

The Ethical Challenges of Implementing Counterterrorism Measures and the Role of the OSCE

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In 2001, the United Nations (UN) passed Security Council Resolution 1373. This resolution requires states to comply with universal counterterrorism instruments and to legislate on the prohibition of financing terrorism.¹ An important feature of Resolution 1373 is the establishment of the UN Counterterrorism Committee (CTC) as a subsidiary organ of the Security Council.² The Committee analyzes implementation of the resolution through assisting member states on such issues as: drafting legislation; border control; police and law enforcement initiatives; and anti-terrorist financing measures. The CTC also performs country visits and liaises with regional organizations to aid in adoption of the counterterrorism instruments. Regional organizations, such as the Organization for Security and Cooperation in Europe (OSCE), are keenly placed to assist the CTC because they are attuned to local demands. Nevertheless, global terrorism objectives still face difficulties. Much has been written about the technical issues of implementing counterterrorism provisions — either states are unable or unwilling to do so — but beyond these issues are ethical quandaries.

This article therefore addresses the ethical dilemmas of counterterrorism and the efforts of the OSCE. It begins with an examination of the importance of legitimacy to counterterrorism efforts. Next, the ethical bottlenecks that currently exist are analyzed. While it would be impossible to identify a single ethical perspective, this article partially draws on research finding that ethical dilemmas arise when measures lack legitimacy.³ The article then moves on to an assessment of the OSCE's role in developing counterterrorism measures in participating states. A brief conclusion is offered to suggest where improvements might be made implementing more comprehensive counterterrorism measures.

Counterterrorism, human rights and legitimacy

Conspicuous in its absence from Resolution 1373 is a robust human rights mechanism. The absence of this mechanism was partially remedied in 2004 when the CTC's executive directorate was mandated to liaise with the Office of the UN High Commissioner for Human Rights (OHCHR) and a human rights expert was appointed to the CTC.⁴ However, neither significantly ensures that states adhere to their obligations in a broader context. What is more, there have been consistent calls to make human rights an important part of counterterrorism. In a 2001, joint statement between the UN, the Council of Europe (CoE), and the OSCE Office for Democratic Institutions and Human Rights (ODIHR), states were urged to avoid violation of fundamental freedoms and undermine legitimate dissent. The statement stresses the need to protect these rights as a basic tenet of democratic society. Where derogations are necessary, the joint statement calls for them to be brief and only used when extremely necessary.⁵ Since then, many organs and organisations, as well as academics have stressed the importance of upholding human rights while combating terrorism.⁶ These strong calls are, however, not always translated into (adjustments of) policies. In this respect, it is important to point

1 United Nations Security Council Resolution 1373, S/Res/1373 (28 September 2001)

2 The CTC oversees the implementation of measures such as: criminalizing terrorist financing, freezing terrorists assets, denying terrorist safe havens, sharing legal assistance and information between state governments, criminalizing active and passive assistance for terrorism.

3 Transnational Terrorism, Security & the Rule of Law (TTSRL), *The Ethical Justness of Counterterrorism Measures*, December 2008 at <http://www.transnationalterrorism.eu/tekst/publications/WP6%20Del%2012b.pdf>.

4 United Nations Security Council, S/2004/124 (19 February 2004).

5 Mary Robinson, Walter Schwimmer, Ambassador Gerard Stoudmann, *Joint Statement, Human Rights and Terrorism*, November 2001.

6 See for example the *Guidelines on human rights and the fight against terrorism*, adopted by the Committee of Ministers of the Council of Europe, on 11 July 2002 at the 804th meeting of the Ministers' Deputies.

to the adoption of Security Council Resolution 1624 (2008), in which the UN Security Council stressed that human rights must be upheld in counterterrorism efforts.⁷ The need to uphold human rights is critical in counterterrorism efforts because measures have the potential to be used by governments to legitimize action against political opponents. When this happens, the moral high ground of counterterrorism efforts is lost.

Maintaining moral superiority also imbues counterterrorism measures with legitimacy. A legitimate law is one that is easily able to compel citizens towards compliance.⁸ Legitimacy is manifest when citizens can comprehend a law and act accordingly. It requires clear language and an apparent link between the objective and the process of a measure. In other words, a law must have a clear purpose. Beyond this, however, legitimacy accrues when a law is coherent with the principles on which it is based. In the context of counterterrorism, western liberal democracy has a well-defined framework of normative rights for its citizens. For counterterrorism measures to be legitimate not only must they be clearly constructed and have an apparent purpose, but they must be in line with this normative framework.

