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A Sea Change in Security: How the 'War on Terror' Strengthened Human Rights

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**A Sea Change in Security:
How the 'War on Terror' Strengthened Human Rights**

Abstract

In many ways the Bush administration's "war on terror" weakened states' respect for their human rights obligations, and the UN Security Council's initial response to 9/11 seemed to follow the Bush administration's lead. In keeping with its historical lack of engagement with human rights questions, the SC in 2001-2003 did little to ensure that the counter-terrorism measures it demanded of states would take their obligations under human rights and humanitarian law into account. However, starting in 2002, a backlash against the perceived excesses wrought by the SC's counter-terrorism measures gained momentum. Other UN bodies, as well as NGOs, regional intergovernmental institutions, and national and international courts increasingly asserted that human rights and security are mutually reinforcing. The emerging norm of mutual reinforcement gradually began to be institutionalized by the SC, which over time directed its Counter-Terrorism Committee (established Oct., 2001) to incorporate human rights concerns more robustly into its monitoring regime, country visits, technical assistance, and communications. This paper analyzes three stages in the development of CTC's human rights program: Talking, First Steps, and (perhaps) Walking. It analyzes the incorporation of human rights into CTC's Preliminary Implementation Assessment matrix, a document that forms the basis of the committee's work with individual states. It also documents the development of the committee's joint work with other UN human rights bodies, donor states, and NGOs. CTC's work with states is rooted in dialogue rather than sanctions, and relies on confidentiality rather than transparency. Yet even this relatively weak form of engagement with human rights is a rather impressive change from the past. The paper asserts that the SC's evolving approach to counter-terrorism has bound the UN's security and human rights missions more closely together than ever before.

Biographical Note

Michael Galchinsky is a Professor of English at Georgia State University. He is the author of *Jews and Human Rights: Dancing at Three Weddings* (Rowman and Littlefield, 2007), a legal and social history of Jewish human rights movements since World War II, as well as articles on topics ranging from the intersection of international human rights and humanitarian law after 9/11, the West Bank settlements, and human rights culture. He is a Faculty Fellow at the Yale Center for Cultural Sociology.

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Overview

After 9/11, the Bush administration attempted to drive a wedge between counter-terrorism and human rights. The administration argued that rights like freedom of speech and movement, due process, privacy, protection from search and seizure, and limits on detention and interrogation made terrorists’ jobs easier. The administration brought pressure to bear on the United Nations Security Council, essentially, to internationalize the USA PATRIOT Act.¹ While the administration’s approach was hard-line, the logic behind it was not new; in fact, the separation between security issues and human rights issues was embedded in the structure of the United Nations, where military questions have historically been located in the Security Council and human rights questions in various Charter and treaty bodies. The institutional structure reflected the notion that war and other states of emergency, like the fight against global terrorism, are governed by one set of laws and procedures, peace and human rights by another.

Yet, in response to the global “war on terror,” this structure has come to seem increasingly outdated, and a new norm is evolving that sees human rights and security as inextricably intertwined. The Office of the High Commissioner of Human Rights, in its “Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism” (2003), concluded that a consensus was emerging that human rights law and humanitarian law share a “common nucleus of non-derogable rights and common purpose of promoting human life and dignity.”² This is not to say that the new norm was accepted everywhere. The creation, and especially the institutionalization, of new norms are generally gradual and political processes, and even more so in this case because the stakes are so high. The transformation traced here is not a completed transition and probably will not be for a

generation. Nevertheless, this new norm has catalyzed the beginnings of change in the UN's institutional structure.

A month after 9/11, at the urging of the United States, the Security Council passed Resolution 1373, drawing on its Chapter VII powers to establish a new Committee on Counter-Terrorism with a sweeping mandate to ensure that states implement counter-terrorism measures.³ The resolution reinforced the separation between security and human rights: it mandated that states cooperate with each other in the fight against terrorism but, except for one minor reference to asylum, did not specify that in doing so they must respect their human rights obligations in international law. This in itself might not have been so significant given that states' obligations to human rights are guaranteed by treaty and custom, but because the resolution presupposed an international state of emergency, states could reasonably interpret the omission as permission to derogate from human rights in the pursuit of suspected terrorists. And many did.

It was all the more significant because, in many commentators' eyes, 1373 was a watershed resolution that, for the first time, made the Security Council a "global legislator."⁴ In 2002, CTC's first chair, UK Permanent Representative to the UN Jeremy Greenstock, made the separation explicit, asserting that human rights monitoring was "outside the scope" of CTC's mandate and best left to human rights organs within the UN.⁵ These comments support Kim Lane Scheppele's contention that, after 9/11, the first wave of global public law—human rights law—gave way to a second wave of security law based on the idea of a permanent "international state of emergency" in which, it was thought, certain human rights obligations could be ignored.⁶ These included the prohibition on torture and arbitrary detention, protection from non-refoulement, due process rights, free speech, and a host of others.

