



## DPI Briefing Paper

# Counter-Terrorism Measures in Internal Armed Conflicts: The Obligations from International Law

## Introduction

There is no precise definition of terrorism agreed upon by the international community, in part because of the lack of consensus concerning the circumstances under which the challenge of state sovereignty by rebel groups may or may not be considered legitimate. The closest, albeit non-binding, wording available is the description of the United Nations Security Council's Resolution 1566 (2004), which states that terrorists commit 'criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act'.<sup>1</sup>

Terrorist attacks can have devastating consequences on the right to life and liberty, and directly attack the integrity of Governments, civil society, and economic activity, thereby threatening the enjoyment of fundamental human rights by all. This means that states, which have a fundamental duty to safeguard the rights of their citizens, 'have not only a right but a duty to take effective counter-terrorism measures'.<sup>2</sup> At the same time, it has been recognized that counter-terrorism measures carried out by states engaged in non-international armed conflicts have frequently themselves come into conflict with the upholding of basic human rights, as enshrined by international law and humanitarian law standards.<sup>3</sup>

This short briefing paper will set out the applicability of international obligations to situations of counter-terrorism or military operations in non international armed conflicts, and address some of the key issues arising in this complex area of international human rights law.

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<sup>1</sup> United Nations Security Council Resolution 1566 (2004), p.2

<sup>2</sup> Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism, and Counter-terrorism: Fact Sheet No.32*, p.19

<sup>3</sup> Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism, and Counter-terrorism: Fact Sheet No.32*, p.24

## The International Bill of Human Rights

International Human Rights Law is primarily derived from two principal, legally binding treaties, themselves derived from the Universal Declaration of Human Rights (UDHR): the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), both adopted in 1966 and entering into force in 1976. Together with the UDHR, they constitute the International Bill of Human Rights.<sup>4</sup>

The International Bill of Human Rights provides for three different kinds of human rights: absolute rights, limited rights, and qualified rights. There is no justification for violating *absolute* rights, such as protection from slavery and freedom from torture, inhuman, or degrading treatment. *Limited* rights, such as the right to liberty, are those which are expressed in absolute terms but from which there may be derogations within strictly defined limits laid out in the text of the ICCPR and ICESCR. The right to liberty, for example, can be taken from an individual after the proceedings of a fair trial. Finally, *qualified* rights are those rights which may come into conflict with the rights of others, and hence permit restrictions to be made on them in order to balance out the competing rights of different actors, such as the individual and society.<sup>5</sup> Rights which are qualified include the right to freedom of expression, association, and the right to a private life.<sup>6</sup>

Both limited and qualified rights are derogable. This means that, in times of emergency that threaten the life of the nation, a state may aver from full observation of these rights in order to meet its security needs. To do so, states must publicly state that an emergency exists, and the nature, purpose, and expected length of its planned period of derogation.<sup>7</sup> Significantly, qualified rights may only be legally limited if their limitation has been shown by states to be necessary, proportional, and non-discriminatory:<sup>8</sup> the existence of a state of emergency, in itself, is no guarantee that derogations will be lawful.<sup>9</sup> Derogations must also be subject to periodic review, which 'includes scope, duration, and manner of implementation'.<sup>10</sup> Article 4

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<sup>4</sup> OSCE, *Countering Terrorism, Protecting Human Rights: Manual*, p.44

<sup>5</sup> OSCE, *Countering Terrorism, Protecting Human Rights: Manual*, p.66

<sup>6</sup> The International Covenant on Civil and Political Rights, International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, allows under Article 4 for derogations to articles other than numbers 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18.

<sup>7</sup> International Covenant on Civil and Political Rights, Article 4 (3): 'Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.'

<sup>8</sup> OSCE, *Countering Terrorism, Protecting Human Rights: Manual*, p.68

<sup>9</sup> HRC, General Comment No. 29: States of Emergency (article 4), doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 6: 'the fact that some of the provisions of the Covenant have been listed in Article 4 (paragraph 2), as not being subject to derogation does not mean that other Articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists.'

