

MANFRED NOWAK AND ANNE CHARBORD (EDS),
USING HUMAN RIGHTS TO COUNTER TERRORISM
(EDWARD ELGAR 2018)

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During election campaigns politicians habitually claim that human rights obstruct their valiant efforts to counter terrorism. Frightened by the possibility to get caught up in a terrorist attack and overwhelmed by the extensive media coverage of terrorism, the wider public is generally persuaded by the rhetoric of the politicians. Despite the seemingly endless stream of counter-terrorism legislation at the international, regional, and national level, terrorist organisations continue to evolve, reinventing themselves and outmanoeuvring law enforcement and intelligence agencies. Far-reaching counter-terrorism measures potentially engage with the whole spectrum of human rights, ranging from the prohibition of torture and the right to life to the right to privacy and freedom of speech. The relationship between counter-terrorism and human rights is delicate and multi-faceted, with both short-term and long-term dimensions. Edited by Manfred Nowak and Anne Charbord, the thought-provoking book under review, *Using Human Rights to Counter Terrorism*, asks the historically vexed question: Do human rights impede counter-terrorism efforts or are they a valuable tool in the fight against terrorism?

Human rights law imposes 'positive obligations' on states to take firm action to counter terrorism, e.g. to protect the right to life of the citizens of a state.¹ At the same time, there are unmistakably specific cases in which human rights law may prevent a state from taking measures it deems necessary to counter terrorism. Since most human rights are qualified rights, as opposed to absolute rights, and as such allow states some room to derogate in time of emergency, it

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¹ *Osman v UK* ECHR 1998-VIII 3124, para 115.

is evident that human rights law already offers states an ample range of mechanisms to balance the protection of a certain right and national security interests.² As the former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has stated: 'Law is the balance, not a weight to be measured'.³

Many legal scholars approach the interplay between counter-terrorism efforts and human rights from a dogmatic and legalistic perspective.⁴ Such dogmatic legal arguments about international legal obligations in human rights treaties and their protocols, preambles, and explanatory memoranda are undoubtedly important. However, the authors of this book have addressed the controversial relationship between human rights and counter-terrorism in a more sophisticated and comprehensive fashion by adopting a variety of perspectives. The book's key argument is that, 'contrary to conventional wisdom, respect for human rights does not hinder the fight against terrorism; it actually assists it from a moral, legal, judicial and operational perspective'.⁵ This argument is clearly spelled out and thrust to the forefront at the very beginning of the book.

The authors of the book include the current UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism⁶ and her two predecessors;⁷ the former UN Special

² Manfred Nowak and Anne Charbord, 'Key Trends in the Fight against Terrorism' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018) 81.

³ UNHCR 'Report of the Special Rapporteur on human rights while countering terrorism' (2010) UN Doc. A/HRC/16/51, para 12.

⁴ For examples of such arguments, see various chapters in: Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy's Challenge* (Hart 2008); K Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011).

⁵ Manfred Nowak and Anne Charbord, 'Introduction' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018) 4.

⁶ Fionnuala Ní Aoláin, 'The Complexity and Challenges of Addressing the Conditions Conducive to Terrorism' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018).

⁷ Ben Emmerson, 'New Counter-Terrorism Measures: Continuing Challenges for Human Rights' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to*

Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment;⁸ and other high-profile counter-terrorism experts, including the former Director of Global Counter Terrorism Operations for the UK Secret Intelligence Service (MI6).⁹ One of the main strengths of the book is that the authors distinguish themselves through a combination of academic prowess coupled with unrivalled practical expertise in the field of counter-terrorism. It is therefore hardly surprising that the book adopts a highly pragmatic approach to answer the vexed question of whether human rights impede or enhance counter-terrorism efforts. Nonetheless, the book also offers a fair amount of substantive legal analysis and effectively deals with theoretical issues whenever necessary.

On the other hand, the selection of academics and counter-terrorism experts from predominantly legal backgrounds means that empirical studies of the interplay between human rights and counter-terrorism unfortunately fall largely outside the scope of the book. The further inclusion of such studies could prove helpful to substantiate the claims put forward throughout the piece. For example, it would be worthwhile to investigate the precise role that excessive counter-terrorism laws play in the radicalisation of individuals at the micro level, using large samples from several states. The results of such empirical research could then be used in support of more abstract arguments and could in turn provide a compelling incentive for lawmakers and policymakers to abstain from violating human rights in the name of counter-terrorism.

In terms of structure, the book can roughly be divided into two parts. The first three chapters broadly sketch the main developments and human rights challenges in the field of counter-terrorism since 9/11. Chapters 4 to 8 each

Counter Terrorism (Edward Elgar 2018); Martin Scheinin, 'Impact of Post-9/11 Counter-Terrorism Measures on all Human Rights' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018).

⁸ Manfred Nowak and Anne Charbord, 'Key Trends in the Fight against Terrorism' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018).

