



TERRORISM AND INTERNATIONAL LAW

Accountability, Remedies, and Reform

A REPORT OF THE IBA TASK FORCE ON TERRORISM

ELIZABETH STUBBINS BATES

Edited by the IBA Task Force

Justice Richard Goldstone, HHJ Eugene Cotran, Gijs de Vries,
Julia A Hall, Juan E Méndez, Javaid Rehman



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PREFACE

It was in response to the terrorist attacks of 11 September 2001 that the International Bar Association (IBA) established its first Task Force on International Terrorism. Its report, which was published in 2003, suggested that the seismic events of 11 September had set governments, international law-makers, and non-governmental organizations on a long journey to tackle the many complex legal challenges inherent in responding to this new form of global terrorism. At the core of this journey lay the task of combating terrorism without jeopardizing the protection of basic rights and freedoms.

Today the threat of terrorism remains as potent as ever, arguably more so. Large-scale attacks have taken place in major cities around the world, including London, Madrid, and Mumbai, and several other attempts have been foiled. In attempting to strike the balance between maintaining national security and preserving fundamental rights, the practices and policies of governments in response to this threat have often been controversial. The rhetoric of the Bush administration's 'war on terror' has stood in sharp contrast to the belief that terrorist threats are the proper purview of policing, rather than military intervention. The invasion of Iraq, Guantánamo Bay, extraordinary rendition, the increase of police and surveillance powers, restrictions on free speech and association, have all generated strong and vocal public opinion. Some have even questioned whether contemporary international law is equipped to meet the challenges of modern terrorism. Governments and law-makers have been confronted with complex legal questions, such as: Do state's human rights obligations apply extra-territorially? Does the use of force in counter-terrorism constitute armed conflict, meaning that international humanitarian law should apply, and if so what is its relationship with international human rights law? To what extent are states obliged to provide remedies for victims of terrorist attacks and victims of violations which occur in the course of counter-terrorism operations?

Given the considerable developments in international law and state practice since the publication of the first Task Force report, it became clear that a fresh and updated analysis of the legal issues and challenges was needed. The IBA therefore convened a new Task Force to provide expert analysis of international law and how it continues to regulate states' counter-terrorism policies, and to provide a global overview of developments in state practice, including but not restricted to the US-led 'war on terror'.

It was important for the IBA to attract a range of expertise to the Task Force, in order to reflect the multidisciplinary nature of these complex challenges. The IBA's Human Rights Institute was fortunate enough to have as its outgoing Co-Chair Justice Richard Goldstone, who had also acted as Co-Chair of the IBA's previous Task Force on Terrorism in 2003. Justice Goldstone kindly accepted the invitation to Chair the current Task Force, which he has done with the same intellectual rigour and fair-mindedness that has characterized his long and distinguished career.

His Honour Professor Judge Eugene Cotran, visiting professor and Chairman of the Centre of Middle Eastern and Islamic law at the School of Oriental and African Studies, London, is a distinguished jurist and recognized as a prominent scholar of the Arab region. Ms Julia A Hall is Amnesty International's expert on counter-terrorism in Europe and has authored several reports documenting the transfer of alleged terrorism and national security suspects. She brought with her a wealth of experience from the field and has added a valuable practitioner's viewpoint to the Task Force. Professor Juan E Méndez, Co-Chair of the IBA's Human Rights Institute, is one of the world's leading human rights lawyers. He is a former President of the Inter-American Commission on Human Rights and of the International Center for Transitional Justice and his scholarship in the field of international law and knowledge of the Americas has proved indispensable. Professor Javaid Rehman is an internationally recognized legal scholar and an expert on Islamic law, international human rights law, and international terrorism, in particular relating to Afghanistan and Pakistan. Professor Rehman brought with him critical insight into the challenges affecting this troubled region. Mr Gijs de Vries was the EU's Counter-Terrorism Coordinator between 2004–07, and has provided an important policy-maker's perspective to the Task Force's consideration of the multi-faceted issues in this complex area.

