Principles*, note 4 above, paras. 15 and 17.

⁷³ 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 this document refers to the rule of law; 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), pp. 175–184.

⁷⁴ See ICCPR, arts. 4(1) and 26.

⁷⁵ 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. See GA Res. 59/191 (2005), preambular para. 12; CHR Res. 2005/80, preambular para. 15; “Statement on Racial Discrimination and Measures to Combat Terrorism,” note 43 above, 107.

3.3 Discretionary Powers Must Not Be Unfettered

Counterterrorist law must not confer an unfettered discretion, it must not be arbitrarily applied, and it must be implemented by means that establish adequate checks and balances against the potential misuse or arbitrary application of counterterrorist powers.

Counterterrorism measures prescribed by law may involve a conferral of a discretion. This brings two matters into consideration:

1. Any law authorizing a restriction of rights and freedoms must not confer an unfettered discretion on those charged with its execution.
2. 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 restrictions on the conferral of discretions are reflected within the Commissioner's Guidelines and the guidelines of the Council of Europe, as well as within the *Siracusa Principles*.⁷⁶

3.4 Confining Measures to the Objective of Countering Terrorism

Counterterrorist measures must be confined to the countering of terrorism.

A final matter relevant to the establishment or review of counterterrorism measures concerns the potential scope of application of any counterterrorist prescription or authorizing provision. 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 an important issue expressly dealt with by the Commission and Sub-Commission Special Rapporteurs on counterterrorism.⁷⁷ It is also reflected within the guidelines adopted by the Committee of Ministers to the Council of Europe and the Inter-American Commission on Human Rights. These guidelines require that those measures seeking to limit or restrict rights or freedoms for the purposes of counterterrorism must be defined as precisely as possible and be confined to the sole objective of countering terrorism.⁷⁸ This principle is relevant to the creation and application of counterterrorism measures.

⁷⁶ See the Commissioner's Guidelines, note 6 above, paras. 3(b) and 3(j); Council of Europe's Guidelines, note 7 above, Guideline II; *Siracusa Principles*, note 4 above, paras. 16 and 18.

⁷⁷ See Martin Scheinin, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, A/60/370 (2005), para. 47; Koufa, *Specific Human Rights Issues*, note 29 above, para. 33.

⁷⁸ See Council of Europe's Guidelines, note 7 above, Guideline III(2); Inter-American Commission on Human Rights report, note 8 above, paras. 51 and 55; *Siracusa Principles*, note 4 above, para. 17.

Although seemingly unproblematic in theory, this issue may pose considerable difficulties in practice due to the lack of a universally agreed-upon definition of “terrorism.” The first substantive report of the UN special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, however, provides a useful starting point to address these practical challenges.⁷⁹

LINKS TO EXISTING OPERATIONAL DEFINITIONS (“TRIGGER OFFENSES”)

None of the 13 universal terrorism-related conventions and protocols contain a comprehensive definition of “terrorism.” Rather, the conventions are operational in nature and confined to specific subjects, whether air safety, maritime navigation and platforms, the protection of persons, or the suppression of the means by which terrorist acts may be perpetrated or supported. Neither do resolutions of the various UN bodies expressly adopt a definition.

Nonetheless, several recent instruments utilize a useful trigger in determining what conduct, in the absence of a comprehensive definition, should be characterized as “terrorist” by linking the term to existing conventions related to terrorism. The first is the Council of Europe Convention on the Prevention of Terrorism, which defines a “terrorist offence” as any of the offenses within 10 of the 12 antiterrorism conventions in force at the time of adoption, excluding the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft and the Convention on the Marking of Plastic Explosives for the Purpose of Detection.⁸⁰ All of the offenses within the Council of Europe Convention are thus linked to offenses created by and definitions within the universal conventions on countering terrorism that are currently in force. A similar approach is taken in Article 2(1)(a) of the International Convention for the Suppression of the Financing of Terrorism.

The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has confirmed that this approach is a proper starting point.⁸¹ Although subject specific, the conventions are universal in nature, so that use of offenses described in them can be treated as broadly representative of international consensus.⁸² By itself, however, this approach is not sufficient to determine what conduct is truly terrorist in nature. The point can be illustrated with reference to the Tokyo Convention on Offences

⁷⁹ Martin Scheinin, *Promotion and Protection of Human Rights*, E/CN.4/2006/98 (2005), chap. III.

