

House Foreign Affairs Committee
Tom Lantos Human Rights Commission

Hearing
on
Counter-terrorism and Human Rights: Striking the Right Balance

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Statement of Tom Parker
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There is a common misconception that one often encounters in the national security arena to the effect that successful counter-terrorism operations and human rights observance are somehow antagonistic concepts. One approach is typically considered ‘hard’ and the other ‘soft’. In fact, history consistently teaches us that counter-terrorism efforts are actually most effective when conducted within a human rights framework, and most counterproductive when conducted in defiance of international human rights law. It is for this reason that one of the four pillars of the United Nations Global Counter-Terrorism Strategy, adopted unanimously by Member States in 2006, is ensuring respect for human rights and the rule of law.

Terrorism is a contingent political strategy. At the outset, terrorist groups are by their very nature marginal, lacking in popular support, and limited in terms of the physical force they can project. Even the weakest states are powerful in comparison, with access to far more substantial resources in terms of men, material and treasure. Left to their own devices, terrorists will rarely possess sufficient force to successfully attain their political goals. The key insight of generations of terrorist conspirators has been to explicitly seek to turn the state’s strength to their advantage, provoking government after government to overreact to the threat they pose by introducing draconian security measures, curtailing civil liberties, and infringing established human rights protections. This in turn results in a greater polarization of the population, the radicalization of greater numbers of the terrorists’ potential constituents, and the undermining of the state’s legitimacy both at home and abroad. This strategy has been appositely described as “political jujitsu.”

Terrorists are typically enthusiastic self-publicists, and group after group has published pamphlets, communiqués, and manuals explaining both what they are trying to achieve and how they are hoping to achieve it. The operational doctrine I have just outlined has been explicitly referenced in terrorist literature for more than 150 years by terrorist organizations of diverse political character and active on almost every continent. The idea that the state can be deliberately provoked into

acting in such a manner as to give rise to greater opposition can be traced back at least as far as the 1850s and Karl Marx's articles on *The Class Struggles in France 1848–1850* and Pierre-Joseph Proudhon's influential monograph *A General Idea of the Revolution in the Nineteenth Century*. It can be found in Sergei Nechaev's *Catechism of the Revolutionist* and Peter Kropotkin's *Spirit of Revolt*. It was written into the *Handbook for Volunteers of the Irish Republican Army*. The Basque separatist group ETA formally adopted a concept of operations it called the "Action–Repression–Action" thesis. The Italian Red Brigades embraced a similar approach that became known as "*tanto peggio, tanto meglio*," literally "the worse, the better." For *Fateh* this strategy was known as *al-taffir al-mutasalsil* or "consecutive detonation." In his book *Knights under the Prophet's Banner* the current leader of *al-Qaeda*, Ayman al-Zawahiri, expressed his belief that provoking international conflict would be an effective strategy for mobilizing what he termed domestic resistance in the Muslim world. *Al-Qaeda* insider Abu Bakr Naji published *The Administration of Savagery* expounding on this strategy in more detail. In 2015, the ISIS publication *Dabiq* devoted an issue to what it termed *The Extinction of the Gray Zone*. This is just a small sample of the readily accessible terrorist tracts that articulate this strategic approach. It should not come as a surprise to anyone working in counter-terrorism that this goal exists, and yet it always seems to catch counter-terrorists by surprise, so much so that the academic Louise Richardson has identified what she has termed "a pathology of state overreaction". Time and time again states fall right into the trap terrorists have laid for them.

Furthermore, we know from extensive field research that experience of state violence, whether direct or indirect, is one of the primary drivers of terrorism. Terrorist groups are typically dynamic enterprises with fluctuating and elastic membership. Individuals join and leave the fight in response to a variety of internal and external factors, but the desire to avenge the loss or injury of a loved one is one of the most commonly cited motivations for taking up arms. When the injury is perceived as being particularly unjust that effect is magnified. A United Nations Development Programme study, *Journey to Extremism in Africa*, which interviewed 495 current and former African militants and found that 71% cited government action, including the "killing of a family member or friend" or the "arrest of a family member or friend," as the tipping point that prompted them to join a terrorist group. The authors concluded that state security-actor conduct could often be considered "a prominent accelerator of recruitment, rather than the reverse." A February 2017 survey conducted in North East Nigeria by the Network for Religious and Traditional Peacemakers found that 57% of former Boko Haram fighters they interviewed identified a desire for revenge as having had a major influence on their decision to join Boko Haram. There are numerous studies from conflicts as diverse as Northern Ireland, Afghanistan, and Somalia that have reached similar conclusions. A cross-national empirical study conducted by James Walsh and James Piazza found that countries with a poor human rights record were also more likely to experience both domestic and transnational terrorist attacks. Terrorist leaders have long intuitively understood that violence begets violence and that aggressive government action against their constituents can be a powerful recruitment tool. The founding emir of the Pakistani *Tehrik-i-Taliban*, Baitullah Mehsud, once