Observers contend that a relationship exists between human rights and counterterrorism. Many see that compromises must be made. This is not necessarily true. It is important to recognize that the struggle against transnational terrorism is a long-term confrontation. Deviations from human rights protections may be permissible in the short-term, but when the timeframe of such a struggle is viewed in decades, rather than months or years, it becomes apparent that compromises are unsustainable. Western liberal democracy cannot forego human rights, even in the name of security.

Protecting human rights is the surest way to keep strong the very institutions that terrorists try to eliminate. Counterterrorism measures that circumvent such revered norms as free speech, the right to trial, and freedom from arbitrary arrest and torture not only have a questionable record in preventing terrorism, but they also forfeit much of the moral superiority that governments claim over terrorists. They are, furthermore, one-dimensional, while terrorism springs from a multitude of issues. It is important that governments take broad approaches, beyond law enforcement. They should employ the vast scope of a state's power to deal with the terrorist threat, not only legally or with force, but politically, socially, and diplomatically. Ultimately, however, counterterrorism measures must not pose as large a threat to fundamental freedoms than the threat from terrorism necessitates because undermining human rights protections runs the risk of illegitimacy.⁹ When this happens, the ability of counterterrorism measures to compel compliance is called into question. In the following section, the article partially draws on research done under the auspices of the Transnational Terrorism, Security & Rule of Law project to identify the ethical bottlenecks that arise when measures lack legitimacy.

Ethical bottlenecks of counterterrorism measures

Terrorism is anathema to democratic principles and governments find themselves striving to protect their citizens. However, because terrorism is rooted in its seeming unpredictability, policies often diverge from human rights principles in the name of societal protection. Policymakers rationalize this divergence and safety becomes a trade-off between human rights and security. This article argues for a different perspective. We

7 United Nations Security Council Resolution 1624, S/Res/1624 (14 September 2005).

8 TTSRL, *op cit.*, p. 13.

9 TTSRL, *op cit.*, p. 9.

should recognize that terrorism and counterterrorism can both threaten the core values of free democratic society, such as the rule of law, and that these core values should not be lost to either side.¹⁰ When viewing both terrorism and counterterrorism being able to harm liberal democracy, we can see policies that are ethically compromised.

At the heart of counterterrorism policies, three ethical bottlenecks can be distilled. These are trends that arise as a result of low legitimacy across a range of counterterrorism measures. They are symptomatic of the faults with the collective counterterrorism approach, rather than problems associated with just one or two individual measures. Their existence indicates that there is a lack of coherence with human rights principles across the spectrum of counterterrorism policy.

The first ethical bottleneck is the ambiguity of criminality. This quandary arises out of the difficulties in demarcating the extent to which governments can criminalize behavior under the aegis of counterterrorism efforts; it occurs because policies are indeterminate. The second ethical bottleneck is the ambiguity of power. This problem occurs because of the broad application of legislation. When security is the primary objective it hinders the use of exacting measures. What results is an attempt to provide blanket security to a society. Some counterterrorism measures themselves do not have an obvious link to the specific objective and seem more inline with the provision of this type of security. The final ethical bottleneck is divergence from the rule of law and good governance. These are the bedrocks of the democratic response to terrorism, but many measures fail to cohere with their principles.

It is important not to discount the severity of these ethical bottlenecks. The resources of state governments can be used to great effect against terrorism, but these same resources also have the capacity to easily neglect human rights obligations. This is because the threat of terrorism comes in many forms. Terrorists have found ways to exploit the architecture of globalization and are able to execute attacks in novel ways. Laws must keep up with the threat. Flexibility is therefore necessary. The strategic framework of counterterrorism laws must be broad enough to deal with the myriad forms of terrorist and terrorist related activity, from smuggling, drug trafficking, fund raising, to actual attack. However, too much flexibility is problematic as laws become diluted and lose legitimacy.

The ambiguity of criminality pertains to the obscure construction of legislation. It can be defined as the unclear link between criminal behavior and terrorist activity. As stated previously, legitimacy is derived in part by the ability of a measure to be easily understood by citizens. In the counterterrorism context, the trend exists to criminalize otherwise permissible activity. An example of this can be found in the struggle to develop an operative definition of terrorism. Many states have struggled or are struggling with this right now. Many have differing definitions and some are extremely broad. In the European Union, the Framework Decision on Combating Terrorism (2002) and its proposed amendment (2008) have developed a litany of offenses that can constitute terrorism. Critics contend that many of these offenses fall short of conventional interpretations of terrorism; the scope of what constitutes terrorism is excessive.¹¹ Included in this definition are acts of public protest and dissent which authorities may deem contributive to terrorist violence. The ambiguity is that the distinction for what type of behavior constitutes legitimate protest and what type of behavior constitutes a terrorist offence is unclear.