⁹ Richard Barrett and Tom Parker, 'Acting Ethically in the Shadows: Intelligence Gathering and Human Rights' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018).

explore a topical issue in depth: the causes of terrorism, foreign terrorist fighters, intelligence gathering to counter terrorism, the preventive criminal justice approach against terrorism, and accountability of human right violations in countering terrorism. This structure works well. Unlike many other edited volumes, the editors have ensured that each chapter is firmly grounded within the book's main theme. The interplay between counter-terrorism efforts and human rights law runs as a common thread across all chapters. However, the strong focus on the overarching theme has also resulted in a not insignificant amount of repetition across chapters. Important international legal instruments, such as UN Security Council Resolution 1373 and UN Security Council Resolution 2178, are analysed on more than one occasion. Although a certain degree of overlap is inevitable due to the crucial role of these legal instruments and cases, it may make the book less attractive for those wishing to read it from cover to cover.

In Chapter 1, the editors set the scene by exploring the key trends in counter-terrorism at the international and national level in the aftermath of 9/11. The editors analyse how the initial Security Council resolutions, that blatantly disregarded human rights, were partly remedied by the more human rights friendly approach of the General Assembly. As a result, recent Security Council resolutions frequently contain a clause that requires states to implement them with full respect for human rights. Furthermore, Manfred Nowak and Anne Charbord persuasively spell out some of the key trends in counter-terrorism at the national level: the unhelpful use of the war paradigm in the counter-terrorism context, the externalisation of counter-terrorism measures, determined attempts at circumventing the prohibition of torture, increased reliance on intelligence information, and the use of various branches of law to counter terrorism.

After the lengthy yet perceptive opening chapter, the following seven chapters expertly and critically investigate the profound impact that counter-terrorism measures have had on human rights in various jurisdictions. As it is becoming increasingly clear that counter-terrorism measures 'now permeate nearly every

aspect of life',¹⁰ I will not seek to provide a comprehensive overview of the impact of such measures. However, I have distinguished four key themes that pervade the book, all of which must be addressed in order to avoid even more adverse consequences for human rights in the immediate future.

The first key theme is an enduring one: the absence of agreement on a definition of terrorism at the international level. As Fionnuala Ní Aoláin acutely observes in Chapter 4, this has led to a situation of 'conceptual and practical fuzziness around the obligations and limitations of states when addressing politically motivated violence'.¹¹ As highlighted by Martin Scheinin in Chapter 2, a proper definition of terrorism is crucial to limit the scope of application of counter-terrorism laws, which usually offer lower levels of protection to individuals than ordinary laws. In Chapter 8, Lisa Oldring explains how these definitional clouds at the international level have opened the door for the adoption of vague and broad laws at the national level, not only by totalitarian regimes but also in democratic societies that generally respect the rule of law.

The long-standing controversy about the definition of terrorism directly relates to the second key theme that emerges from the book: the ambiguities surrounding the intersection between terrorism and armed conflict. The foreign fighter phenomenon has evidenced the transnational character of modern-day terrorist organisations. The introduction of the new legal concept of the 'foreign terrorist fighter' in Security Council Resolution 2178¹² has led to a further conflation between legal regimes: counter-terrorism law, international human rights law, and international humanitarian law. In Chapter 5, Lisa Ginsborg persuasively argues that it is legally problematic as well as detrimental to the fundamental principle of belligerent equality if acts that are lawful under international humanitarian law, such as attacks on a state's military assets, are considered terrorist acts. This is precisely the reason why many of the international conventions against terrorism do not apply to situations of armed conflict. Ben Emmerson scrutinises, in Chapter 3, how the existence of an armed

¹⁰ Nowak and Charbord (n 5) 2.

¹¹ Ní Aoláin (n 6) 169.

¹² UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.

conflict, an intricate question of law and fact, determines the legality of lethal drone strikes which impact on the right to life. Manfred Nowak and Anne Charbord conclude that 'attempts at lowering the protection that individuals deserve by artificially applying the war paradigm to measures to counter-terrorism does not stand up to legal scrutiny'.¹³

The third key theme that is raised across the book is the growing recognition of the need to address the root causes of terrorism, including through a practice called 'countering violent extremism'. The occurrence of human rights violations due to excessive and discriminatory counter-terrorism measures has been identified as a major cause of terrorism. Conversely, respect for the rule of law and the promotion of human rights are recognised as indispensable to avoid the radicalisation of potential future terrorists. In Chapter 4, Fionnuala Ní Aoláin provides some invaluable insights into the conditions conducive to terrorism at the micro and macro level, highlighting the significant interplay between the various conditions. In Chapter 5, Lisa Ginsborg critically investigates the rise to prominence of the notion of 'countering violent extremism' (CVE) in international legal instruments. While a comprehensive response to prevent the radicalisation of terrorists, including radicalisation on the internet, should in principle be welcomed, Ginsborg rightfully warns that the broad concept of 'extremism' could lead to the abuse of human rights when left undefined.