⁸⁰ “Council of Europe Convention on the Prevention of Terrorism,” 16 *Council of Europe Treaty Series* 196 (adopted May 16, 2005, not entered into force as of July 2006). The list of conventions mirrors the list contained within the International Convention for the Suppression of the Financing of Terrorism, but also includes the latter convention.

⁸¹ Scheinin, note 79 above, para. 33.

⁸² This approach must be qualified in one respect, to note that this linkage is not applicable in the case of the Convention on the Marking of Plastic Explosives for the Purpose of Detection. Because the convention does not actually proscribe any conduct but instead places obligations upon states relating to the marking of explosives, it cannot be used as a “trigger offence” treaty. “Convention on the Marking of Plastic Explosives for the Purpose of Detection,” ICAO Doc. 9571, arts. 2 and 3(1) (opened for signature March 1, 1991; entered into force June 21, 1998).

and Certain Other Acts Committed on Board Aircraft. The Convention calls on States to establish jurisdiction over acts that jeopardize the safety of a civil aircraft or of persons or property therein or that jeopardize good order and discipline on board.⁸³ Although this certainly would capture conduct of a terrorist nature, the description of acts over which States must establish jurisdiction is very broad and likely also to include conduct with no bearing at all to terrorism.

CUMULATIVE CHARACTERISTICS OF CONDUCT TO BE SUPPRESSED

The solution to the problem just identified can be drawn from Security Council Resolution 1566 (2004). Although the resolution did not purport to define “terrorism,” it called on all States to cooperate fully in the fight against terrorism and, in doing so, to prevent and punish acts that have the following three cumulative characteristics:

1. acts, including against civilians, committed with the intention of causing death or serious bodily injury, or the taking of hostages; and
2. irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, also committed for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; and
3. such acts constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.⁸⁴

The third criterion represents the “trigger offense” approach discussed above. The important feature of the resolution is the cumulative nature of its characterization of terrorism, requiring the trigger offense to be accompanied with the intention of causing death or serious bodily injury or the taking of hostages, for the purpose of provoking terror, intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act. This cumulative approach acts as a safety threshold to ensure that it is only conduct of a truly terrorist nature that is identified as terrorist conduct.⁸⁵ Not all acts that are crimes under national or even international law are acts of terrorism, nor should be defined as such.⁸⁶

By way of further example, there are clear parallels between acts of terrorism and other international crimes, including crimes against humanity, whether in

⁸³ “Convention on Offences and Certain Other Acts Committed on Board Aircraft,” 704 UNTS 219, arts. 1(1), 1(4), and 3(2) (opened for signature September 14, 1963; entered into force December 4, 1969).

⁸⁴ SC Res. 1566 (2004), para. 3.

⁸⁵ A cumulative approach is, in fact, the one taken in defining prohibited conduct under the International Convention Against the Taking of Hostages. Hostage-taking is defined as the seizure or detention of a person (a hostage) accompanied by a threat to kill, injure, or continue to detain the hostage in order to compel a third party to do or to abstain from doing any act. To that extent, hostage-taking, as described, encapsulates all three characteristics identified within Security Council Resolution 1566.

⁸⁶ Scheinin, note 79 above, para. 38.

the terms set out in the Statute of the International Criminal Court or in the proscription of such crimes under general international law. As already identified, the Security Council, General Assembly, and Commission on Human Rights have also identified terrorism as something that:

- endangers or takes innocent lives;
- has links with transnational organized crime, drug trafficking, money laundering, and trafficking in arms as well as illegal transfers of nuclear, chemical, and biological materials;
- is also linked to the consequent commission of serious crimes such as murder, extortion, kidnapping, assault, the taking of hostages, and robbery.⁸⁷

Notwithstanding such linkages, counterterrorism must be limited to the countering of offenses within the scope of and as defined in the international conventions and protocols relating to terrorism or to the countering of associated conduct called for in Security Council resolutions, including the requirements as set out in Resolution 1566.⁸⁸