In fact, there is a good deal of evidence that the globalization of counter-terrorism law between Oct. 2001 and early 2003 enabled executives in many states to aggrandize power and use the proclaimed state of emergency as a pretext for passing “exception laws,” i.e., counter-terrorism laws that reclassified as terrorists groups that were in fact merely political opponents or minorities.⁷ Indeed, Judge Richard Goldstone and others have shown that a number of other states—the UK, India, Russia, the Philippines, Thailand, South Africa, Zimbabwe, Liberia and Indonesia—have already cited US behavior as precedent for exception laws restricting or suspending human rights law for detainees.⁸ These developments have implications larger than the fates of the individuals involved: the legitimacy of both international human rights and humanitarian law is at stake. As Goldstone put it of humanitarian law, “What is of particular concern is that this violation of international law...might well weaken the Geneva Conventions and be used to justify similar violations by other countries.”⁹ Each exception law risks contributing to the establishment of new, less restrictive state custom.¹⁰

This early situation was fluid, however. Starting in 2002, a backlash against the perceived excesses wrought by counter-terrorism measures gained momentum. Evidence piled up that, contrary to the notion that the easing of human rights constraints helps states prosecute the war on terror, abuses by states are a “powerful predictor of subsequent terrorist attacks,” especially if the rights abused involve physical integrity, like the prohibition of extrajudicial killing, disappearances, torture, and prolonged detention.¹¹ In late 2002, numerous actors at the UN called for changes in CTC’s 1373 regime so that it would systematically monitor states’ compliance with their human rights obligations while countering terrorism.¹² In an address to the Security Council, Secretary-General Kofi Annan argued that “while we certainly need vigilance to prevent acts of terrorism, and firmness in condemning and punishing them, it will be

self-defeating if we sacrifice other key priorities — such as human rights — in the process.”

Recognizing that “the protection of human rights is not primarily the responsibility of the Council — it belongs to other United Nations bodies, whose work the Council does not need to duplicate,” he nonetheless maintained that “there is a need to take into account the expertise of those bodies and to make sure that the measures the Council adopts do not unduly curtail human rights or give others a pretext to do so.”¹³

In response, CTC Chair Greenstock reiterated that human rights monitoring was outside the scope of the committee’s mandate. He expressed the concerns of many of the permanent member states (i.e., the United States, the United Kingdom, and Russia), which were committed to fighting terrorism without being hampered by undue concern for habeas corpus, limits on detention, and restrictions on torture and surveillance, despite that derogation from many of these rights was prohibited under any circumstances by human rights law, humanitarian law, and customary international law.

Nonetheless, other UN bodies joined the Secretary-General in calling for greater coordination. The General Assembly affirmed, in a 2002 resolution by Mexico, the importance of respecting human rights while countering terrorism.¹⁴ Mary Robinson, then the High Commissioner for Human Rights, urged CTC to incorporate respect for human rights into its technical assistance, and her office published a “Digest of Jurisprudence” relating to human rights and terrorism. Sir Nigel Rodley, Vice-Chair of the Human Rights Committee (overseeing the ICCPR), argued that CTC could not just leave human rights to treaty bodies because these were too easily manipulated and their decisions would not carry the weight of Security Council decisions under Chapter VII Charter provisions. Besides, he pointed out, his committee could

only deal with 15 state reports per year.¹⁵ The UN High Commissioner for Refugees and UNESCO also threw their weight behind the new norm.

Outside pressure was exerted by NGOs, and regional intergovernmental institutions. Both Human Rights Watch and the European Commission for Democracy through Law issued reports documenting the use of 1373 by states to justify human rights abuses and urged the Commission on Human Rights to do more to prevent this.¹⁶ The International Law Commission published its *Draft articles on Responsibility of States for Internationally Wrongful Acts*, urging states to respect human rights during their responses to terrorist acts.¹⁷ The Council of Europe, the Inter-American Commission on Human Rights, the African Union, and the Organization for Security and Cooperation in Europe promoted the mutually enforcing nature of human rights and counter-terrorism and limited such practices as incommunicado detention and torture.¹⁸

National, regional and international courts joined in supporting the creation of the new norm. The OHCHR's "Digest" cited numerous opinions by the European Court of Human Rights, the International Committee of the Red Cross, and various national courts limiting permissible derogations from human rights law in counter-terrorism.¹⁹ Inter-American and African Union regional invoked the articles in their charters protecting human rights from derogation during armed hostilities and public emergencies. The International Court of Justice, in its advisory opinions related to Israel's construction of a wall in the occupied territories and to the armed conflicts in Uganda and the Democratic Republic of Congo, reiterated the relevance of human rights in armed conflict.²⁰