Elizabeth Stubbins Bates, formerly David Davies of Llandinam Research Fellow and currently Visiting Fellow at the London School of Economics and Political Science, was commissioned to write the Report. With its intention of providing expert analysis of such a broad range of legal issues and global coverage of examples of state practice, the Report was ambitious in its aims and scope. However, from the very inception of the project Elizabeth demonstrated her outstanding technical expertise and skilful understanding of the key debates in counter-terrorism and international law in formulating the structure of the Report and consistently producing drafts of exceptional quality.

Two plenary meetings of the Task Force were convened, both at the IBA Headquarters in London. During the first, held in July 2009, the Task Force considered and agreed the structure, aims, and scope of this ambitious work. Throughout 2009 and 2010, draft chapters were then authored by Elizabeth with typical diligence and academic precision and offered to the Task Force, who critically analysed the

issues at stake, providing input and detailed comments according to the members' vast range of expertise and experience, which were then incorporated into the text. The Task Force oversaw and supported the author by offering its guidance on research and latest developments. The Task Force held its second and final plenary meeting in May 2010, towards the end of the drafting process, approving final drafts of the Report and its Conclusions and Recommendations.

The IBA's view is that combating terrorism requires insight from a variety of different, potentially contradictory perspectives, with the ultimate aim of reaching consensus on as many issues as possible. This was reflected in the multilateral approach of the Task Force which strives to present the range of opinion of its members whilst remaining scholarly and rigorous. Whilst the Task Force members are not acting representatively for their respective organizations or institutions, this Report has been shaped by the convergence of rich and diverse viewpoints.

The Report itself is intended to appeal to the broad range of actors working in this multi-faceted area, and to reflect the diversity of academics and practitioners in the IBA membership. It is sufficiently discursive and cognisant of theoretical debates to appeal to academics and policy-makers, yet set out clearly and concisely enough, and with a broad range of examples and case studies, to appeal to practitioners, particularly those who are not experts in the field. The chapters on international human rights law and international humanitarian law offer a clear framework of analysis and updates on how each of these branches of international law continue to regulate states' counter-terrorism policies. The Report analyses the key current issues in counter-terrorism, including the extra-territorial application of international human rights law; the interoperability of international human rights law and international humanitarian law; reform in counter-terrorism; and victims' rights to a remedy and reparations. We also hope that significant value lies in its updated analysis of case law and examples of state practice drawn from a truly global selection of jurisdictions, ranging from Colombia to the Philippines.

The Report does not include detailed analysis of the international law on the use of force, international refugee law, extradition, mutual legal assistance, or the private law consequences of counter-terrorism. The exclusion of the international law on the use of force is a significant choice, as the Report aims to articulate clearly when international humanitarian law does and does not apply to the regulation of terrorism and counter-terrorism operations, and to avoid the inference (from politics rather than law) that terrorism and counter-terrorism operations always take place through the lens of 'war'.

Lastly, the Task Force aims to contribute and add value to the current debates surrounding counter-terrorism and international law through providing authoritative conclusions and recommendations for states, inter-governmental and non-governmental institutions, the judiciary, and policy-makers to consider how to strike the balance between ensuring respect for fundamental rights whilst protecting the

global public from terrorist violence. In formulating its recommendations, the following themes seemed to capture the essence of the issues at stake:

- States must place international law at the centre of their counter-terrorism efforts, engaging fully with the ratification, implementation, and enforcement of IHL and IHRL treaties.
- States should train their armed forces personnel, law enforcement officials, and intelligence officials in applicable IHL and IHRL, as a means of preventing violations of IHL and IHRL.
- In addition to complying with the monitoring mechanisms which exist at the international and regional levels, states should monitor their own enforcement of IHL and IHRL by ensuring compatibility between their treaty obligations and conditions in practice.
- The prevention of future violations may be encouraged by a full implementation of states' obligations to investigate and prosecute violations of IHL and IHRL: and by states' obligations to ensure a remedy and reparation both for victims of terrorist attacks and for victims of violations of international law committed in counter-terrorism operations.