<sup>10</sup> OSCE, *Countering Terrorism, Protecting Human Rights: Manual*, p.89

of the ICCPR prescribes that states may only aver from full observance of articles of the covenant to 'the extent strictly required by the exigencies of the situation'. Moreover, any measures must never include 'discrimination solely on the ground of race, colour, sex, language, religion or social origin'.<sup>11</sup>

## **International Criminal Law**

### ***The Fourth Geneva Convention (Article 3)***

In addition to the International Bill of Human Rights, the Fourth Geneva Convention and its additional protocols are considered binding to all states<sup>12</sup> and together constitute a vital legal authority on issues relating to counter terrorism. Article 3 of the Fourth Geneva Convention outlines the mandatory basic necessities an authority must provide to any population under its authority, regardless of security concerns, during non-international armed conflicts. Non international conflicts are protracted, armed confrontations occurring between government forces and the forces of one or more armed, organised groups.<sup>13</sup> This means that counter terrorist operations which pit the government against an armed, organised militant group over a sustained period of time, during which significant military engagement occurs, are very likely to meet the definition of an internal armed conflict. Along with reiterating the responsibility of states to uphold the fundamental rights including the right to life, the right to freedom from torture, and the right to a fair trial,<sup>14</sup> Article 3 also forbids the taking of hostages, and stipulates that 'the wounded and sick shall be collected and cared for'.<sup>15</sup>

### ***The Fourth Geneva Convention ( Additional Protocol II)***

The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), applies to state parties engaged in non-international armed conflicts. It reiterates that states may not interfere with the provision of basic items essential for the survival of the civilian population,<sup>16</sup> and take steps to ensure their supply if the civilian population is in need. These

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<sup>11</sup> International Covenant on Civil and Political Rights, Article 4, Section 1

<sup>12</sup> While initially binding to signatories only, in 1993 the United Nations adopted a report from the Secretary General and commission of experts concluding that the Fourth Geneva Convention, in its entirety, had passed into the body of international customary law and is thus binding to all states. *Statute of the International Criminal Tribunal for the former Yugoslavia, Security Council resolution 827 (1993)*, 25 May 1993

<sup>13</sup> International Institute of Humanitarian Law, *The Manual* (2006), 1.1.1, see also International Committee of the Red Cross *Opinion Paper 2008*

<sup>14</sup> Fourth Geneva convention, Article 3 (1)

<sup>15</sup> Fourth Geneva Convention, Article 3 (2)

<sup>16</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 14: 'Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas

items include foodstuffs, drinking water,<sup>17</sup> and medical supplies.<sup>18</sup> This absolute requirement for states to ensure that the basic needs of civilians are provided for is further affirmed in international humanitarian law.<sup>19</sup> In non-international (as well as international) armed conflicts, states must ensure that the wounded and sick must receive treatment 'to the fullest extent practicable and with the least possible delay'.<sup>20</sup> This means that, as with those rules dealing with the provision of medical care during international armed conflicts, states engaged in non international armed conflicts must at all times refrain from interference with the provision of medical services and, if medical care is not available, take whichever steps are available to them to remedy the situation.<sup>21</sup> As the 1987 commentary explicitly affirms, the obligation for states to ensure that the wounded and sick receive medical treatment is essential to ensure that states engaged in internal armed conflicts are not in violation of humane treatment, a fundamental right,<sup>22</sup> and constitutes a foundational rule in international humanitarian law.<sup>23</sup>

## Customary International Law

The International Bill of Human Rights and Additional Protocol II to the Fourth Geneva Convention do not make reference to terrorism specifically. The way in which the rules they lay out relate to terrorism can be best discussed with reference to international customary law, which relates three cardinal rules for those engaged in anti-terror operations

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for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.'

<sup>17</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 14

<sup>18</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 7 (2): 'In all circumstances they [the wounded, sick and shipwrecked] shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

<sup>19</sup> Declaration of Minimum International Humanitarian Standards, Article 3(f): 'deliberate deprivation of access to necessary food, drinking water and medicine [is prohibited]. If these have not been deliberately deprived but are not forthcoming the Declaration treats international humanitarian organisations as the source of remedy, and stipulates that states grant them 'all the facilities necessary' (Article 15) to perform these duties.