Human rights advocates also argued that the International Criminal Court's enabling statute amalgamates human rights and humanitarian law in many areas, limiting derogation even during armed conflict or states of emergency.²¹ Counter-terrorism officials and personnel could

be liable for crimes against humanity under the statute if they systematically tortured suspected terrorists, persecuted them as part of an ethnic or national group, or arbitrarily detained them. They could be liable for war crimes—assuming the court determined that the “war on terror” was, in fact, an armed conflict governed by its statute—for depriving suspected terrorists of POW status, torturing detainees or subjecting them to humiliating or degrading treatment, detaining them unlawfully, depriving them of fair trial rights and habeas corpus before a regularly constituted court, or unlawfully deporting them.²²

This article will demonstrate that, over time, as evidence spread of an emerging consensus that counter-terrorism and human rights are mutually reinforcing, it became routine practice for UN actors to proclaim that a state’s human rights compliance made its counter-terrorism efforts more effective, not less. These reiterations of the new norm constituted a strong collective rebuke to the practice of those states, many of them Western powers, that had followed the US lead.

In response to this cultural shift, the Security Council gradually gave CTC more leeway to incorporate human rights concerns in its monitoring regime, joint work with other human rights bodies, country visits, technical assistance, and communications. Overall, I discern three discrete stages in the gradual development of CTC’s practice with respect to human rights between 2003 and the present: Talking, First Steps, and (perhaps) Walking. This trajectory has led to a rather startling new situation. While the Security Council had earlier expressed concern for human rights in extreme circumstances (e.g., in resolutions on South African apartheid and Soviet repression), through CTC, the Security Council, for the first time in its history, has given to human rights the stature of a binding Chapter VII imperative.²³

The issue of human rights in counter-terrorism was the catalyst for a larger shift in thinking about the relation between human rights and security more generally, which has had an impact on debates about other arenas, such as sexual violence against women and children during armed conflict, or the crackdown on free speech by dictators during the Arab Spring.²⁴ Through its actions with respect to counter-terrorism, the Security Council has made human rights a legitimate, ongoing object of concern in its chamber.

Stage 1 (2003-2006): Talking

Quick transformations in the observance of emerging international norms are rare because of the complexity of multilateral negotiations, the clashing of divergent national interests, and institutional inertia. Shifts tend to require painstakingly small steps enacted through the most mundane institutional processes: committee meetings, work programmes, speeches, funding requests, and the like. Where human rights in counter-terrorism is concerned, the small steps have begun to add up to a greater movement, but in order to understand that movement, especially where there are so many actors pursuing so many different agendas, one must observe carefully a myriad of moving parts and establish their interrelations.

The first stage in the development of human rights awareness in counter-terrorism efforts involved a change in the way UN actors talked about it.²⁵ Between 2003 and 2006, across a wide range of UN agencies, the language of official statements and resolutions moved from the conventional wisdom that human rights and counter-terrorism are mutually exclusive to the conclusion that they are “mutually reinforcing.”²⁶ The first step was to insert human rights retroactively into the mandate covered by 1373, which the Security Council did in several resolutions between 2003 and 2005. In January, 2003, in Res. 1456, the Council for the first

time asserted that “States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, . . . in particular international human rights, refugee, and humanitarian law.” This language has become routine boilerplate in every resolution since. In this case, however, the resolution was not adopted under Chapter VII of the Charter, so it did not become part of 1373’s mandate.²⁷

The language might have remained pro forma, but in 2004, CTC began to consider how to incorporate human rights *awareness* into its *practice*. First, in March, the Security Council passed Res. 1535, forming an executing authority—the Counter-Terrorism Committee Executive Directorate (CTED)—to advise CTC of how best to implement Res. 1373.²⁸ CTED was directed to compile information on individual states’ compliance, prepare CTC for country visits, and provide technical assistance to states. The resolution created a new team of experts to monitor implementation, the Assessment and Technical Assistance Office, and, significantly, established a staff position for a senior human rights officer. The latter was the first human rights expert ever appointed to a position in the Security Council. The new officer was tasked with contributing information on state assessments, briefing CTED’s executive director in preparation for state visits, helping draft reports and communications, and reporting on human rights issues to all CTED groups.

Still, CTED’s first executive director, Javier Ruperez, remarked that “protection of human rights cannot be construed as a priority of the CTC.”²⁹ Only a year later, however, CTED’s Work Program did mention this emphasis, albeit briefly and gingerly: “CTED will advise CTC and follow its policy guidance with respect to the ways and situations in which a human rights perspective might be appropriately incorporated into its substantive work.”³⁰ This is cautious bureaucratic language for “I don’t want to say this too loudly or I might lose my job.”