¹⁰ TTSRL, *op cit.*, p. 7.

¹¹ International Commission of Jurists, *Briefing Paper: Amendment to the Framework Decision on Combating Terrorism – Provocation to Commit a Terrorist Offence*, March 2008, p. 4.

Furthermore, those who are perceived associates of terrorism are often at risk for detention. In France, for example, family members and friends may be arrested and interrogated. It is not clear how association to a terrorist act is construed, thus making it difficult for the general public to adjust their behavior. Identifying criminal behavior becomes a *recondite* task because the law is too broad and not easily understood.¹² The CTC Special Rapporteur on human rights recently remarked that broad definitions ‘of terrorism or of specific terrorist crimes are often counterproductive in the crucially important task of countering international terrorism. If national law applies the stigma of terrorism to a broad range of activities, it may dilute the message and also delegitimize the fight against terrorism in the eyes of the population or certain segments of it.’¹³

Other issues have been identified in Transnational Terrorism, Security & the Rule of Law research. One is the fact that *ex ante* measures have become widespread features of states’ counterterrorism approaches and assign criminality before the fact. Stop and search methods have been widely employed by OSCE states, most notably the United Kingdom. Under this measure, authorities are permitted to stop suspicious individuals and search for evidence of terrorist activity. ‘This power could be used in an arbitrary manner. For example, the British police have been accused of using this power mainly against the Asian community, which subsequently will lead to a feeling of discrimination.’¹⁴ Another problem is that the ‘beyond reasonable doubt’ standard that traditionally governs stop and search measures is lowered to ‘reasonable grounds.’ Guilt is not proven, merely assumed. Limits on the power of the state are unclear and, in cases such as stop and search, rest in the judgment of the law enforcement authorities in the event. The potential for arbitrariness dilutes the principle in which the burden of proof to establish guilt lies with the state. Criminality is not proven in this context, but it is punished based on suspected future acts. The third problem is that the use of evidence gathered from intelligence agencies is increasingly used to prosecute terrorist suspects. The problem from this is that this evidence is often classified and the accused cannot challenge its use in court. Criminality is not proven through a legal process, it is, again, assigned. Even if intelligence agencies are acting in good faith, the legitimacy from assigning guilt is low *vis-à-vis* human rights protections.

In addition to the difficulties of identifying where criminality begins and legal behavior ends, there is also the trouble of identifying the limits of state power. This is apparent in the existence of longer pre-trial detentions, more intrusive investigative powers, and the use of evidence acquired by intelligence services that cannot be challenged in court. The objectives of these expanded procedural freedoms are unclear. The ambiguity of power is therefore defined as the vague or unchecked limits placed on the state in applying law enforcement methods to counterterrorism efforts. Quixotic pursuits of ‘national security’ are ethically troublesome when neither national security is defined, nor threats are explicitly explained. For example, Spanish law currently employs a stringent *incommunicado* detention measure. This law mandates that detainees suspected in membership of an armed group may be held in pre-trial detention for up to 2 years. They may be held *incommunicado* if a judge finds that their detention will be useful in an ongoing investigation. In this case, judicial guarantees are not applicable for the detainee because the Spanish constitution states that terrorist suspects have certain suspended rights, such as private access to a lawyer.¹⁵ At issue is the determination of

12 TTSRL, *op cit.*, p. 7.

13 Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Statement by Professor Martin Scheinin to the Counterterrorism Committee of the Security Council 20 October 2008 (New York).

14 TTSRL, Contextual Paper, Case Study: UK, p.4 at [http://www.transnationalterrorism.eu/tekst/publications/UK%20case%20study%20\(WP%206%20Del%2012b\).pdf](http://www.transnationalterrorism.eu/tekst/publications/UK%20case%20study%20(WP%206%20Del%2012b).pdf).

15 Spanish Constitution, art. 55.2.

the length of detention, which is based on a magistrate's estimation of the suspect's ability to be useful in a terrorism investigation. Spanish law does not provide a litmus for a suspect's utility. This softened procedural action has an unclear objective.¹⁶ The vague limits of power stem from the relentless search for maximum security, but, in the end, the power of the state to continue measures that impact the lives of individuals long after a threat has subsided does more harm to civil liberties than they do to establish societal security.