<sup>20</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 7

<sup>21</sup> Fourth Geneva Convention, Article 55

<sup>22</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 6, Part III, 1987 commentary (4632): 'the right of the wounded, sick and shipwrecked to receive aid is a fundamental guarantee of humane treatment in a specific situation'

<sup>23</sup> Declaration of Minimum International Humanitarian Standards, Article 12: 'In every circumstance, the wounded and sick, whether or not they have taken part in acts of violence, shall be protected and treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them on any grounds other than their medical condition.'

concerning necessity, distinction, and proportionality.<sup>24</sup> Two of the most authoritative sources of customary international law, the Declaration of Minimum International Humanitarian Standards and the International Committee of the Red Cross' Customary International Law Study, will be drawn from further here to illustrate these rules.

### ***The Principle of Necessity***

It is recognised that counter terrorism operations may breach certain human rights, and there are circumstances under which the property, livelihood, and even lives of non-combatants may be risked.<sup>25</sup> If this is to be legal, any measures implemented must first comply with the principle of *necessity*. This means that they can only be performed if they are necessary to achieve legitimate military objectives.<sup>26</sup> Operations intended to instil fear into the general population,<sup>27</sup> or to collectively punish the general population,<sup>28</sup> for example, are not legitimate military objectives and are hence forbidden.

### ***The Principle of Distinction***

Once the principle of necessity has been satisfied, states must adhere to the principle of *distinction* in their pursuit of their security objectives. The principle of distinction is the requirement to at all times distinguish between civilians and combatants.<sup>29</sup> This is supported by the Additional Protocol II and the Declaration of Minimum Humanitarian Standards, which both expressly state that attacks against civilians are forbidden and measures that may harm civilians are heavily restricted.<sup>30</sup> The principle of distinction means that, among other measures, states must limit their military operations to those objects, such as territory, installations, and buildings, which make an effective contribution to military action and whose destruction offers a definite military advantage.<sup>31</sup> Any military operations which

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<sup>24</sup> The most comprehensive studies of customary international law, which will be drawn from here, are the ICRC *Customary International Law Study* (2005) and the International Institute of Humanitarian Law's *The Manual* (2006)

<sup>25</sup> This follows from the general principles enshrined in the International Bill of Human Rights that the pursuit of fundamental human rights, of which security is integral to, may mean others may be compromised; see ICCPR, Article 4, which is discussed above.

<sup>26</sup> ICRC Casebook, 05-06-2012 Glossary: 'The principle of military necessity is, like the related principle of proportionality, an essential component of international humanitarian law. The "principle of military necessity" permits measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by international humanitarian law. In the case of an armed conflict the only legitimate military purpose is to weaken the military capacity of the other parties to the conflict.'

<sup>27</sup> Declaration of Minimum International Humanitarian Standards, Article 6: 'Acts or threats of violence the primary purpose of foreseeable effect of which is to spread terror among the population are prohibited.'

<sup>28</sup> ICRC, Customary International Humanitarian Law Study, Rule 103: 'Collective punishments are prohibited.'

<sup>29</sup> ICRC, Customary International Humanitarian Law Study, Rule 1: 'parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.'

<sup>30</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 13, and Declaration of Minimum International Humanitarian Standards, Article 5

<sup>31</sup> ICRC, Customary International Humanitarian Law Study, Rule 8: 'In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective

treat an area which contains military objectives along with civilians and/or civilian property as a single target will breach the principle of discrimination and are as such completely forbidden.<sup>32</sup> Acknowledging and adhering to the principle of distinction means taking all feasible measures to avoid if possible, and minimise in any case, harm to civilians.<sup>33</sup>