The next step came as a response to the London train bombings of September, 2005. The Security Council passed the groundbreaking Res. 1624, focusing on incitement to terrorist acts. This resolution brought counter-terrorism and human rights closer than they had ever been. In its preambular paragraphs, 1624 not only included the boilerplate language, but also made specific reference to the need to protect freedom of expression and refugees and prohibit states from repatriating refugees to countries that torture. Moreover, for the first time in a resolution, it included an *operative* paragraph requiring that states respect their human rights obligations in relation to all aspects of counter-terrorism as outlined by 1373.³¹ By placing this requirement in an operative clause, the Security Council obligated states to conform their practices to their platitudes. Finally, the resolution charged CTC to consider economic, cultural, and social rights that were often threatened in the fight against terrorism, and the abuse of which could in fact be conducive to terrorism. The abuses mentioned specifically included religious and ethnic discrimination, poor economic development, and repression of civil society. In other words 1624 went beyond the established concern with civil and political rights to consider economic, social, and cultural rights.³²

Meanwhile, a wide range of other UN actors were already pressuring CTC in the area of human rights, or would come to do so:

- The Security Council's Al Qaeda and Taliban Sanctions Committee
- The Secretary-General
- The Office of the High Commissioner for Human Rights
- The Human Rights Council, and its Special Rapporteur on the protection and promotion of human rights and fundamental freedoms while countering terrorism
- Various human rights treaty bodies (ICCPR, ICESCR, CAT)

- The General Assembly's United Nations Counter-Terrorism Implementation Task Force

For example, on March 10, 2005 at the International Summit on Democracy, Terrorism, and Security in Madrid, Secretary-General Kofi Annan gave his famous "5 D's" speech identifying five "pillars" of what he termed a "principled, comprehensive strategy" to fight global terrorism. The fifth "D" was to "Defend human rights in the struggle against terrorism," recognizing that upholding human rights is, as Annan put it, "not merely compatible with a successful counter-terrorism strategy. It is an essential element of it." He continued, "Compromising human rights...facilitates achievement of the terrorist's objective – by ceding him the moral high ground and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits."³³ Annan's speech was taken as a call for a rigorous and consistent approach to human rights in counter-terrorism throughout the UN system.

The General Assembly responded to this call, and on September 20, 2006, passed a comprehensive resolution, the "United Nations Global Counter-Terrorism Strategy," which became the standard framework for all relevant actors throughout the UN system.³⁴ The "Strategy" articulated what had become the new conventional wisdom—that terrorism is itself aimed at the destruction of human rights, that respect for human rights "is the fundamental basis for the fight against terrorism," and that security and human rights are "interlinked and mutually reinforcing."³⁵ Moreover, in its Plan of Action, the GA echoed the Secretary-General in asserting that violations of human rights create conditions "conducive to terrorism" and it called for all UN bodies to "scale up" their cooperation and assistance to states on these issues. In reaction against the US-led spread of exception laws, the "Strategy" called for the apprehension,

extradition, and prosecution of terrorist suspects under the rule of human rights law.³⁶ To show it was serious, the General Assembly promised to strengthen its financial support to the Office of the High Commissioner of Human Rights for increasing field operations in this area.³⁷

The new Human Rights Council (having replaced the Human Rights Commission) acted as well, incorporating counter-terrorism concerns in the new mechanism it created for tracking states' adherence to their obligations under international law: the Universal Periodic Review.³⁸ Requiring states to report every four years, the UPR asked for states' responses to questions about how their counter-terrorism measures complied with specific aspects of human rights law.³⁹ The duplication of efforts with CTC is clear, and one could forgive states for complaining of reporting fatigue, but the UPR process now conformed to the broader UN Strategy.⁴⁰

The Security Council reacted to all the pressure from other UN and regional actors by issuing its standard-setting Policy Guidance for CTED of May, 2006.⁴¹ The Policy Guidance directed CTED to advise CTC as a matter of course on the human rights aspects of states' counter-terrorism programs, as part of the ongoing dialogue with States on their implementation of 1373. It guided CTED to provide detailed technical assistance on human rights compliance to states, to liaise with other human rights organizations inside and outside the UN and with civil society, and to incorporate human rights into its public communications strategy. The Policy Guidance essentially required CTED to begin operationalizing its human rights responsibilities—without, however, allocating any additional resources for it to do so.