⁸⁷ See SC Res. 1269 (1999), preambular para. 1; SC Res. 1373 (2001), para. 4; SC Res. 1377 (2001), para. 6; SC Res. 1456 (2003), preambular paras. 3 and 6; SC Res. 1540 (2004), preambular para. 8; GA Res. 3034 (XXVII) (1972), para. 1; GA Res. 31/102 (1976), para. 1; GA Res. 32/147 (1977), para. 1; GA Res. 34/145 (1979), para. 1; GA Res. 36/109 (1981), para. 1; GA Res. 48/122 (1993), preambular para. 7; GA Res. 49/185 (1994), preambular para. 9; GA Res. 50/186 (1995), preambular para. 12; GA Res. 52/133 (1997), preambular para. 11; GA Res. 54/164 (1999), preambular para. 13; GA Res. 56/160 (2001), preambular para. 18; GA Res. 58/136 (2004), preambular para. 8; GA Res. 58/174 (2003), preambular para. 12; CHR Res. 2001/37, preambular para. 16 and operative para. 2; CHR Res. 2004/44, preambular para. 7.

⁸⁸ The recently adopted International Convention for the Suppression of Acts of Nuclear Terrorism is at odds with this cumulative approach. The Convention requires States parties to prohibit the possession or use of nuclear material or devices with the intent (1) to cause death or serious bodily injury, (2) to cause serious property damage or damage to the environment, or (3) to compel a person, organization or State to do or abstain from doing any act. The wording of Article 2(1) does not fit with Security Council Resolution 1566, treating the resolution's first two characteristics (intent to cause death or injury or the taking of hostages; for the purpose of influencing conduct) as alternative rather than cumulative requirements. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has expressed concern that, just as in the case of the Tokyo Convention already discussed, this may capture conduct that does not meet the general criteria for defining what acts are terrorist in nature. See Scheinin, note 79 above, para. 41.

CONDITION 4:

Counterterrorist Measures Seeking to Limit Rights Must Be Necessary

Where a counterterrorist measure seeks to limit a right, this limitation must be necessary to pursue a pressing objective and rationally connected to the achievement of that objective.

The final two steps in determining whether rights limitations imposed through counterterrorist measures are in compliance with international human rights law involves consideration of the necessity (Condition 4) and proportionality (Condition 5) of such measures. Necessity involves three requirements:

1. The pursuit of an objective permitted by the expression of the right concerned
2. The need for that objective to be pressing and substantial in a free and democratic society
3. The existence of a rational connection between the objective and the measure in question

4.1 The Pursuit of Permissible Objectives

Where a counterterrorist measure seeks to limit a right, this limitation must be in furtherance of the permissible objectives identified in the expression of the right.

A matter considered earlier in this Handbook (see Condition 2.4) was that the permissible scope of any limitation of rights will ultimately depend upon their particular expression. A number of human rights and fundamental freedoms codified by international instruments, such as the ICCPR, contain specific references to objectives that may justify limitation or restriction. Those of relevance to counterterrorism might include the protection of national security, territorial integrity, public order and safety, or the rights and freedoms of others.⁸⁹ Reference to the particular expression of the right or freedom will be necessary in each case.

⁸⁹ See, e.g., ICCPR, art. 19(3) (Freedom of Expression, providing that “[i]t may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals”).

4.2 Pressing and Substantial Concerns in a Free and Democratic Society

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 human rights falling outside the category of peremptory norms. Notwithstanding the importance of counterterrorism per se, however, it is the objective of the particular legislative provision or counterterrorist policy/measure that must be assessed.

A common feature of rights-limitation provisions, particularly within domestic human rights instruments, is the requirement that any limitation be necessary in a free and democratic society. In this regard, the State has an undeniable duty to protect its nationals; and it cannot be doubted that counterterrorism is a sufficiently important objective in a free and democratic society to warrant, in principle, measures to be taken that 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 individuals, societies, and international security. This is clearly recognized within the international guidelines mentioned and within a multitude of resolutions of the Security Council, General Assembly, and Commission on Human Rights.

There is clear recognition, then, that terrorism impacts 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 not to oversimplify this position. Regard must be had to the objectives of the particular counterterrorist measure being examined. Paragraph 4 of the 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); must serve a legitimate purpose; and must be necessary in a democratic society. It will be instructive in this regard to consider the following objectives of counterterrorism law and practice.

