

FACTSHEET

Terrorism and human rights

89 – 93 Fonthill Road
Finsbury Park London N4 3JH
Tel +44 (0) 20 7561 6820 Fax 020 7561 6821
info@prisonersabroad.org.uk www.prisonersabroad.org.uk
Charity Number 1093710



"Our responses to terrorism, as well as our efforts to thwart it and prevent it, should uphold the human rights that terrorists aim to destroy. Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism - not privileges to be sacrificed at a time of tension."

Kofi Annan, UN Secretary-General¹

Contents

1	Introduction	1
2	The Balancing Act in International Human Rights Law	2
2.1	Limitations built into human rights definitions	2
2.2	Derogation from human rights obligations	2
2.3	Non-derogable rights	2
2.4	Discrimination	3
3	Arrest and Detention	3
4	Trial by military or 'special' court	4
5	Third country extraditions	5
6	The Death Penalty	6
7	Summary	6

1 Introduction

States may use the real or perceived presence of a terrorist threat to justify treating prisoners in a way that may otherwise be contrary to international human rights standards. It is useful to know what measures states may or may not legitimately take when faced with terrorism in order to know whether that country is acting in accordance with its international human rights obligations.

Governments have a clear right and possibly a duty, to protect citizens from terrorist attacks and to bring the perpetrators of such acts to justice. It is, however, the manner in which these counter-terrorism measures are conducted which may affect fundamental human rights. Powers of search, arrest and detention may be affected by the counter-terrorism measures adopted by states. The threat of terrorism may also result in limitations on other rights such as freedom of expression and religion and the right to seek asylum. It must be remembered that even those suspected of terrorist offences must be treated in accordance with certain basic international human rights standards.

¹ Statement at special meeting of the Security Council's Counter-Terrorism Committee with International, Regional, and Sub-Regional Organizations, on 6 March 2003

Prisoners Abroad: Terrorism and Human Rights

© Prisoners Abroad. Updated July 2006

The information provided in this factsheet is intended for information purposes only. It is not intended to constitute, nor does it constitute legal advice. Prisoners Abroad recommend that professional legal advice should always be sought. The information contained in this factsheet is subject to change and may not be up-to-date or accurate. Prisoners Abroad gives no warranty and makes no representation regarding the accuracy or completeness of the information provided. Prisoners Abroad will not be held responsible for any loss or damage arising from the use of the information provided.

2 The Balancing Act in International Human Rights Law

Human rights law attempts to strike a balance between legitimate national security concerns and the protection of individual rights and freedoms. In general, measures taken to combat terrorism should remain consistent with international human rights law.

2.1 Limitations built into human rights definitions

Many human rights, in particular, the rights to freedom of expression and assembly, the right to manifest one's religion and rights to respect for family life and privacy, have 'limitation clauses' built into their definitions. These clauses provide that: states must respect these rights except for eg where *necessary in a democratic society in the interests of national security*. For example, governments are allowed to use surveillance techniques that would normally violate the right to privacy when this is done for good national security reasons². In certain limited situations, this may even include monitoring of correspondence between individuals and their legal representatives³. Freedom of expression can be restricted where it promotes the use of violent means against the government or supports acts of terrorism, the crucial point of differentiation being whether that expression may incite violence⁴.

2.2 Derogation from human rights obligations

All of the major human rights treaties allow those countries which are party to them to derogate from certain rights (to state that they will not apply that right for a certain period of time)⁵. These derogations are only permissible '*in times of war or other emergency threatening the life of the nation*'. A state must have an officially proclaimed state of emergency before they can derogate from their human rights obligations and notice of any such derogation must be deposited with the relevant treaty-monitoring body⁶. Derogations should be a temporary measure and limited in duration and are only permitted to the extent strictly required by the situation.

2.3 Non-derogable rights

Some human rights are seen as so fundamental that they cannot be limited in any circumstances, including situations where the state is facing a terrorist threat. In particular, these are the right to life; the right to be free from torture, cruel, inhuman and degrading treatment; the right not be punished for an act that was not a criminal offence at the time it was committed; freedom of thought, conscience and religion; and the prohibition of slavery. Violations of these rights are never permissible.

² European Court of Human Rights decision in *Klass and Others v Germany* 5029/71 [1978] ECHR 4 (6 September 1978)

³ European Court of Human Rights decision in *Erdem v Germany* 38321/97 [2001] ECHR 434 (5 July 2001)

⁴ European Court of Human Rights decision in *Zana v Turkey* 18954/91 [1997] ECHR 94 (25 November 1997) and *Karatas v Turkey* 23168/94 [1999] ECHR 47 (8 July 1999)

⁵ Article 15 European Convention on Human Rights, Article 4 International Covenant on Civil and Political Rights and Art 27 American Convention on Human Rights

⁶ For example, notice of derogations from the European Convention on Human Rights must be submitted to the Council of Europe and notice of derogations from the International Covenant on Civil and Political Rights must be deposited with the UN Human Rights Committee.