### ***The Principle of Proportionality***

Thirdly and crucially, when determining the best course of action to counter terrorism, states must abide by the principle of *proportionality* if their actions are to be legal under international law.<sup>34</sup> This can be a complex task, requiring states to weigh up the expected benefits of an action versus the chance of harm to civilians, and means that an area exists where the legality or illegality of an action taken depends on contextual factors balancing the need to safeguard human rights with the need to counter terrorism, itself derived from the duty of the state to safeguard the rights of the people.<sup>35</sup> It also means that even where a legitimate security goal exists and where care is taken to distinguish between civilian and military targets, an operation may be illegal if it extracts too high a human cost for too meagre a security gain.<sup>36</sup> It should be remembered that counter-terrorist operations which cause the wider population to incur heavy penalties, particularly if they are both unnecessary to counter, and disproportionate to the scale of, the terrorist threat faced, are at risk of qualifying as collective punishment, the act of punishing a wider group because of their association with the actions of certain individuals.<sup>37</sup> Collective punishment is completely forbidden under international law, which holds that a person must not be punished for a crime that she or he is not responsible for.<sup>38</sup>

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contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.'

<sup>32</sup> ICRC, Customary International Humanitarian Law Study, Rule 13: 'Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited.'

<sup>33</sup> ICRC, Customary International Humanitarian Law Study, Rule 17: 'Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.'

<sup>34</sup> ICRC, Customary International Humanitarian Law Study, Rule 14: 'Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.' See also the Declaration of Minimum International Humanitarian Standards, Article 5 (2): 'Whenever the use of force is unavoidable, it shall be in proportion to the seriousness of the offence or the objective to be achieved.'

<sup>35</sup> See International Institute of Humanitarian Law, *The Manual*, 2006, 2.1.1.4 Proportionality: 'an attack is forbidden if it may be expected to cause incidental loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'

<sup>36</sup> For further discussion see Kerim Yildiz and Susan Breau, *The Kurdish Conflict: International Humanitarian Law and Post-Conflict Mechanisms*, Routledge 2010, p.73-75

<sup>37</sup> The accepted definition of collective punishment derives from the Hague Regulations (1899), Article 50: 'No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly or severally responsible'

<sup>38</sup> Eg. Declaration of Minimum Humanitarian Standards, Article 3 (b); ICRC, Rule 103

## **Review: International Law and Counter-Terrorism**

*International law governing counter-terrorism operations is primarily derived from the following:*

### **International Bill of Human Rights**

- Binding to all states signatory to the ICCPR and the IESCR.
- Outlines the fundamental human rights, which states engaged in counter terrorism operations must respect at all times and under all circumstances, e.g the right to freedom from torture.
- Outlines those rights which are restricted and qualified, and the situations where these rights may be (narrowly) circumscribed, e.g freedom of movement.

### **Fourth Geneva Convention (Article 3)**

- Binding on to all states engaged in non-international armed conflicts.
- Reiterates the responsibility of states to uphold fundamental rights including the right to life, the right to freedom from torture.
- Forbids the taking of hostages and require states to take every measure feasible to ensure that the wounded and sick receive medical treatment.

### **Fourth Geneva Convention (Additional Protocol II)**

- Binding on all states engaged in non-international armed conflict.
- Requires that states ensure the provision of basic necessities to the civilian population and refrain from interfering with the provision of, and provide themselves if none is forthcoming, of medical treatment for the sick and injured.

### **International Customary Law**

- Binding on all parties, including states parties, engaged in conflict. Is laid out, in particular, in the Declaration of Minimum International Humanitarian Standards and International Committee of the Red Cross, Customary International Humanitarian Law Studies.
- Requires that all counter-terrorism operations must pass the tests of necessity, distinction, and proportionality, in order to be permissible under international law.

## Counter-terrorism and International Human Rights Law: Case Study

### *The Case of Isayeva v Russia*

A particularly salient example of how international human rights law relates to military counter-terrorism operations conducted by states is the case of *Isayeva v Russia*. The case concerned a bombardment of a village in Chechnya by Russian fighter jets following the entry into the village of large number of rebel forces designated terrorists by the Russian state.<sup>39</sup> The European Court of Human Rights found in favour of the applicant, who alleged that the Russian state had acted illegally by engaging in indiscriminate bombings.

