

Protection of Human Rights and Fighting Terrorism

“How do you defeat terrorism? Salman Rushdie was once asked. His answer was simple. “Don’t be terrorized.”

Why start a presentation about protection of human rights with a literary citation. Because the issue of how to protect human rights while fighting terrorism today is not simply about a few measures that need to be discussed or tweaked, but rather it is the whole approach, the structure of how states are pursuing counter terrorism that needs to be reviewed.

Traditionally, liberal states largely relied on their criminal justice system to deal with terrorist threats. Of course, you had exceptions and abuses, but generally, the accepted framework was a criminal law enforcement one. Planners and perpetrators of terrorist acts were treated as criminals – maybe particularly heinous criminals - but criminals nonetheless, and were dealt with through the judicial system.

A criminal justice response that respects the principles of rule of law and human rights is arguably the most accountable and legitimate response to terrorism. It helps avoid an escalation of violence and ensures that any state-sanctioned response is within the well established rule of law framework. And frankly, it worked well overall with many terrorist groups – be it of the anarchist, fascist, extreme left, nationalist or religious kind—brought to justice.

This model, has been under attack. First, after 9/11 and in the last few years in response to ISIS.

After the attacks of 9/11, the US decided to move away from a criminal justice model and its underpinning assumptions. It threw out the rule book and decided to wage what George W. Bush called a “Global War on Terror.” Bush did not only put aside international law but also domestic checks and balances by trying to circumvent US courts. This shift in approach had disastrous effects and led to abuses in Guantanamo and Abu Ghreib, illegal rendition flights, torture memos, military commissions, and “special registration” procedures in the US for foreigners from certain countries.

While some OSCE countries joined this disastrous “global war on terror,” many others provided a useful counter balance by refusing to embrace the paradigm and insisting on due process and law enforcement tools.

But the emergence of ISIS, the increase in terrorist attacks on European soil in the last three years, and successive populist attacks on liberal institutions and politics, have caused cracks in this model and an increasing number of states – including many OSCE members - are embracing a response that undermines the rule of law and human rights.

So what are some of the new and troubling trends in counterterrorism efforts.

I want to focus on 5 key aspects that taken together show a drift away from a law enforcement approach and a weakening of the rule of law.

1) The banalization of states of emergency:

Since late 2015, France, Egypt, Ethiopia, Mali, Tunisia, and Turkey have cited terrorism as a reason to enact or extend states of emergency. Some of these emergency measures vastly increase government powers to search, detain, and monitor individuals, to shut establishments such as meeting houses and places of worship, and to ban public gatherings or free speech.

Other countries like Hungary have adopted constitutional amendments or new legislation to make it easier to declare a state of emergency

Others have introduced exceptional powers found in emergency laws into permanent law, such as the 2016 counter terrorism law in Poland or the draft CT law currently being discussed in the French parliament

Declaring a state of emergency has its place of course. But the key is that such measures are supposed to be exceptional.

But today, governments are saying that a state of emergency is needed as long as there is a high security risk. Given that no one knows when the risk will be deemed acceptable, and most politicians prefer to err on the side of caution (“I have yet to hear any politician say, the security risk is acceptable”), **the exceptional becomes the new normal.**

By suggesting that regular laws, procedures, and oversight mechanisms are not sufficient to counter threats, it weakens the premise of the rule of law and relegates it to a luxury for “normal” times.

2) Overly broad and vague definitions of terrorism:

The debate about what constitutes terrorism is an old one and I have no desire to revisit it today. But the key issue here is that increasingly, countries including Australia, Brazil, Canada, China, Egypt, Israel, Saudi Arabia, and Tunisia have enacted counterterrorism laws criminalizing non-violent activities that fall far short of material support or participation, such as singing a banned group’s anthem or participating in anti-government protests.

We have documented the use of CT laws to prosecute and prolong incarceration of political activists, human rights defenders, students, journalists, and trade unionists.

Many countries have used broad definitions of terrorism to silence dissenting voices or pressure them. We can talk about Turkey and its repression of Kurdish activism. Just take the recent detention and investigation of French journalist Loup Bureau for terrorism because he had photos of himself standing with Kurdish fighters in Syria.