One obstacle was that, by 2005, CTC had piled up a substantial backlog of reports from states on their efforts to implement 1373. Moreover, many states were failing or did not have the capacity to submit reports. By the end of 2005 CTC had only managed to make ten country visits. So, to streamline the reporting process and make standards and recommendations more

consistent, CTED in 2006 developed a new tool, the Preliminary Implementation Assessment (PIA). Compiled from a wide range of sources, the PIA assessed, point by point, how states responded to each requirement in the three paragraphs of 1373. As a CTED PowerPoint presentation explained, the PIA was intended to enable CTC to:

- Make a targeted approach,
- Focus more on implementation than reporting,
- Ensure thorough, consistent, transparent and even-handed analysis for all Member States of the United Nations,
- Use international standards,
- Allow for a longer and flexible period of time for reporting while maintaining exchanges and dialogues with Member States, and
- Provide a basis for a global assessment of counter-terrorism efforts.⁴²

Note that the PIA process was not backed by the threat of sanctions, and so was considered by many human rights organizations to lack teeth. Still, this was the first time human rights concerns were incorporated in CTED's practical assessments, and CTED claimed it would henceforth include human rights issues in its country visits. Progress was slow, however; by December 2006 CTED had made only five more visits, which meant that most PIAs were completed without the hands-on information gathered by the visiting teams through their personal contacts with state officials, civil society members, and members of the military and judiciary. CTED could visit only those states that agreed to host them, and could meet with only those officials permitted to talk with them. By the end of 2006, CTED had completed only 42 of a promised 230 PIAs. It was and remains difficult to gauge the extent to which the visits and PIAs impacted human rights outcomes, because, as international criminal law expert George

Andreopoulos pointed out, "only the country concerned is privy to the information included in the PIA."⁴³ It is not even clear whether, at this point, the PIAs and visits raised human rights issues at all.

In this first stage of the trajectory we there were many resolutions about implementation and there was cross-talk and duplication among proliferating actors. The PIA process represented embryonic but weak implementation. As E. J. Flynn, CTED's senior human rights officer, put it in an article reviewing this period, "the Security Council has increasingly accepted the link between upholding human rights and humanitarian law and maintaining international peace and security. Yet in some areas, there remain strong currents of opinion holding that the human rights perspective should not unduly burden the Council's agenda. This has been the case with the Council's work on counter-terrorism."⁴⁴

Stage 2 (November, 2007- June 2008): First Steps

In the second, relatively brief, stage, CTC and CTED began to review their efforts and confront obstacles to states' implementation. In December, 2007, the SC directed CTED to reorganize its work plan in order to enact the PIA process in earnest.⁴⁵ In response, CTED created new subcommittees for reviewing PIAs consisting of three geographical clusters and five technical groups that cut across geographical zones. The technical groups included those on technical assistance, terrorist financing, border security, arms trafficking and law enforcement, and last, the human rights aspects of counter-terrorism. Mike Smith, who was appointed CTED's executive director in November, 2007, called for a "harmonized approach to the assessment of human rights issues across all clusters."⁴⁶ CTED also revised communications and country visits to emphasize human rights. Due to the increased efficiencies of the new work

plan, and with the aid of a new staff member, by the end of 2008, the CTED was able to finalize PIAs for all states. It also began work on a “Survey of Implementation of SC Res. 1373 (2001).” The Survey would list a number of typical human rights developments in states’ counterterrorist activities, such as training programs for law enforcement in community policing.

The duplication of efforts among UN actors continued, but there were more efforts at coordination. On the one hand, in July, 2008, the Office of the High Commissioner for Human Rights (OHCHR) issued a fact sheet on human rights and counter-terrorism, which listed concerns virtually identical to those identified in CTED’s Survey of Implementation, although it did add concerns about due process, the independence of the judiciary, non-refoulement, and free speech.⁴⁷ On the other hand, Martin Scheinin, the Human Rights Council’s Special Rapporteur on counter-terrorism and human rights, issued a statement in Oct. 2008 citing clear progress in the linkages between CTC, CTED, and the HRC.⁴⁸ The next month, the General Assembly formed a Counter-Terrorism Implementation Task Force, comprised of members of all the relevant UN agencies with the express mission of coordinating efforts throughout the system. The Task Force included a Working Group on Human Rights. This coordination immediately produced something new. The Working Group undertook its first country visit to Madagascar in 2008. In a presentation to experts on counterterrorism when it returned, the Working Group’s members argued that states’ obligations under the Covenant on Economic, Social, and Cultural Rights, including the obligation to promote development, are crucial to the prevention of terrorism. Indeed, they suggested “the need to reframe the notion of security to include [development issues].”⁴⁹ This meant that CTED and the Task Force had moved from focusing merely on *countering* terrorism to *preventing* it.

Still, obstacles continued: as of 2008, no country visits had included a representative of a human rights body, not even the CTED's own senior HR officer.⁵⁰ How states reacted to the PIAs and other reports and visits remained vague outside of the committee, and details were few because the dialogue between CTC and individual states remained confidential.

Stage 3 (June 2008-present): Walking?