boasted: “Each drone strike brings me three or four more suicide bombers.” To be sure, not every abused individual becomes a terrorist, nor equally has every terrorist necessarily suffered personally from human rights abuses at the hands of the state. It is simply a common, perhaps the most common, feature of radicalization case studies.

It doesn't have to be this way. International human rights law and international humanitarian law provide a framework within which lawful state responses to terrorism should be conducted. This framework makes provision for wide-ranging international cooperation on counter-terrorism, establishes the benchmarks that characterize genuinely democratic societies, and creates an international regime of protection for fundamental human rights — such as the right to life, the right to liberty, the right to freedom of conscience, and the right to privacy —to ensure that individuals enjoy a measure of protection from the unbridled power of the state and from the predations of terrorist actors. Executive powers are limited for the most part by the requirement that due process is observed in their application and that they are used in a manner that is reasonable, necessary and proportionate to the threat posed by criminal activity. This actually provides states with considerable latitude in responding to terrorist threats, so long as they do not cross some fundamental red lines: states cannot detain suspects indefinitely without trial; states cannot torture suspects or render them to be tortured elsewhere; and states cannot murder suspects with impunity. Any deviation from the “fundamental principles of fair trial” — including the presumption that a suspect is innocent until proven guilty — is completely prohibited.

International human rights law anticipates that states will need to surveil, eavesdrop on and otherwise clandestinely collect information on the person and activities of terrorist actors using skilled surveillance professionals, technical devices, covert searches, informants, and undercover officers. It simply requires, once again, that these tools are used lawfully in a manner that is reasonable, necessary and proportionate to the threat posed by the criminal activity in question. There is a growing body of international jurisprudence that delineates where the line between proportionate and disproportionate action should be drawn. Navi Pillay, the former UN High Commissioner for Human Rights, purposely acknowledged the vital role that intelligence collection plays in the prevention of terrorist violence, publicly stating: “The use of accurate intelligence is indispensable to preventing terrorist acts and bringing individuals suspected of terrorist activity to justice.” The Council of Europe's Committee of Experts on Special Investigation Techniques in relation to Acts of Terrorism has likewise noted: “The objective of the European Convention on Human Rights is not to disarm the authorities responsible for prevention or prosecution in criminal matters. The Convention sets out criteria in order that the authorities' activities should constantly be guided by the rule of law and the pursuit of the democratic ideal.”

Perhaps the investigative activity that has received the most attention since the September 11 attacks is the interviewing of terrorist suspects, and specifically the use of coercive measures by the interviewers. The potential to question a terrorist suspect obviously represents an important information-gathering opportunity. There is unquestionably great value to a cooperating suspect

who is prepared to provide answers to his interlocutors' questions openly, honestly, and to the best of his or her ability. But there is a universe of difference between rapport-based conversations and coerced speech. The simple fact is that both can result in the production of truthful or deceptive statements. However, it is important to understand that any testimony obtained only represents one stage of any competent investigation, and, until such testimony is tested, analyzed, and compared to other relevant evidence or intelligence, the wise investigator is going to place very little store in it in isolation. History is replete with examples of hardened terrorists who have ended up cooperating with the authorities in rights-based police interviews. The Norwegian right-wing extremist mass murderer Andreas Behring Breivik and Osama bin Laden's former driver Salim Hamdan are both examples of cooperative interview subjects. Equally, there are many well-documented examples of motivated terrorists successfully either protecting their secrets or proffered false or misleading information to their torturers. Moreover, the unlawful use of coercive methods comes with a host of both legal and utilitarian downsides, not least the vulnerability of this approach to confirmation bias, the not uncommon concomitant risk of torturing an innocent individual, the personal criminal liability of the torturer (torture is an international crime with no statute of limitations), and the catastrophic damage to the reputation of the state that allows such methods. Former CENTCOM Commander and Director of the CIA David Petraeus, once observed: "Abu Ghraib and other situations like that are non-biodegradable. They don't go away. The enemy continues to beat you with them like a stick."

