



SECURITY AND HUMAN RIGHTS

Edited by

Benjamin J Goold and Liora Lazarus

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and
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Foreword

This collection of essays, scrutinising the relationship between security and human rights from a multidisciplinary perspective, could not have come at a more opportune moment. The political interest in security and human rights, and in crime and disorder, has never been more intense. Much of this attention has very direct effects upon the rights of defendants and the interests of the victims of crime. It seems to me that this key place, where the rights of these two groups bisect, is a touchstone for the quality of criminal justice and its moral heart. And this is particularly critical, particularly stark, in cases involving allegations of terrorist activity, where the victim may not be simply private but also in a real sense public—where the victim is, and is intended to be, the community as a whole: all of us and all of our institutions.

It is often said that the pendulum has swung too far in favour of defendants. Too many due process restraints are Victorian in culture. They are no longer relevant. They are too restrictive and hamper the search for justice. Much is made of the revived jurisdiction on abuse of process and some of its wilder manifestations. Obviously the prosecuting authority finds itself at the heart of this debate. That is as it should be and I welcome our being there.

Of course we have our own view of the appropriate balance between defendants and the victims of crime in a criminal trial. Just as we have our own view of the appropriate relationship between the State and those against whom it determines to apply punitive criminal sanctions. And I understand, as do all criminal lawyers, that in no place is this relationship more sensitive than in cases where it is alleged the defendants have set out to attack the State itself, often hoping to destroy its values and its institutions by deliberately targeting its most vulnerable members.

So we need to start by being clear that the threat posed by terrorism is real and serious. It is also necessary to be clear that the precise category of threat which we face is actually new. Of course terrorism isn't a new phenomenon. But this form is a little different.

Terrorists today will use indiscriminate violence. They seek, as a deliberate tactic, mass civilian casualties, of the most vulnerable people they can find. They target individuals, institutions, communities and nations, trying to set people against each other. This is all calculated and deliberate. It can also, if we are not careful, be strikingly successful.

Moreover, the terrorist threat comes with global dimensions. It is no longer purely a domestic problem. Its causes are no longer restricted to one state. This means those causes may be a long way beyond our control. We may be dependent on the whims of foreign electorates.

But I also believe it is critical that we understand that this new form of terrorism carries another more subtle, perhaps equally pernicious risk: it might

encourage a fear-driven and inappropriate response. By that I mean it can tempt us to abandon our values. I think it important to understand that this is one of its primary purposes. Understanding this will help us to resist the dangerous temptation to succumb, as will a determination to judge the threat itself with care, and obviously not to underestimate it, obviously. Only a fool would do that.

Terrorism is designed to put pressure on some of our most cherished beliefs and institutions. So it demands a proactive and comprehensive response on the part of law enforcement agencies. But this should be a response whose fundamental effect is to protect those beliefs and institutions. Not to undermine them. We must protect ourselves from these atrocious crimes without abandoning our traditions of freedom.

Our criminal justice response to terrorism must be proportionate and grounded in due process and the rule of law. So, although a development in the role of the security services and the police is essential and desirable in this context, I believe an abandonment of Article 6 fair trial protections in the face of terrorism would represent an abject surrender to nihilism. It would represent defeat.

The rhetoric around the 'War on Terror' illustrates the risks nicely. London is not a battlefield. The innocents who were murdered on 7 July 2005 were not victims of war. And the men who killed them were not, as in their vanity they claimed on their ludicrous videos, 'soldiers'. They were criminals. They were fantasists. We need to be very clear about this. On the streets of London, there is no such thing as a 'war on terror', just as there can be no such thing as a 'war on drugs'. The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement.

Acts of unlawful violence are proscribed by the criminal law. They are criminal offences. We should hold it as an article of faith that crimes of terrorism are dealt with by criminal justice. And we should start by acknowledging the view that a culture of legislative restraint in the area of terrorist crime is central to the existence of an efficient and human rights compatible process.

We wouldn't get far in promoting a civilising culture of respect for rights amongst and between citizens if we set about undermining fair trials in the simple pursuit of greater numbers of inevitably less safe convictions. On the contrary, it is obvious that the process of winning convictions ought to be in keeping with a consensual rule of law and not detached from it. Otherwise we sacrifice fundamental values critical to the maintenance of the rule of law—upon which everything else depends.

Sometimes it is important to restate the obvious: the complexities of modern society are such that there is unlikely to be an end to the use of violence for political ends any time soon. Perhaps all we have at our disposal are different methods of managing this ugly phenomenon. But it is self evident that the means we choose must be far-sighted. Because every time a conviction is achieved, it can only be sustained and built upon by ensuring that it is fair—and therefore safe from being overturned on appeal. Equally that it enjoys the widest public confidence. People must be able to trust the decisions of the Courts.