In the final phase, from June 2008 until the present, the UN undertook substantial efforts to improve states' implementation and UN actors' coordination. On October 29, 2009, in an address to CTC and CTED, Nevanthem Pillay, the High Commissioner for Human Rights, provided a useful overview of developments at CTC and CTED since the issuance of the 2006 Policy Guidance, and she noted areas of remaining concern. On the plus side, she pointed out that CTC and CTED had embraced the idea that countering terrorism while upholding human rights "creates a climate of trust between a State apparatus and those under its jurisdiction" and that "such trust is the very foundation of effective responses to global challenges, including terrorism." She noted that CTED's human rights officer had begun to develop joint technical assistance with her office, to act as the liaison between CTED and the Human Rights Council's Special Rapporteur, and to match underdeveloped states to donors engaged in capacity-building and rule-of-law activities. She also noted that in the PIA process, CTC had been more willing to engage in dialogue about human rights concerns, as a result of which she indicated that other UN human rights bodies—including the treaty body monitoring compliance with the Covenant on Civil and Political Rights—had begun taking states' reports to CTC seriously.

Nevertheless, she noted a number of concrete areas for improvement. She urged CTC to insist that states' definitions of terrorism-related crimes be specific, so as to avoid ex-post-facto

law enforcement or retroactive criminalization of formerly legal activities. She warned CTC of the negative consequences of national, ethnic, or religious profiling. CTC, she said, should insist that states refrain from creating exceptional courts to deal with terrorism. The committee should be vigilant in monitoring states' restrictions on freedom of expression, in particular for civil society organizations. It should insist on the protection of individuals' privacy in the face of increased intelligence-gathering. It should demand that states cease torture, ill-treatment, and rendition of detainees. CTED should include the senior human rights officer on its country visits, and ask states specific questions in responses to their reports about human rights compliance.⁵¹

Evidence shows that CTC took Pillay's recommendations to heart. In November, 2009, CTC's chair, Ranko Viločić, briefed the Security Council, noting that all PIAs and country visits now raised human rights issues. The next month CTED released its broad Survey of Implementation, which reported that "in virtually all regions there remain significant concerns that counter-terrorism measures...do not comply with those States' obligations under international law." While citing many of the same concerns that the High Commissioner had brought to CTC's attention, it added the continued use of extrajudicial executions, black sites, and refoulement. Part of the problem was that states did not always grasp their responsibilities under the norm of mutual reinforcement. A great leap forward was the publication of CTED's *Technical Guide to the Implementation of SC Res 1373 (2001)*. The *Technical Guide* detailed how states should fulfill their human rights responsibilities in ten concrete areas of the PIA:

- freezing of assets
- regulation of charities
- criminalization of assistance

- suppression of recruitment
- prevention of conducive conditions
- use of special investigative techniques and courts
- denial of safe haven
- precision of the definition of terrorism-related crimes
- pre-trial detention rules
- and extradition/non-refoulement.

In addition, CTED published a Compilation of International Good Practices, Codes, and Standards, which presents models for state practice based on a wide variety of UN and regional treaties and codes, as well as INTERPOL manuals.⁵² Finally, CTED initiated a “stock-taking exercise” consisting of a follow-up review of the implementation of resolution 1373 two years after the PIA.⁵³ The latter won praise from states for maintaining the dialogue and focusing it on implementation. In all these ways, CTED made its interaction with states a recursive and ongoing process.

A Parallel Case: The Sanctions Committee

The degree to which these changes reflected the will of the Security Council—and the continuing ambivalence its members felt toward the observance of human rights in counter-terrorism—can be measured by reference to parallel developments in the work of another Security Council committee, the Al Qaeda and Taliban Sanctions Committee (called the “Sanctions Committee” or “1267 Committee” after the SC resolution that created it). This committee, created in 1999, focuses on the financing of terrorism. In the aftermath of 9/11, its activities became a central focus of the SC’s counter-terrorism strategy. The Sanctions

Committee began placing suspected individuals and groups on a Consolidated List that obligated states to freeze the listed individuals' and groups assets. An individual could be named to the list by any state, which was not obligated to provide justification, and, apart from directly petitioning the listing state (which was under no obligation to respond) there was no way an individual could prove that he or she was not financing terrorism and so be removed from the List. Because the committee targets individuals, a concern for its treatment of those individuals' human rights grew among actors within and outside the UN. For example, the European Court of Justice (later The Court of Justice of the European Union), in the *Kadi* case (2008), found that the list preemptively punished individuals who were only suspected, but not proven, to have financed terrorism, breaching their fair trial rights.⁵⁴ Eventually, responding to numerous complaints about this procedure, the committee appointed what it called a "focal point" to receive delisting requests.⁵⁵ There was only one problem: the focal point was permitted to receive petitions, but it had no authority to act on them.