The last ethical bottleneck is the divergence from the rule of law and good governance. Contemporary counterterrorism measures display a worrying potential for human rights abuses. As the protection of civil liberties and human rights is the cornerstone of the rule of law and good governance, the fact that this potential exists is significant. Terrorism is, admittedly, a peculiar threat. Not only are attacks designed to cause proximate damage, but their use is intended to reverberate through the victim society. A strong legal defence is needed against this threat, but it must maintain the moral high ground. Ideally, this response derives its support from the adherence to the rule of law and application of good governance.

Research into several European counter-terrorism measures and policies shows that especially ethical bottlenecks arise because of restricted access to legal counsel, presumption of guilt, risk of torture, and invasions of privacy. At stake is the rule of law and good governance- the foundations of these fundamental norms. The next examples are also illustrations of this.

Two examples of this divergence can be highlighted. The first is found in diplomatic assurances for the protection of extradition subjects. Where there is a high level of legal trust between states, such as in the EU, extradition processes have been modified to deal with terrorism. Implementations of new procedures generally uphold human rights principles related to extradition. The European Arrest Warrant is a prime example. However, where legal trust is low or extradition processes are not formalized, human rights abuses may occur. The use of diplomatic assurances has become prevalent between requesting and requested states to guarantee that the requested person or persons will be treated in accordance with human rights norms. The OSCE points out that such agreements are common among participating states and that diplomatic assurances have little efficacy in ensuring human rights protections.¹⁷ Where the requesting state has a dubious human rights record, these assurances circumvent the legal principle of non-refoulement and leave the requested person at risk of torture. The non-binding UN Model Treaty on Extradition, in which non-refoulement is present, is also ignored. There is little efficacy in these informal agreements to avoid maltreatment of requested persons. Good governance principles — in this case non-refoulement — are significantly challenged.

Another example highlighting the divergence from the rule of law is the use of data retention. In the Transnational Terrorism, Security & the Rule of Law project, the use of data retention techniques were found to be at odds with the right to privacy. This right is supported in the European Convention on Human Rights and the International Covenant on Civil and Political Rights, as well as the European Union Charter of Fundamental Rights.¹⁸ Electronic and travel data retention have been maligned for contravening the right to privacy. While terrorists have made savvy use of the networks of globalization- financial, transportation, and communication- European and American policy makers have tried to find ways to limit exploitation of these

16 TTSRL, *op cit.*, p. 54 – 56.

17 OSCE, Background Paper on Extradition and Human Rights in the Context of Counterterrorism, 20 March 2007, p. 9.

18 TTSRL, *op cit.*, p. 30-32.

networks. In doing so, the capture and retention of data of suspected terrorists is necessary. Unfortunately, much of the practice of data retention is not focused solely on terrorists or even suspected terrorists, but on entire populations. Rather than using data retention as an investigative tool, which is the purpose, the result is potential discrimination against certain ethnic or religious groups or assumes guilt of every individual in society. There is no clear framework for when data can be retained. It is simply retained. While the practices of data retention that are prevalent in the European Union or the United States have not appeared in all of the smaller countries- particularly those in the OSCE-bilateral agreements and information sharing practices have augmented the potential for data captured in the US and EU to be shared with third party states. As safeguards are weak in the former and perhaps non-existent in the latter, data retention measures explicitly undermine the right to privacy.

In sum, counterterrorism measures that lack legitimacy create ethical problems for broader counterterrorism efforts. Ethical bottlenecks expand the power of the state to potentially impact the lives of individuals to an extent equal to or greater than the threat of terrorism. Despite being well-intentioned, counterterrorism measures must do more to incorporate determinate provisions inline with the human rights heritage of liberal democracy.

The CTC, regional organizations & counterterrorism

The OSCE has made commendable advancements in fusing human rights and counterterrorism. The Bucharest Plan of Action for Combating Terrorism, established at the Ninth Ministerial OSCE Conference, tasked the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) with assisting participating states in developing measures to counter terrorism.¹⁹ As a whole, the OSCE is tangibly committed to working with human rights organizations and governments to uphold fundamental freedoms.²⁰ Much of the work done under the aegis of the OSCE has been assisting the implementation of the universal anti-terrorism instruments mandated by Resolution 1373. This has been necessary because the mandatory obligations of Resolution 1373 created added burdens for many states, particularly those with limited resources and expertise.²¹ To deal with this issue, the Action against Terrorism Unit (ATU) and ODIHR have worked closely with the CTC and UNODC to provide training and workshops for OSCE states.