The Task Force wishes to thank the IBA Foundation Inc for its generosity in funding this important project. The Task Force acknowledges the generosity of the London School of Economics and Political Science Department of International Relations, the David Davies of Llandinam Research Fellowship, and the Dinam Charity in allowing Elizabeth Stubbins Bates to work on this exciting project and for funding her work from 2008 to 2009. The LSE Department of Law, where Elizabeth Stubbins Bates was a Visiting Fellow in 2009–10, also facilitated work on the book. The Task Force is also extremely grateful to the European Human Rights Advocacy Centre/Memorial (EHRAC) for its expert advice regarding Russian counter-terrorism legislation.

The work of the Task Force would not have been possible without the support of IBA staff. Alex Wilks, as the Senior Programme Lawyer assigned to the Task Force, managed the different aspects of this complex project from its inception and deserves credit for the broad project design. Lucy Winder, as IBA Senior Content Editor, provided invaluable editorial expertise and assistance throughout the process. Thanks must also go to Mahmuda Ali and Aurora Garcia, who dealt with the considerable administrative requirements of the project, as well as Nicole Pellicena for her help with the IBA's marketing strategy.

The Task Force should also like to thank the following IBA Human Rights Institute interns for their tremendous assistance in compiling research materials for the report and assisting with the Task Force meetings: Edwina Brown, Jo Buckley, Peter Hamm, Catharine Hubner, Zoe Jacob, Shyam Kapila, Tarini Mehta, Peter Morcos,

John Nee, Lindsay Oak, Tricia Patel, Vijaya Poopalasingam, Joy Reddy, Melissa Ritchie, Katie Rivkind, Matthew Sands, Mattais Schain, and Daniel Thompson.

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The law and facts were last updated on 30 May 2010.

IBA Task Force on Terrorism, International Bar Association

BIOGRAPHIES OF TASK FORCE AND AUTHOR

Justice Richard Goldstone (Chair)

Justice Goldstone, previously a South African Constitutional Court judge, former Chief Prosecutor of the United Nations International Criminal Tribunal for Rwanda and the former Yugoslavia, is also a past IBA Human Rights Institute Co-Chair. Justice Goldstone has been involved in human rights interventions and missions in almost all parts of the world. Justice Goldstone served as National President of the National Institute of Crime Prevention and the Rehabilitation of Offenders (NICRO) and Chairperson of the Bradlow Foundation, a charitable educational trust. He founded and for some years chaired the board of the Human Rights Institute of South Africa (HURISA). He was a member of the International Group of Advisers of the International Committee of the Red Cross and a member of the committee appointed by the Secretary-General of the United Nations to investigate allegations regarding the Iraq Oil for Food Programme. In 2009 Justice Goldstone led an independent fact-finding mission created by the UN Human Rights Council to investigate international human rights and humanitarian law violations related to the Gaza War. The mission's findings that Israel and Hamas had both committed serious violations of the laws of war led to a major international controversy. Justice Goldstone has been a visiting Professor at New York University, Fordham, Harvard, and Georgetown law schools.

Professor Judge Eugene Cotran

Judge Cotran joined the School of Oriental and African Studies (SOAS) in 1960 as a Research Officer and lecturer in African law. He continues to work with the institution, sits as an International Arbitrator, and is a legal consultant to the Qatar Financial Centre (QFC) Civil and Commercial Court and its Judiciary. Judge Cotran was appointed a High Court Judge in Kenya in 1977, and later a Circuit Judge in the UK in 1992. He has acted as a Chairman or member in various Middle Eastern Arbitrations, the International Criminal Court of Arbitration, the Immigration Appeal Tribunal, the London Court of International Arbitration, and the Centre of Islamic and Middle Eastern Law. He is also Secretary of the Pan African Council and Vice-Chairman of Medical Aid for Palestinians. Judge Cotran has published a number of works on African and Middle Eastern law, immigration law, and international law. He is the General Editor of Butterworths

Immigration Law Service and is on the Editorial Board of various Commonwealth and Middle Eastern journals.