Ultimately, this means sustaining an approach to the prosecution of these crimes that is founded in reason and which welcomes the shield against injustice which due process rules provide. A similar tone may be found in United States constitutional writing, which emphasises that ‘implicit in the provisions and tone of the constitution are the values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion’.¹ These are civilising qualities in the State and criminal lawyers should celebrate them. We should never be defensive about them.

So, how should the criminal justice system respond to the terrorist threat? In answering this question, we need to deal with a number of issues: the importance of the Human Rights Act 1998; the role of lawyers; legislation and evidence; and finally, community relations. But more generally, we need to avoid a response to terrorism that is based only on fear and suspicion. This kind of climate has no room for the rule of law. Indeed it encourages the opposite.

In the United Kingdom, our institutions are strong, and our liberal values are intact. We continue to have a Constitution and laws that protect rather than oppress us. And our enduring criminal law framework, underpinned by the European Convention on Human Rights, properly directs us towards justice and due process, towards fair procedures and evidence-driven policing. So in fighting terrorism, we shouldn’t make exceptions to the rule of law; we should use the strength inherent within it.

Critical to this is that individual rights and national security are not seen as being mutually exclusive. As many of the authors in this timely volume point out, this is not a zero-sum game. Improvements to national security do not have to come at the expense of rights. As the title of this collection has it: security and human rights. Not security or human rights.

So where does all this leave us as lawyers, as politicians, as intellectuals? What is our specific response to the threats to our security, and the strains that those threats are putting on our Constitution? As a lawyer myself, I think it is vital that we work to convince the public of the importance of our traditional values of justice. We need to reveal again their centrality to our way of life, especially in the face of terrorist threats. We need to preach more widely than to the converted. We need, all of us, to be advocates for the view that human rights do matter. That far from undermining our national security, they are a critical part of it.

There is clear room for security and rights. And it is our duty to protect both.

Ken Macdonald QC
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London
February 2007

¹ *S v Makwanyane and Another CCT3/94* paragraph 222 (per Justice Langa).

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The Oxford Colloquium on Security and Human Rights (16–17 March 2006) was organised in an effort to encourage more interdisciplinary thinking about the relationship between security and human rights. For this purpose, it brought together academics and practitioners from the related fields of criminal justice, public law, international law and international relations.

The Colloquium was supported by the Law Faculty of the University of Oxford and the British Academy, and was hosted by St Anne's College.

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Abbreviations

ACLU	American Civil Liberties Union
ASBO	anti-social behaviour order (UK)
AU	African Union
CAPPS	Computer Assisted Passenger Pre-screening System (USA)
CCTV	closed-circuit television
CERD	Committee on the Elimination of Racial Discrimination (UN)
CHS	Commission on Human Security
CIA	Central Intelligence Agency (USA)
CODIS	Combined DNA Indexing System (USA)
CTC	Counter-terrorism Committee (UN)
DARPA	Defence Advanced Research Projects Agency (USA)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, or European Convention on Human Rights (1950)
ECtHR	European Court of Human Rights
ECOSOC	Economic and Social Council (UN)
ECOWAS	Economic Community of West African States
ESC	European Social Charter
ETA	Basque Homeland and Freedom group
EU	European Union
FAA	Federal Aviation Administration (USA)
FBI	Federal Bureau of Investigations
FCC	Federal Constitutional Court (Germany)
GA	General Assembly (UN)
HRA	Human Rights Act (1998) (UK)
ICCPR	International Covenant on Civil and Political Rights (1976)
ICESCR	International Covenant for Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IOCA	Interception of Communications Act (1985) (UK)
ISC	Intelligence and Security Committee (UK)
JCHR	Joint Committee on Human Rights (UK)
JTAC	Joint Terrorism Analysis Centre
NATO	North Atlantic Treaty Organization

NDNAD	National DNA Database (UK)
NGO	non-governmental organisation
NYPD	New York City Police Department
OAU	Organisation of African Unity
P5	Permanent Five (UN)
PIRA	Provisional Irish Republican Army
R2P	'Responsibility to Protect'
RCAG	Rail Commuters Action Group (South Africa)
RIPA	Regulation of Investigatory Powers Act (2000) (UK)
RSHO	risk of sexual harm order (UK)
SC	Security Council (UN)
SCR	Security Council Resolution (UN)
SIAC	Special Immigration Appeals Commission (UK)
TIA	Total Information Awareness (USA)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
UNOSOM	UN Operation in Somalia
UNITAF	Unified Task Force (Somalia)
UNSG	United Nations Secretary-General
USA PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (2001) (USA)
WMD	weapons of mass destruction

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