And this is happening in countries with traditionally strong rule of law measures. One clear example is when the UK stopped David Miranda at Heathrow airport and questioned him under Schedule 7 of the Terrorism Act for possession documents provided by Snowden.

The principle of legality under international law requires that criminal laws are sufficiently precise that it is clear what constitutes a criminal offence.

3) **Criminalization of various forms of expression that fall short of incitement to violence**

Countries have criminalized any expression that is deemed to praise, glorify, apologize for, acts defined as terrorism. Yet, terms like “glorify” or “apology” are vague and have been used to silence legitimate forms of expression.

This has affected many people, from activists to children saying things on Facebook or in their school courtyard

In Spain, glorification of terrorism has caught up with artists. In February 2016, a Spanish court charged two puppeteers with “glorifying terrorism” for staging a carnival show that included violent scenes and a puppet holding a sign that referenced Al-Qaeda and the Basque armed group ETA. A

judge dismissed the charges four months later, but the puppeteers were jailed for four days in the interim and barred from leaving the country.

In the wake of the Charlie Hebdo attacks, France has applied its “glorification” of terrorism penal code provision broadly, convicting hundreds of people. And dozens of cases, prosecutors interrogated children, some as young 13, for referencing ISIS in social media or during altercations with police.

When it comes to criminalizing expression, international law requires strict conditions to endure that such sanctions do not restrict freedom of expression.

4) **Use of administrative control measures to restrict people’s freedom of movement**

Increasingly, states are resorting to the use of administrative control measures to control a person’s movement.

Such control measures include: house arrest (or assigned residency), confiscation of travel documents, regular reporting procedures.

Now what is the human rights problem with these measures:

- People are punished before any crime has been committed
- Usually there are no safeguards or recourse for those affected to properly challenge these measures

States don’t have to wait for an attack to take measures. Criminal law already penalizes a whole set of preparatory acts and could be used and is used to prosecute suspected terrorists before they commit an attack.

Rather the problem with these administrative measures it that people are being punished without a real proceeding, without the ability to defend themselves, and usually on the basis of evidence that you have no access to.

The central figure of the judicial judge is slowly being replaced by an administrative judge who has usually less ability to stand up or question the requests by the executive.

5) **mass surveillance:**

States have been expanding their mass surveillance practices. States may have a legitimate goal to surveil, but any communications surveillance must be necessary and proportionate.

Indiscriminate mass surveillance and retention of people’s communication for maybe future use, runs against this.

This can get quickly technical. But I like to bring it back to a basic example.

How would you feel if the state went into your house while you were away at the office to just check that you were not doing anything criminal. Or open your mailbox to read through your mail. This would be very upsetting and we can all recognize would violate rights to privacy. So why would we accept it when it happens online? Just because the technology allows it, does not make it ok.

In effect, this is what happens in many countries when it comes to online surveillance. Our lives – increasingly online – are easily swept up.

Conclusion

The issue is not the pursuit of security by states or opposing security and freedoms. The terrorism threat is real and the state is expected to respond to it.

Rather, the problem is the rush to adopt ever more restrictive measures without a proper assessment of their impact on key freedoms and rights or even an examination of their effectiveness. Incrementally, but surely, these measures are weakening judicial oversight, blurring lines between war and law enforcement, and eroding key protections and rights that have been earned painfully over decades.

The impact of these measures is felt most acutely by members of certain ethnic or religious groups, notably Muslims, migrants and refugees, and this treatment is further eroding their trust in the national authorities.

It is essential to stop this drift towards ever more repressive measures and create the space for a calm evidence-based discussion on the appropriate response to new security threats. The temptation to adopt new laws and measures after every attack – when emotions are at their height – should be resisted.

States should return to a criminal justice response to terrorism and provide their judicial authorities with the resources to confront these new challenges. The judicial system has shown itself capable in the past of adapting to ever changing and increasingly international forms of terrorism through better international cooperation and more resources. Many countries have shown that it is possible to adopt mechanisms to reduce the incidence and severity of terrorist violence while acting within the strict constraints and protections of the criminal justice system and the rule of law. This approach should be encouraged.

But in order to have the space for discussion on how to confront terrorism, it is essential to address the climate of fear. The late US president, Franklin D. Roosevelt, famously said during his first inaugural address which coincided with the Great Depression that the “only thing we have to fear is fear itself.”