In the applicants favour was two key factors. Firstly, while the Court agreed with the Russian state that the security situation called for exceptional military measures,<sup>40</sup> no state of emergency had been officially and publicly declared in Chechnya.<sup>41</sup> Secondly, the 'massive use of indiscriminate weapons' combined with the failure to take action to protect the villagers from violence<sup>42</sup> violated the principles of necessity, distinction, and proportionality. The operation had failed to pursue the most necessary goal (the protection of civilians); had through bombardment of a single area containing a high density of civilian targets failed to abide by the principle of distinction; and thereby, failed to achieve a balance between the aim pursued and the means employed to achieve it, running afoul of the principle of proportionality.<sup>43</sup>

## Human Rights and Counter-Terrorism: Examples

To give further context to the legal relationship between human rights and counter-terrorism measures under international law, some of the most common rights which counter-terrorism measures have often violated are outlined below.

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<sup>39</sup> *Isayeva v Russia*, 57950/00

<sup>40</sup> *Isayeva v Russia*, 57950/00 (180) 'The Court accepts that the situation that existed in Chechnya at the relevant time called for exceptional measures by the State in order to regain control over the Republic and to suppress the illegal armed insurgency.'

<sup>41</sup> *Isayeva v Russia*, 57950/00 (191)

<sup>42</sup> *Isayeva v Russia*, 57950/00 (191) 'Even when faced with a situation where, as the Government submit, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters, the primary aim of the operation should be to protect lives from unlawful violence. The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents.'

<sup>43</sup> *Isayeva v Russia*, 57950/00 (181): 'Accepting that the use of force may have been justified in the present case, it goes without saying that a balance must be achieved between the aim pursued and the means employed to achieve it.'



### ***Right to Life***

Every human being has the inherent right to life.<sup>44</sup> The right to life is not entirely absolute, but exceptions must be construed narrowly.<sup>45</sup> There are instances when the use of lethal force by state actors is justified: defence of persons, arrest, preventing escape and pacifying a riot or insurrection are the common limitations.<sup>46</sup> To be legal, lethal force must be demonstrated to be absolutely necessary to perform any of the above actions. In *Güleç v. Turkey*, for example, the ECHR found that Turkish gendarmes had violated human rights by using lethal force to quell rioters, when appropriate, non-lethal measures could have been used instead. Citing the need for proportionality and necessity, the Court stated that 'it goes without saying that a balance must be struck between the aim pursued and the means employed to achieve it'.<sup>47</sup>

### ***Right to Freedom of Movement***

The right to freedom of movement is enshrined in Article 12 of the International Covenant on Civil and Political Rights.<sup>48</sup> It is a relative right, and as such may be restricted, if its restriction is required to protect public security and the rights and freedoms of others.<sup>49</sup> As with other relative rights, tests of proportionality and necessity must be applied if it is to be derogated from. One example of when these tests failed is in the case of a wall built by the Israeli state through the Occupied Palestinian Territories.

The Advisory Opinion of the International Court of Justice was that the wall violated the freedom of movement of a number of Palestinians, which in turn compromised their ability to access other rights, such as to clean water and employment. In considering Israel's case, the ICJ acknowledged that human rights law contained provisions for derogation that may be called upon by states to satisfy their national security needs, but that such derogations must be proportionate and necessary. In this case, the ICJ was not convinced that the route Israel had chosen for the wall was necessary to achieve its security objectives of protection from terror attacks; this

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<sup>44</sup> International Covenant on Civil and Political Rights, Article 6 (1): 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

<sup>45</sup> Article 2(2) ECHR; See also OSCE, *Countering Terrorism, Protecting Human Rights: Manual*, p.108

<sup>46</sup> OSCE, *Countering Terrorism, Protecting Human Rights: Manual*, p.108

<sup>47</sup> *Op.cit.*, note 252, ECHR, *Güleç v. Turkey*, para. 71.

<sup>48</sup> International Covenant on Civil and Political Rights, Article 12 (1): 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.'