The avowed purpose of most counter-terrorism investigations is the arrest, conviction and subsequent incarceration of suspected terrorists, and international human rights law offers many different frameworks within which a state may detain a terrorist suspect or convicted terrorist: administrative detention, pre-trial detention, punitive detention, and the confinement of prisoners of war. The fundamental principle governing all these forms of detention is that that "no one shall be subjected to arbitrary arrest or detention" or "deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." The drafters of the International Covenant on Civil and Political Rights made it clear in their preparatory work that "arbitrariness" should not simply be equated with "unlawful" but should rather be interpreted more broadly "to include elements of inappropriateness, injustice, lack of predictability, and due process of law." No derogation from the customary international law prohibition on arbitrary detention is possible. Secret detention and enforced disappearance, practices closely associated with torture, are similarly prohibited and may, if used in a widespread or systematic manner, amount to crimes against humanity. It is difficult to imagine a compelling argument that these basic principles present an obstacle to successful counter-terrorism operations.

The last main category of executive action is the use of force. Force is an extremely broad concept in international law, with lawful forms of compulsion extending from the verbal notice of arrest and minimal physical restraint at one end of the spectrum, to the use of potentially lethal weapons at the other. As with other areas of executive action, international human rights law imposes two

core obligations on officials who are lawfully empowered to use force in performance of their duties—that force is used only when it is necessary to do so, and that, when it is used, it is used in a manner strictly proportionate to the seriousness of the offence and the legitimate objectives sought. The requirement of necessity also imposes an obligation to minimize the level of force applied “regardless of the level of force that would be proportionate.” It is not the gravity of the threat that determines the level of force that can be used to contain it, but rather the manner of action that would be sufficient to neutralize the threat. The criterion that there should be a proportionate relationship between the degree of force used and the legitimate objective for which it is being used, requires that any escalation of force ceases when the consequences of applying additional force outweigh the value of the objective for which it is being employed. In sum, international human rights law imposes limits to ensure that force is used as sparingly as possible, but also recognizes that sometimes the only way to protect the public from acts of violence is to meet force with force.

The facts should really speak for themselves:

- terrorists see advantage in provoking the state into overreacting and abusing human rights, indeed this is central to their strategy;
- social science research has identified state abuses as a major – perhaps the major – driver of terrorist recruitment;
- international human rights law anticipates and endorses the lawful use of a wide range of potentially intrusive and robust enforcement tools, and it simply places limits on the use of these tools so that they are not abused and their use does not undermine democratic life; and
- the historical record strongly suggests that exceeding these limits serves little practical purpose, but can greatly damage the societies that do so.

Staying within a human rights framework is smart counterterrorism. It stops states falling into the trap that allows terrorist groups to turn their own strength against them. It ensures that state responses have inherent legitimacy. It reduces polarization. It reduces radicalization. That is why, for the United Nations Office on Drugs and Crime, human rights can be found at the heart of our counter-terrorism programming. Effective counter-terrorism requires nuanced, measured, whole-of-society responses to terrorist violence, and ensuring a synergy between human rights observance and effective counter-terrorism has rightly been established by our Member States as the global best practice standard.

Biographical Note

Tom Parker is currently the Project Coordinator for Counter-Terrorism Programs in the United Nations Office on Drugs and Crime (UNODC) Country Office in Nigeria. He has previously served as an adviser to the Office of the National Security Adviser in Baghdad during the conflict with ISIS, as an adviser on human rights and counter-terrorism to United Nations Counter-Terrorism Implementation Task Force (CTITF), and as the Policy Director for Terrorism, Counterterrorism and Human Rights for Amnesty International USA. He has also served as a war crimes investigator for the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), a transitional justice adviser to the Coalition Provisional Authority (CPA), and an Intelligence Officer in the British Security Service (MI5). Tom is the author of *Avoiding the Terrorist Trap: Why Respect for Human Rights is the Key to Defeating Terrorism*. He has taught undergraduate and postgraduate courses on international terrorism in Yale University's Residential College Seminar Program, Bard College's Globalization and International Affairs Program, and the National Defense University at Fort Bragg. He is a graduate of the London School of Economics, the University of Leiden and Brown, and has held research fellowships at Yale and Duke universities.