The OSCE and UNODC have held numerous workshops to build capacity among participating states to operationalize the counterterrorism provisions of the universal instruments. The organization also coordinates inter alia the development of stringent travel document security, container security, and airline security, small arms and light weapons controls, as well as promotes public- private partnerships. Combined, these efforts augment counterterrorism capacities. With regard to the ethical challenges, the OSCE has made laudable contributions as well.

The ATU imbues legitimacy into counterterrorism programs. Its efforts, though predominantly needs-based and technically oriented, also promote a comprehensive approach to dealing with threats. For example,

19 OSCE, Ninth Ministerial Council, Bucharest 2001, 4 December 2001, *Bucharest Plan of Action for Combating Terrorism*.

20 Jaap de Hoop Scheffer, *International human-rights law is flexible enough to respond to acute terrorist threats effectively*, Opening Statement at the OSCE Seminar on Human Rights and Terrorism, September 2003 (The Hague).

21 Curtis Ward, *Building Counterterrorism Capacity: State Action and the Role of the UN Counterterrorism Committee*, 2005.

the ATU has been actively promoting the inclusion of the business sector and civil society in formulating counterterrorism policies. In 2007, it advocated so-called, public private partnerships (PPPs) as a means to address, among other topics, social, political, and economic conditions that terrorists exploit and to promote human rights and inter-cultural dialogue.²² The OSCE's objective of utilizing these joint ventures in participating states is to strengthen respect for human rights and the rule of law and to promote democratic accountability.²³ Incorporating civil society in counterterrorism efforts is an effective way to create measures that the public can easily interpret and which cohere with human rights. This comprehensive approach therefore breeds determinate measures whose objectives are clear; ethical bottlenecks are minimized.

Working in the human dimension of the organization's framework, ODIHR facilitates and analyzes the efforts of participating states in protecting human rights. A key contribution of ODIHR has been publishing an expansive volume on human rights and counterterrorism.²⁴ This manual is used as a textbook for policy makers to acquaint themselves with the obstacles and best practices of upholding fundamental freedoms, whilst concurrently implementing effective counterterrorism measures. Published in 2007, the manual covers all relevant international human rights conventions and how they relate to terrorism.

The ODIHR manual is a strong example of how the organization facilitates legitimate counterterrorism policy. It acknowledges that defining terrorism is a difficult task. However, it warns against applying broad definitions because of the danger of criminalizing permissible activities.²⁵ As stated above, Transnational Terrorism, Security & Rule of Law research found that the broadly conceived definitions of terrorism used by many state governments have questionable legitimacy. Acquainting policymakers with the negative human rights effects of a broad terrorism definition may limit the ambiguities of criminality that arise from indeterminate definitions. Such activities augur well for legitimate counterterrorism policies.

Thus, OSCE plays an important supplementary role to the CTC. This occurs in two ways. First, the OSCE assists participating states in facilitating their commitments to the provisions of the universal anti-terrorism instruments. Through capacity building workshops and assistance in developing counterterrorism legislation, the OSCE helps ensure that local exigencies are dealt with when participating states implement security measures. Second, through ODIHR the human rights shortcomings of the CTC can be assessed and remedied in participating states. By augmenting CTC guidance with human rights emphasis and localized support, the OSCE has been able to make substantive steps in helping participating states recognize the importance of human rights norms in the counterterrorism struggle. The organization therefore helps legitimize the struggle against terrorism; it compels participating states to comply with the CTC and it bolsters their capacity to protect human rights.

Conclusion — regional organizations and the ethics of counterterrorism

It is important to remember that counterterrorism efforts do not necessarily lead to human rights infringements. Rather, it is ambiguous laws and overly expansive state powers that make counterterrorism efforts destructive to democratic principles. The OSCE enhances not only effectiveness in providing

22 OSCE Ministerial Council, Decision No. 5/07 *Public-Private Partnerships in Countering Terrorism* (30 November 2008).


23 Curtis Ward, *Building Counterterrorism Capacity: State Action and the Role of the UN Counterterrorism Committee*, 2005.

24 OSCE, *Countering Terrorism, Protecting Human Rights* (Warsaw, OSCE/ ODIHR) 2007.

25 *Terrorism, Protecting Human Rights*, *op. cit.*, p. 23.

security, but also the legitimacy of doing so thereby preventing the emergence of the ethical bottlenecks of counterterrorism. However, the organization should continue to assist participating states with formulating workable policies that are clearly formulated and coherent with human rights principles. Maintaining the moral high ground through comprehensive and ethical measures will prove that the balance between security and liberty is not as tenuous as initially claimed.





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