Mr Gijs de Vries

Mr Vries is currently a member of the Board of the Netherlands Court of Audit. He was Deputy Interior Minister of the Netherlands between 1998 and 2002, and was the European Union's Counter-Terrorism Coordinator from March 2004 to March 2007. Since September 2008, he has served as chairman of the European Security Research and Innovation Forum (ESRIF). Mr Vries was also Chairman of the EU Integration Programme, Center for European Policy Studies, Co-founder of the European Council on Foreign Relations, and Member of the Advisory Council of the Center on Global Counter-Terrorism Cooperation.

Ms Julia A Hall

Ms Hall is a human rights lawyer and a counter-terrorism and human rights expert at Amnesty International's London-based secretariat. She has conducted extensive research and advocacy in a number of areas, including the prohibition against torture and unlawful ('extraordinary') rendition. Ms Hall previously served as senior legal counsel for the Terrorism and Counter-Terrorism Program at Human Rights Watch, where she worked from 1996–2009. She has authored numerous reports, articles, and amicus briefs on a range of counter-terrorism topics, conducted sustained advocacy at the United Nations, the Council of Europe, and the European Union, and served as an expert on individual cases before the European Court of Human Rights. In July 2008, she monitored the military commission of Salim Hamdan, Osama bin Laden's former driver, at Guantánamo Bay.

Professor Juan E Méndez

Professor Méndez, currently a Co-Chair of the IBA's Human Rights Institute, served as the United Nations Secretary-General's Special Adviser on the Prevention of Genocide from July 2004 to May 2007. He worked with Human Rights Watch for 15 years, where he served as general counsel. From 1996–99, Professor Méndez served as the executive director of the Inter-American Institute of Human Rights in Costa Rica and became president of the Inter-American Commission on Human Rights of the Organization of American States in 2002. Professor Méndez also served as President of the International Center for Transitional Justice, before being appointed Special Adviser on Crime Prevention at the International Criminal Court, Office of the Prosecutor. Professor Méndez has taught international human

rights law at Georgetown Law School, the University of Notre Dame School of Law, and at the Johns Hopkins School of Advanced International Studies (SAIS). He also teaches regularly at the Oxford Master's Programme in International Human Rights Law.

Professor Javaid Rehman

Professor Rehman is a Professor of Law and Head of the Brunel Law School at Brunel University in West London. He has extensive experience as an advocate and as a human rights lawyer. He has taught international law at the Universities of Hull, Leeds, and Ulster, and has been a visiting professor at various institutions in the US, Japan, Pakistan, and France. Professor Rehman is a member of the International Law Association (ILA) and is Co-Rapporteur of the ILA Committee on Islamic Law and International Law. He has acted as a consultant on human rights law, minority rights, and terrorism for the European Commission, the United Nations, the World Bank, Northern Ireland Human Rights Commission, the Government of Pakistan, and Minority Rights Group. He regularly advises on the development of higher education in both the UK and South Asia.

Ms Elizabeth Stubbins Bates (author)

Elizabeth Stubbins Bates is based at the London School of Economics and Political Science (LSE). She has researched and taught in international law and is part of the inaugural teaching team for LSE's pioneering undergraduate course, LSE100. In 2008–09, Ms Stubbins Bates was the David Davies of Llandinam Research Fellow at the LSE Department of International Relations, working on international humanitarian law, international human rights law, and counter-terrorism. Before coming to LSE, Ms Stubbins Bates was a consultant to the Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR) and to the Coalition to Stop the Use of Child Soldiers; a Legal Adviser at Amnesty International; and an American Society of International Law (ASIL) Arthur C Helton Fellow. Ms Stubbins Bates is a member of the ASIL and of the British Institute of International and Comparative Law. She works in English and French, and speaks some Russian.

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