Moreover, it quickly became apparent that the Consolidated List was subject to abuse: the fact that there was no way to get oneself removed from the List was apparent when it was discovered that some of the listed individuals had died years before and yet remained on the list.⁵⁶ There was no mechanism for judicial review.⁵⁷ In December 2009, the Security Council decided to work toward greater fairness. It streamlined the delisting procedure, and, in accordance with Res. 1904 (2009), began to publish brief "narrative summaries" of reasons for placing individuals, groups, undertakings and entities on the List.⁵⁸ The summaries are prepared with the assistance of the committee's Monitoring Team in coordination with the relevant designating States. They include "the statement of the case, coversheet or any other official information provided to the Committee, or any relevant information available publicly from

official sources, or any other information provided by the designating State(s) or Committee members.”⁵⁹ The narratives perhaps stand in for the right of the accused to hear the charges against him, which could provide the accused the basis for contesting the listing. However, since this is not a court proceeding, the listed persons still have no avenue for legal appeal.

The Security Council also replaced the focal point with an Ombudsperson who is independent of the Sanctions Committee and tasked with interacting with petitioners who make delisting requests, as well as with relevant states and organizations. The Ombudsperson then reports to the committee.⁶⁰ In June, 2010, Judge Kimberly Prost was appointed the first Ombudsperson. In her first press conference on July 15, 2010, Judge Prost reiterated her intention to be independent and fair, but still noted that “Sanctions isn’t a *legal* committee. There is no due process. The [listing and delisting procedures] don’t have the same measures as legal processes.” She sees her role as addressing this issue: “There are problems with fairness,” she said, “let’s address those through this new office.”⁶¹ By July, 2010, she had set up a stand-alone website, public email address and simple, straightforward submission and review procedures for petitioners seeking delisting.⁶² Still, it remains to be seen whether this more transparent process will be effective, in the absence of regular judicial review. As of June, 2011, some 500 names remained on the Consolidated List, and it should be noted that the Obama administration has worked to weaken efforts to integrate judicial review into the process.⁶³

Conclusion

Juxtaposing the history of the Sanctions Committee next to that of CTC, it seems evident that, while both have moved in the direction of greater concern for human rights, CTC has integrated this concern more thoroughly into his operations. By July, 2010, when CTC reported

to the Security Council on its recent work, it claimed to have completely adopted the standards outlined in the Policy Guidance and in the High Commissioner's remarks.⁶⁴ CTC's report to the Security Council on December 7, 2010 surveyed its human rights work as part of its three-year funding review.⁶⁵ The document asserts that human rights is raised "routinely" with states at every level, during "country visits, workshops, videoconferences and other exchanges," and that CTC now works routinely with the Sanctions Committee to plan regional workshops to help States "lacking the capacity to submit responses" as required (5).

All this is a far cry from where the committee started in 2001. Yet the big question remains: does any of this activity produce positive outcomes for states' observance of human rights in counter-terrorism? Unfortunately, the answer cannot yet be assessed because CTC/CTED's work products—the PIAs, stock-taking exercises, records of technical assistance, and accounts of state visits—are still not publicly accessible. Given that CTC has no recourse to sanctions, it is unclear what follows when the committee determines that a given state could do more to implement a particular measure. Do states file a new report in response to the PIA, and is their report taken into account in the stock-taking exercise? The country visits are similarly mysterious: there are no guidelines to suggest how the visiting team interacts with state officials on these issues, what the senior human rights officer's role is, and to what extent the human rights observations made by the visiting team are incorporated into the PIA and stock-taking exercise. There is still no way of determining whether, in general, the process has led to substantive corrections on human rights issues, and if so, whether there is a pattern in the types of human rights that states have been most and least willing to address. While secrecy may in some instances be necessary in order for states to deal in good faith on sensitive issues, it must be balanced against the human rights requirement of transparency.

While the committee's proceedings are confidential, it is still possible to identify some indirect measures of the influence of Res. 1373 on human rights. The Human Rights Committee's Concluding Observations in response to country reports often shed light on the state's compliance with human rights in counter-terrorism efforts. For example, in its 2010 Concluding Observations on Israel's most recent country report, the Human Rights Committee asserts that "measures designed to counter acts of terrorism, whether adopted in connection with Security Council resolution 1373 (2001) or in the context of the ongoing armed conflict, should be in full conformity with the Covenant."⁶⁶ The HRC goes on to suggest five concrete steps that Israel should undertake to ensure conformity.