THE COUNTERING OF AN ACTUAL THREAT OF TERRORISM AGAINST THE STATE

Due to the manner in which terrorist organizations operate, it is a very difficult thing to assess the existence and level of the threat of terrorism, whether actual or potential. 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 counterterrorist measure directed to assuaging such a threat. Although the obvious place to begin, evidence of actual threats is not so palpable. Establishing the existence of actual threats relies upon intelligence that, although very important, has its own set of complications.⁹⁰ Intelligence is not

⁹⁰ John Lewis, deputy director of the FBI Counterterrorism Division, acknowledged that “[i]ntelligence is an imperfect business at best.” John Lewis, paper presented at ICT’s Fifth International Conference on “Terrorism’s Global Impact,” Interdisciplinary Center Herzliya, Israel, September 13, 2005.

always available,⁹¹ reliable,⁹² or properly assessed.⁹³ Further complicating matters, the absence of intelligence does not mean an absence of a threat.

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 both against the probability of that potential being actualized and the probable consequences of such acts, also relies upon intelligence, but to a lesser extent.⁹⁴ Potential threats can also be assessed by analyzing 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. Although States have paid increased attention to border security in the new millennium, transboundary activity and the inexpensive means of perpetrating terrorist acts means that the operational capacity of most terrorist entities should be viewed as being reasonably high.⁹⁵ 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.⁹⁶

THE CONTRIBUTION OF THE MEASURE TO THE INTERNATIONAL ANTITERRORIST 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 antiterrorism and how the measure being examined furthers this objective. US Ambassador to the United Nations John Danforth made this point in an address to the CTC in 2004:

[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

⁹¹ This is said to be the case leading up to the Bali bombings of October 2002 and 2005 and the London bombings in July 2005. Concerning the 2002 Bali bombings, see Mark Forbes, “No Warning of Bali Bombing,” *Age*, December 11, 2002, <http://www.theage.com.au/articles/2002/12/10/1039379835160.html>. For 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, January 7, 2003, <http://www.wsws.org/articles/2003/jan2003/igis-j07.shtml>. For the London bombings on July 7, 2005, compare Wikipedia, “7 July 2005 London Bombings,” http://en.wikipedia.org/wiki/7_July_2005_London_bombings; Wikinews, “Coordinated Terrorist Attack Hits London,” July 7, 2005, http://en.wikinews.org/wiki/Explosions,_serious_incidents'_occurring_across_London.

⁹² This 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. See, for example, “Report: Iraq Intelligence ‘Dead Wrong,’” *CNN.com*, April 1, 2005, <http://www.cnn.com/2005/POLITICS/03/31/intel.report>.

⁹³ This is alleged to be the case prior to the September 11, 2001, attacks in the United States of America. Subcommittee on Terrorism and Homeland Security, House Permanent Select Committee on Intelligence, *Counterterrorism Intelligence Capabilities and Performance Prior to 9-11*, July 2002, http://www.fas.org/irp/congress/2002_rpt/hpsci_ths0702.html.

⁹⁴ On the issue of assessing potential threats of terrorism, see, for example, Artificial Intelligence Lab, Eller College of Management, University of Arizona, *Terrorism Knowledge Discovery Project: A Knowledge Discovery Approach to Addressing the Threats of Terrorism* (September 2004).

⁹⁵ See, for example, Marc E. Nicholson, “An Essay on Terrorism,” AmericanDiplomacy.org, August 19, 2003, http://www.unc.edu/depts/diplomat/archives_roll/2003_07-09/nicholson_terr/nicholson_terr.html.

⁹⁶ See Alex Conte, *Counter-Terrorism and Human Rights in New Zealand* (Wellington: New Zealand Law Foundation, 2007), pp. 8–16, <http://www.lawfoundation.org.nz/awards/irf/conten/index.html>.

meeting their international counter-terrorism obligations, all of us remain vulnerable.⁹⁷

4.3 Rational Connection

For a counterterrorism measure to “necessarily” limit a right or freedom, it must be rationally connected to the achievement of the objective being pursued by the measure in question.