Because of these non-derogable rights and the fact that other rights have built-in limitations (see above), in practice, derogations under human rights treaties apply mainly to fair trial and detention rights. For example, the approach taken by the UK to combat terrorism has resulted in a derogation to the UK's human rights obligations in relation to detention (in particular, permissible length of detention without charge). Nonetheless, despite the non-derogability of torture, many cases have come to light around the world of terrorist suspects being subject to torture or cruel, inhuman and degrading treatment.

Certain procedural rights are also safeguarded from derogation. The right to be tried by a court of law, the presumption of innocence, and the right to judicial review of the lawfulness of detention (*habeas corpus*) are considered non-derogable, even in states of emergency, by the UN Human Rights Committee⁷ (although some countries may take a different view). Any restrictions placed on other due-process rights, such as the right to counsel, are strictly limited by the principles of necessity and proportionality. Some procedural rights are safeguarded from derogation insofar as they affect the enjoyment of non-derogable rights. For example, a derogation could not be made that allowed evidence obtained through torture to be admissible at trial as this may circumvent the non-derogable right to be free from torture.

2.4 Discrimination

Under most international human rights conventions, the rights contained therein must be guaranteed to all individuals on a states territory without discrimination. Any anti-terrorism measure that would otherwise be legitimate, should not either explicitly, or in effect, discriminate on the ground of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In the UK, counter-terrorism legislation has fallen foul of discrimination on the grounds of nationality where certain provisions on detention without trial only applied to non-UK nationals (in particular, failed asylum seekers). In practice, counter-terrorism laws are sometimes used as a means for attacking minority and political groups, including foreign nationals.

3 Arrest and Detention

International human rights law provides a number of rights on arrest and detention. These include the right to be informed of the reasons for your arrest and the charges against you, the right to be brought promptly before a judge and the right to bring proceedings before a court for review of the reasons for your detention. Arrested persons normally have the right to have someone informed of their detention and to receive legal advice without delay.

⁷ UN Human Rights Committee's General Comment No. 29 on "States of Emergency". In the case of *Hamdi v Rumsfeld* (124 S Ct 2633 (2004)) the US Supreme Court held that 'enemy combatants' that are US citizens detained in the US had a right to bring *habeas corpus* proceedings and that some but not all procedural guarantees applied in such cases. For example the Supreme Court accepted the possibility of allowing hearsay evidence and a presumption in favour of the government's evidence. In *Rasul v Bush*, the US Supreme Court also held that foreign national detainees in Guantanamo Bay must have access to US courts to challenge their detention.

However, these rights are often suspended or relaxed in cases involving terrorist suspects and charges. In individual cases, what is permissible will depend on the laws of the particular country. For example, UK law allows a longer period of detention without charge and permissible incommunicado detention for those suspected of terrorist offences. Previous measures have included increased stop and search police powers and special trial procedures in Northern Ireland. Other countries' laws may go substantially further, for example in India, terrorist suspects can be held for three months without charge and a further three with the permission of a special judge. Egypt has utilised military or 'state security' courts with reduced due process guarantees that may not conform to international fair trial standards for those suspected of terrorist charges. Pakistan similarly conducts trials in special terrorist courts. Indonesia currently has draft legislation that would allow six-months detention for questioning and allow the military to conduct arrests. Spain's anti-terror laws permit the use of incommunicado detention as well as pre-trial detention for up to four years and secret proceedings that prevent the defence from having access to the prosecutor's evidence. In the UK, if a non-UK national is deemed to be a terrorist suspect by the Home Secretary they are not allowed access to the information leading to this determination and have no right to legal counsel if they wish to appeal⁸.

Often, the legislation introducing special measures for terrorist cases may itself, on its face, conform to international human rights standards. Nonetheless, this legislation may be abused by the authorities applying it and used against those that are not really suspected of terrorist offences. In particular, broad definitions of the term 'terrorism' can lead to abuse of special powers by those granted them. Due process safeguards are important in preventing abuse of police power and this is why the requirements of a fair trial and the independence of the judiciary are especially important in terrorist cases.

4 Trial by military or 'special' court

Sometimes terrorist offences will result in trial by a special or military court or by some other special procedure. These courts often operate with more relaxed standards of evidence (for example allowing hearsay or secret evidence) and may have reduced possibility of appeal.

Although military or other special courts or tribunals are usually established in accordance with national law, they may detract from international fair trial standards farther than permissible. Where the balance lies and how far these courts can detract from fair trial rights will be decided by national and international courts on a case-by-case basis.