<sup>49</sup> International Covenant on Civil and Political Rights, Article 12 (3): 'The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.'

meant that the damage done to the human rights of Palestinian residents was unnecessary, and hence in violation of international human rights law.<sup>50</sup>

### ***Right to Freedom of Association***

The right to freedom of association is the individual's right to leave or join groups of their own choosing.<sup>51</sup> The UN Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism has expressed concern that 'vague and broad definitions of terrorism, or the absence of such a definition, inhibit the work of associations that do not pursue terrorist tactics'.<sup>52</sup> Freedom of association is violated when a group is banned despite not calling for violence, and not rejecting democratic principles;<sup>53</sup> the ECtHR has also upheld bans on groups which either advocate violence or values counter to fundamental democratic principles.<sup>54</sup>

### ***Right to Freedom of Expression***

The right to freedom of expression is one of the cornerstones of democratic society,<sup>55</sup> a vital right which, like freedom of association, is a 'platform for the defence and exercise of other rights', which has 'often been limited by states in their response to a real or perceived terrorist threat'.<sup>56</sup> Restrictions to the right of freedom of expression are permitted by states if said expression constitutes an incitement to violence; indeed, the Council of Europe's Convention on the Prevention of Terrorism requires states to criminalize the provocation or incitement to commit terrorist offences.<sup>57</sup> In order to do so, states must demonstrate that the expression glorifies violence or that it can be expected to incite others to violence.<sup>58</sup>

In weighing whether the restriction of expression is lawful, states must also consider the public's right to be informed of alternate views. In *Sener vs Turkey*, the ECHR ruled that 'States cannot, with reference to the protection of national security or the prevention of crime and disorder, restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media'.<sup>59</sup> Moreover, states which in their prohibition of incitement to terror include clauses which ban vaguer terms, such as promotion or glorification of terrorist acts, risk infringing on

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<sup>50</sup> *Op. cit.*, note 124, ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

<sup>51</sup> Universal Declaration of Human Rights, Articles (20) and (23)

<sup>52</sup> *Op. cit.*, note 640, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr. Martin Scheinin, para. 23.

<sup>53</sup> OSCE, *Countering Terrorism, Protecting Human Rights: Manual*, p248

<sup>54</sup> Eg. *Refah Partisi v Turkey*, 2003

<sup>55</sup> OSCE, *Countering Terrorism, Protecting Human Rights: Manual*, p.219

<sup>56</sup> Office of the United Nations, Factsheet No.32, Human Rights, Terrorism, and Counter-Terrorism, p.43

<sup>57</sup> Council of Europe, Convention on the Prevention of Terrorism, Article 5 (2)

<sup>58</sup> OSCE, *Countering Terrorism, Protecting Human Rights: Manual*, p.220

<sup>59</sup> *Sener vs Turkey*, 2000, para. 42

the right to freedom of speech, which permits individuals to express sentiments that, however distasteful members of the general public may find them, are not in themselves a direct incitement to violence.<sup>60</sup>

### ***Right to a Private and Family Life***

The recognition of the right to a private and family life, as enshrined in the ICCPR,<sup>61</sup> entails the understanding that ‘the state should not be permitted to intrude into the private sphere in the absence of strict justification.’<sup>62</sup> It is important to note that ‘private life’ should be understood to encompass the ability to conduct relationships with other human beings and perform activities of a professional nature.<sup>63</sup> While the state may derogate from these rights if they are absolutely necessary for security purposes, counter-terrorism operations which entail restrictions on the right to a private and family life, such as the destruction of homes,<sup>64</sup> without sufficient justification, are a violation of international human rights laws.

### ***Social and Economic Rights***

All people have the right to a range of social and economic rights relating to their right to ‘freely pursue their economic, social and cultural development’.<sup>65</sup> Enshrined in the International Covenant on Economic, Social, and Cultural Rights, these include the right to education,<sup>66</sup> the right to employment,<sup>67</sup> the right to secure medical treatment,<sup>68</sup> and the right to enjoy an adequate standard of living.<sup>69</sup> These rights

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<sup>60</sup> See *International mechanisms for promoting freedom of expression*, joint declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression (21 December 2005).

<sup>61</sup> ICCPR, Article 17 (1): ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation’

<sup>62</sup> OSCE, *Countering Terrorism, Protecting Human Rights: Manual*, p.197

<sup>63</sup> ECtHR, *Amann v. Switzerland*, Application no. 27798/95, 16 February 2000, para. 44; op. cit., note 668, ECtHR, *Rotaru v. Romania*, para. 43.