The final component of necessity requires limiting measures to be rationally connected to the achievement of the objective being pursued. This component is relatively simple in its application and is drawn from the international guidelines on counterterrorism and human rights and the jurisprudence of the Supreme Court of Canada. Rational connection will require that the counterterrorist measure being scrutinized logically further the objective of countering terrorism. The Supreme Court of Canada in *Lavigne v. Ontario Public Service Employees Union*, for instance, 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.”⁹⁸ Evidence of this connection might be necessary, however, where such a link is not plainly evident.⁹⁹ This first requirement links with the Commissioner’s Guidelines and the guidelines of the Council of Europe and the Inter-American Commission on Human Rights.¹⁰⁰

⁹⁷ UN Foundation, “Counterterrorism Cooperation Improving, Security Council Told,” *UN Wire*, July 20, 2004, <http://www.unwire.org/UNWire> (last accessed November 20, 2007).

⁹⁸ *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. See David Stratas et al., *The Charter of Rights in Litigation: Direction From the Supreme Court of Canada* (Aurora, Ont.: Canada Law Book Inc., 1990), 6:06. In *R v. Oakes*, for example, section 8 of the Narcotic Control Act of 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.

⁹⁹ *Figuroa v. Canada (Attorney General)* [2003] 1 SCR 912. The Supreme Court of Canada was critical here of aspects of the Canada Elections Act of 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. Although the Court held that it was a pressing objective to ensure that the tax credit scheme was cost efficient, it found 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.

¹⁰⁰ See Commissioner’s Guidelines, note 6 above, paras. 4(b) and 4(d) (requiring limitations to be necessary for public safety and public order and necessary in a democratic society). See also Council of Europe’s Guidelines, note 7 above, Guideline III(2); Inter-American Commission on Human Rights report, note 8 above, paras. 51 and 55.

CONDITION 5:

Counterterrorist Measures Seeking to Limit Rights Must Be Proportional

As well as being necessary, any limitation upon the enjoyment of rights imposed by a counterterrorist measure must be proportional.

The principle of proportionality is not explicitly mentioned in the text of human rights treaties, but it is a major theme in the application of human rights law. Proportionality requires a reasonable relationship between the means employed and the aims to be achieved. Useful questions to ask when determining whether a measure limiting a right meets the requirements of proportionality include but are not limited to the following:

- Is the restriction or limitation in question carefully designed to meet the objectives in question?
- Is the restriction or limitation in question arbitrary, unfair, or based on irrational considerations?
- Is a less restrictive measure possible?
- Has there been some measure of procedural fairness in the decision-making process?
- Does the restriction or limitation in question destroy the “very essence” of the right in question?
- Does the restriction or limitation impair the right in question as little as possible?
- Do safeguards against abuse exist?

A number of aspects and nuances of these questions will be subject to closer examination and explanation in the following paragraphs.

5.1 Limitation, Rather than Exclusion, of Rights

To achieve proportionality, the counterterrorism measure or legislative provision must effect a “limitation” upon rights, rather than an exclusion of them or such a severe limitation that would impair the “very essence” of the right or freedom being affected.

The starting point in determining proportionality is that limitations imposed by counterterrorist measures must not impair the essence of the right being limited.¹⁰¹ This is a matter that will be achieved through the proper application of Condition 2 herein (determining the permissible scope of limitations upon the right or freedom).

5.2 Assessing the Human Rights Impact of the Counterterrorist Measure

Assessing the human rights impact of the counterterrorist measure requires identification of the importance of or the degree of protection provided by the right or freedom affected and the effects (impact) of the limiting provision or practice upon the right or freedom.

Assessing the impact of a counterterrorist provision or measure upon human rights requires consideration not just of the level to which the measure limits a right but also the level of importance the right itself holds. Guidance here is again drawn from 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 individually, it has provided some assistance as to how one can undertake this task. In the well-known decision of *R v. Oakes*, the Court spoke of the need to ensure that the law that restricts the right is not so severe or so broad in its application as to outweigh the objective. In the case of *R v. Lucas*, the Court added that this requires consideration of the importance and degree of protection offered by the human right being limited.¹⁰² This distinction between the importance of the right versus the impact upon the right recognizes that a minor impairment of an important right, for example, might be more significant than a major impairment of a less important right. Privacy, for example, could be treated as a right less important than the right to life. Even a minor interference with the right to life will need to be treated as a serious matter.