For example, the US government intended to use special military commissions to try those detained in Guantanamo bay. However, in the *Hamdan*⁹ case the US Supreme Court held that a Yemeni national detained in Guantanamo bay could not be tried by

⁸ Human Rights Watch, Country Studies: The Human Rights Impact of Counter-Terrorism Measures in Ten Countries.

⁹ *Hamdan v Rumsfeld* 548 U.S. ____ (2006)

Prisoners Abroad: Terrorism and Human Rights

© Prisoners Abroad. Updated July 2006

The information provided in this factsheet is intended for information purposes only. It is not intended to constitute, nor does it constitute legal advice. Prisoners Abroad recommend that professional legal advice should always be sought. The information contained in this factsheet is subject to change and may not be up-to-date or accurate. Prisoners Abroad gives no warranty and makes no representation regarding the accuracy or completeness of the information provided. Prisoners Abroad will not be held responsible for any loss or damage arising from the use of the information provided.

a military commission. One of the reasons given for this decision was that the proposed military commissions did not conform to the requirement of the Geneva Conventions that combatants should be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples'¹⁰ or the requirements of the US Code of Military Justice. The Court held that any trial of Hamdan must incorporate at least the barest of the trial protections recognized by customary international law such as that an accused must be present for his trial and privy to the evidence against him¹¹.

5 Third country extraditions

A situation that is becoming increasingly common with the proliferation of anti-terrorism legislation and increased international co-operation is that of third country extraditions, whereby a British national is arrested overseas for extradition to a third country, usually on the basis of an international arrest warrant. Third-country extraditions on the basis of terrorism charges have been increasing. As with many aspects of counter-terrorism, there are human rights implications in these transfers.

In some cases, third-country extraditions will involve individuals that originally entered the UK as refugees and were granted refugee status in the UK because of fear of persecution in their country of origin. It is often the very countries that they have fled that are seeking their extradition. Once someone has been recognized as entitled to refugee status, it is contrary to international refugee law to return them to the country that they are seeking protection from. However, once they become UK citizens (or otherwise lose their refugee status) they lose the protection of refugee law and this prohibition on being returned.

Under both the Convention Against Torture and European Convention on Human Rights, it is a violation of the right to be free from torture, cruel, inhuman and degrading treatment to return an individual to a country where there is real risk that they will be subject to such treatment. The fact that these individuals were granted refugee status because of their fear of persecution in the country now seeking their extradition may be an indication that there is a real risk of torture if they are returned.

¹⁰ Common Article 3 of the Geneva Conventions provides that: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1)(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

¹¹ *Hamdan v Rumsfeld* pp 70-72. The US Supreme Court looked to Article 75 of Protocol 1 to the Geneva Conventions as 'an articulation of safeguards to which all persons in the hands of an enemy are entitled.' Art 75 provides many of the same fair trial guarantees provided for by the International Covenant on Civil and Political Rights, European Convention on Human Rights and American Convention on Human Rights which would apply in non-conflict situations.

6 The Death Penalty

In some countries, terrorist offences may carry the death penalty. The death penalty may even be mandatory for certain offences, giving the court no discretion as to the sentence or to be able to take mitigating factors into account. In order to be lawful under international law, the death penalty must only be imposed after due process of law. This means that the trial must conform to minimum fair trial standards. If the death penalty is handed down without due process requirements being fulfilled, this may amount to a violation of the right to life.

7 Summary

- States are permitted to restrict the application of certain human rights in the fight against terrorism.
- The right to be free from torture, cruel inhuman and degrading punishment can never be limited, even in cases involving terrorism.
- Certain basic procedural rights such right to be tried by a court of law, the presumption of innocence, and the right to judicial review of the lawfulness of detention should also not be limited.
- In practice, the main rights affected by counter-terrorism measures relate to the length of permissible pre-trial detention, rules relating to stop and search and admission and weighting of evidence. These rights should only be limited as far as strictly necessary and any limitation should be proportionate to the aim.
- Cases involving terrorism may be tried in military or other special courts. These courts should still respect basic due process rights.
- Counter-terrorism legislation should never discriminate solely on the basis of colour, sex, religion, ethnic or national origin.
- In third country extraditions, returning an individual to a country where they face real risk of torture is a human rights violation.
- It is a violation of the right to life to sentence someone to death without due process of law.

If you require this leaflet in a large print format, please contact us. Our details are below.

Tel: 020 7561 6820
+44 20 7561 6820 from outside the UK

Email: info@PrisonersAbroad.org.uk

Mail: Prisoners Abroad, 89-93 Fonthill Road, London,
N4 3JH, United Kingdom