<sup>64</sup> ECtHR, *Bilgin v. Turkey* para. 108.

<sup>65</sup> International Covenant on Economic, Social and Cultural Rights, Article 1 (1): ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.

<sup>66</sup> ICESCA, Article 13 (1): ‘The States Parties to the present Covenant recognize the right of everyone to education.’

<sup>67</sup> ICESCA, Article 9 (1): ‘The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.’

<sup>68</sup> ICESCA, Article 12 (4): ‘The creation of conditions which would assure to all medical service and medical attention in the event of sickness’

<sup>69</sup> ICESCA, Article 11 (1): ‘The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent’

may be subject to certain limitations only so much as they are necessary 'solely for the purpose of promoting the general welfare in a democratic society'.<sup>70</sup>

Large counter-terrorism operations mounted by state actors which affect a large population have the potential to violate the social and economic rights of this population. Indeed, the denial of certain social and economic rights can also breach absolute rights; for example, the denial of medical treatment constitutes a breach of the freedom from torture, inhuman, or degrading treatment,<sup>71</sup> and denial of access to basic resources necessary for survival, such as food and water, is a breach of the right to life.

## **Conclusion: Obligations of States engaged in Counter-Terrorism Operations under International Law**

Counter-terrorist operations mounted against insurgent groups are inevitably complex balancing acts, in which the duty of the state to protect the fundamental human rights of its people must be weighed against the dual duty to uphold the human rights of people affected by military actions. Yet there does exist a clear legal framework under international law, outlined in this paper, which places concrete obligations on states engaged in counter-terrorism.

In summary, the International Bill of Human Rights requires all signatories to refrain from violating fundamental, non-derogable human rights. They may only limit derogable rights in a publicly-declared state of emergency, which must be subject to periodic review taking into account the scope and duration of its effect. As outlined in the Fourth Geneva Convention, all states engaged in non-international conflict have an obligation to take all possible measures to provide the civilian population with all the basic necessities essential to life, and moreover, to ensure that all those seeking medical attention, regardless of combatant or non-combatant status, receive it.

In engaging in counter-terrorism operations, international customary law requires that all measures taken pass the test of necessity and of distinction: any violation of human rights must be shown to be needed in order for the state to uphold its fundamental duty to safeguard security.<sup>72</sup> In addition, counter-terrorism methods must be proportionate, which means that any infringement legal under international law will be the minimum

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<sup>70</sup> ICESCA, Article 4: 'The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.

<sup>71</sup> OSCE, *Countering Terrorism, Protecting Human Rights: Manual*, p.133

<sup>72</sup> International Institute of Humanitarian Law, *The Manual*, 2006. 1.2.1 Introduction: 'all military operations must comply with the principles of distinction, prohibition of unnecessary suffering, and humane treatment'

infringement required to achieve security goals.<sup>73</sup> Finally, the binding and absolute obligation of states to provide effective redress for the victims of human rights violations<sup>74</sup> means that where the counter terrorism operations of states have infringed on human rights, states have an obligation to provide effective redress of these rights as soon as they are able.<sup>75</sup>

With this in mind, governments may be served well by remembering that measures which violate the rights of the wider population generally prove counter-productive to the effort against terrorism, both by inculcating disaffection and hostility amongst people whom may otherwise be counted upon as allies, and by widening the recruitment pool of terrorists. It is for this reason, amongst others, that international arbitrators on human rights law have continuously stressed that 'respect for human rights and the rule of law must be the bedrock of the global fight against terrorism'.<sup>76</sup>

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<sup>73</sup> International Institute of Humanitarian Law, *The Manual*, 2006. 2.1.1.4 Proportionality: 'an attack is forbidden if it may be expected to cause incidental loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'

<sup>74</sup> International Covenant for Civil and Political Rights, Article 2 (3a): 'To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity'

<sup>75</sup> Human Rights Committee, General Comment No. 29: States of Emergency (article 4), doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 6. For more discussion see OSCE, *Countering Terrorism, Protecting Human Rights: Manual*, p.89-90

<sup>76</sup> Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-terrorism Fact Sheet No. 32*, p.22