¹⁰¹ Commissioner's Guidelines, note 6 above, para. 4(c). 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 *Quebec Protestant School Boards*, the 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 section 23(1)(b) of the Charter, the Court held that it 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. *Attorney General for Quebec v. Quebec Protestant School Boards*, [1984] 2 SCR 66. 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 ed. (Thomson Carswell, 2005), p. 799. In a later Canadian case, the court described the *Quebec Protestant 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. *Ford v. Quebec (Attorney General)*, [1988] 2 SCR 712, 773-734.

¹⁰² *R v. Oakes* at 106; *R v. Lucas* [1998] 1 SCR 439, para. 118.

5.3 Assessing the Value of the Counterterrorist Measure

Assessing the “value” of the counterterrorist measure requires identification of the importance of the objective being pursued by the counterterrorist provision or measure and the effectiveness of that provision or measure in achieving its objective (its ameliorating effect).

The value or importance of the counterterrorist objective being pursued must also be assessed, as well as the efficacy of it, recognizing that different counterterrorist measures will not just impact upon rights in a different way but will have different levels of effectiveness. The importance of the counterterrorist measure will have already been assessed when determining whether the measure is necessary (Condition 4 herein). Equally crucial, an analysis must be undertaken whether the measure limiting or restricting the right in question will be effective.¹⁰³ It is beyond question that it can be notoriously difficult to make fair estimates on the effectiveness of counterterrorism measures. Yet, the difficulty of the task cannot be an excuse for the lack of thorough analysis and sound decision-making. An in-depth analysis may include an examination of the experiences from previous terrorism crises and comparable campaigns, such as the so-called war on drugs.

5.4 Assessing the Proportionality of the Counterterrorism Measure

A further proportionality requirement of international and national human rights law is that measures of limitation or restriction must impair rights and freedoms as little as reasonably possible.¹⁰⁴ 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.¹⁰⁵ Other than this understandable and reasonably minor degree of deference, this requirement fits with paragraph 4(g) of the 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

¹⁰³ See, for example, Commissioner’s Guidelines, note 6 above, paras. 4(b) and 4(e)–(g).

¹⁰⁴ See *R v. Oakes* at 106; *R v. Edwards Books and Art Ltd.* [1986] 2 SCR 713, 772–773.

¹⁰⁵ In *R v. Schwartz*, for example, it was suggested that the statutory provision, which provided for a presumption that a person did not have a firearms license if he or she failed to produce one upon request, unnecessarily infringed the presumption of innocence. Counsel for Schwartz argued that police could simply check their computerized records to ascertain whether a license had indeed been obtained. McIntyre J. stated that “[e]ven 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 guaranteed in the Charter, to postulate some alternative which in its view would offer a better solution to the problem.” *R v. Schwartz* [1988] 2 SCR 443, 492–493.

human rights treaties. Arising from the latter requirements but expressly stated within paragraph 4(d) of the Commissioner's Guidelines is the important point that any counterterrorist provisions be interpreted and applied in favor of rights.

With these points in mind, one must undertake the final task of “balancing” the human rights and counterterrorist scales with the aim of producing the least reasonably intrusive means of achieving the counterterrorist objective. To that end, this final Condition formulates the following substantive question for determination by the decision-maker:

Having regard to the importance of the right or freedom [Condition 5.2], is the effect of the measure or provision upon the right [Condition 5.2] proportional to the importance of the objective and the effectiveness of the legislative provision or measure [Condition 5.3]?

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 recognized in the margin of appreciation jurisprudence of the European Court of Human Rights.¹⁰⁶ What this Handbook seeks to ensure, however, is that such debate reflects upon all relevant factors germane both to countering terrorism and complying with international human rights obligations.

¹⁰⁶ 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* (Antwerp: Intersentia, 2002).

About the Center

THE CENTER ON GLOBAL COUNTERTERRORISM COOPERATION is a nonpartisan research and policy institute that works to improve internationally coordinated nonmilitary responses to the continually evolving threat of terrorism by providing governments and international organizations with timely, policy-relevant research and analysis.

The Center promotes a holistic approach that addresses issues of capacity building, information sharing, and law enforcement cooperation and the underlying conditions that can lead to terrorism, for example, extremism, poor governance, lack of civil rights, human rights abuse, religious and ethnic discrimination, political exclusion, and poverty. The Center aims to identify ways to bring together perspectives of the global North and South to develop a more unified global response to terrorism. It is the only research center in the world focusing on the role of multilateral institutions in the global campaign against terrorism.



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