The growing online presence of terrorist organisations brings us to the fourth key theme: the human rights impact of intelligence gathering and mass surveillance in counter-terrorism operations. In Chapter 6, Richard Barrett and Tom Parker analyse the pivotal role that intelligence gathering plays in the prevention of terrorist acts. Covert counter-terrorism action, such as surveillance of digital communications, inevitably tests the boundaries of the right to privacy. The insightful analysis by Barrett and Parker concludes that it is 'clearly possible to collect evidence on potential terrorism threats both at home and abroad entirely within the boundaries of existing human rights law'.¹⁴

¹³ Nowak and Charbord (n 2) 34.

¹⁴ Barrett and Parker (n 9) 239.

In Chapter 8, Lisa Oldring argues that the secrecy surrounding intelligence operations is often an obstacle to ensure accountability for human rights violations. In Chapter 7, Ulrich Garms scrutinises how some states make use of 'advanced criminalisation offences' in order to prevent terrorist acts before they reach the threshold of harmful conduct or punishable attempt. Such a preventive criminal justice strategy allows subjects to be put under surveillance at a rather early stage. As Martin Scheinin notes in Chapter 2, this has resulted in a situation in which 'the line between collection of evidence in a criminal setting and the collection of intelligence becomes more blurred'.¹⁵ Garms highlights the potentially detrimental impact of a preventive criminal justice strategy on the right to a fair trial, the right to privacy, and the principle of legality.

Notwithstanding the sometimes damning findings of human rights abuses that pervade the book, states have recognised the importance of respecting human rights while countering terrorism by making it one of the pillars of the United Nations Global Counter-Terrorism Strategy adopted in 2006.¹⁶ The authors of the excellent study under review have persuasively argued that many states have failed to match the rhetorical commitments set out in this strategy. The discrepancy between official rhetoric and state practice is flagrant. There is therefore no shortage of books on terrorism and counter-terrorism, including ones that are critical about the impact on human rights of counter-terrorism laws.¹⁷ However, this book stands out from other works in the field in several ways.

Firstly, the book addresses the human rights implications of various stages of counter-terrorism practice: the prevention of radicalisation (Fionnuala Ní Aoláin), the investigation of potentially dangerous individuals and the discovery of evidence (Richard Barrett and Tom Parker), the early preparatory phase of

¹⁵ Martin Scheinin, 'Impact of Post-9/11 Counter-Terrorism Measures on all Human Rights' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018) 109.

¹⁶ UNGA Res 60/288 (20 September 2006) UN Doc A/RES/60/288.

¹⁷ For a recent example, see: Satvinder Juss (ed), *Beyond Human Rights and the War on Terror* (Routledge 2018).

criminal acts (Ulrich Garms), and the aftermath of human rights violations (Lisa Oldring). Due to the depth and comprehensiveness of the research, the authors are able to reveal how counter-terrorism laws indeed permeate many aspects of life and why this should worry us. Secondly, the book thrusts the interplay between counter-terrorism and human rights to the forefront, addressing it from an international and comparative perspective. Other works on counter-terrorism are often focused on a specific jurisdiction¹⁸ or a specific thematic area¹⁹ and only deal with their interplay with human rights intermittently. As terrorists swiftly cross international borders, counter-terrorism efforts have become equally transnational, justifying the truly international outlook of the book. Thirdly, since terrorism and counter-terrorism are moving targets, keeping up with recent developments is essential. This book accurately captures some of the key developments that have taken place in recent years, such as the foreign fighter phenomenon, the blurring of the distinction between terrorism and armed conflict, and the rise to prominence of the 'countering violent extremism' phenomenon. As a result, it provides a welcome and timely update on some of the older literature from the decade immediately following 9/11.²⁰

In conclusion, this excellent book edited by Manfred Nowak and Anne Charbord tackles the interplay between human rights and counter-terrorism in a comprehensive, digestible, and convincing fashion. The authors navigate the intricate complexities of the interplay between human rights and counter-terrorism with great skill. They are unanimous in their assessment that respect for human rights is a prerequisite for long-term success in countering terrorism. However, I believe there is one important caveat: the real challenge may not lie in persuading legal academics and human rights advocates of the righteousness of these arguments. Those who are persuaded by the arguments elegantly expressed in this book should seek to convince the wider public, as well as those legislators that keep producing ineffective and counterproductive counter-

¹⁸ Cian Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Hart Publishing 2012); Clive Walker, *Terrorism and the Law* (Oxford University Press 2011).

¹⁹ Francesca Capone, Andrea de Guttry, and Christophe Paulussen (eds), *Foreign Fighters under International Law* (T.M.C. Asser Press 2016).

²⁰ *Ibid* (n 4).

terrorism laws. It is perhaps the only way to resolve the *vexata quaestio* addressed by this book once and for all. However, in these turbulent times, such an endeavour may well prove to be a Herculean task.