Similarly, in its observations on New Zealand's report, it asserts that, "While noting the obligations imposed under Security Council resolution 1373 (2001), the Committee expresses concern at the compatibility of some provisions of [New Zealand's] Terrorism Suppression Amendment Act 2007 with the Covenant." It also tracks New Zealand's record with respect to Res. 1267, recommending that the state "should take steps to ensure that the measures taken to implement Security Council resolution 1267 (1999) as well as the national designation procedures for terrorist groups fully comply with all the legal safeguards enshrined in article 14 of the Covenant."⁶⁷ Again, in commenting on San Marino's counter-terrorism wire tapping law, HRC tries to limit the scope of 1373, recommending that "the State party should ensure that its counter-terrorism measures, whether taken in connection with Security Council resolution 1373 (2001) or otherwise, are in full conformity with the Covenant and in particular that the legislation adopted in this context is limited to crimes that would justify being characterized as terrorist."⁶⁸ The committee often refers offending states to its General Comment No. 29 on derogation during states of emergency.⁶⁹ These are just a few of the many examples in which HRC has both

acknowledged the compulsory nature of 1373 and attempted to limit the negative impact on human rights. To the extent that such comments are necessary, they indirectly bear on the limits of CTC's human rights program. In a similar way, reactions against 1373's procedures by regional organizations and courts reflect a broader effort to ensure that the Security Council will respect the norm of mutual reinforcement.⁷⁰

While CTC's evolving human rights approach is imperfect and requires the proper qualifications and demurrals, it nonetheless reflects a sea change at the Security Council, an evolution that cannot be restricted, in future, to the narrow field of counter-terrorism. From this point on, it will be more difficult for a sitting member to claim that concern for human rights is alien to the Security Council's mission. Seventy years after its establishment, the Council has, in effect, become a human rights body. From that standpoint, the sustained international backlash against the Bush administration's "War on Terror" strengthened human rights.

Notes

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² Office of the High Commissioner of Human Rights, "Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism," HR/PUB/03/1, 2003, 16.

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³ S/RES/1373 (2001) Threats to international peace and security caused by terrorist acts, 28 September, 2001.

⁴ David Cortright, George A. Lopez, Alistair Millar, and Linda Gerber-Stellingwerf, “Global Cooperation Against Terrorism: Evaluating the United Nations Counter-Terrorism Committee,” in David Cortright and George A. Lopez, eds., *Uniting Against Terror: Cooperative Nonmilitary Responses to the Global Terrorist Threat*, p. 28; E. J. Flynn, “The Security Council’s Counter-Terrorism Committee and Human Rights,” *Human Rights Law Review* 7, no. 2 (2007), pp. 371-384.

⁵ Ambassador Jeremy Greenstock, presentation at the symposium, “Combating International Terrorism: The Contribution of the United Nations”, 3-4 June 2002, found at http://www.un.org/en/sc/ctc/docs/rights/2002_06_03_ctcchair_symposium.pdf; also see Eric Rosand, Alistair Millar, and Jason Ipe, “Human Rights and the Implementation of the UN Global Counter-Terrorism Strategy: Hopes and Challenges” (Center of Global Counter-terrorism Cooperation, Jan. 2008); and Flynn, “The Security Council’s Counter-Terrorism Committee.”

⁶ Kim Lane Schepple, “The International State of Emergency: Challenges to Constitutionalism after September 11,” presentation at Emory University Law School, January, 2008.

⁷ Richard Goldstone, “The Tension between Combating Terrorism and Protecting Civil Liberties,” in Richard Ashby Wilson, ed., *Human Rights in the ‘War on Terror’* (Cambridge UP, 2005), pp. 158-159; Neil Hicks, “The Impact of Counter Terror on the Promotion and Protection of Human Rights: A Global Perspective,” *ibid.*, pp. 209-224.

⁸ Goldstone, *ibid.*; Hicks, *ibid.*

⁹ Goldstone, *ibid.*, 164.

¹⁰ International Commission of Jurists, “Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, ‘Assessing Damage, Urging Action’” (International Commission of Jurists: Geneva, 2009); Center on Global Counter-terrorism Cooperation, “Counter-Terrorism and Human Rights.”

¹¹ James A. Piazza and James Igoe Walsh, “Terrorism and Human Rights,” *Political Science and Politics* 43, no. 3 (July, 2010), p. 407; Piazza and Walsh, “Why Respecting Physical Integrity Rights Reduces Terrorism,” *Comparative Political Studies* 43, no. 5 (March 2010), pp. 551-577.

¹² See, e.g., “Statement by Sergio de Vieira de Mello, High Commissioner of Human Rights, to the Counter-Terrorism Committee,” 21 October 2002.

¹³ S/PV.4453. Verbatim record of the 4453rd meeting on 18 January 2002,.

¹⁴ A/RES/57/219, protecting human rights and fundamental freedoms while countering terrorism, 27 February, 2003.

¹⁵ Rosemary Foot, “The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas,” *Human Rights Quarterly* 29 (2007), pp. 489-514.

¹⁶ Human Rights Watch, “Human Rights and Terrorism,” Briefing to the 59th Session of the UN Commission on Human Rights, Feb. 27, 2003, found at

<http://www.hrw.org/legacy/un/chr59/counter-terrorism.htm>, accessed on June 15, 2011;

OHCHR, “Digest,” fn. 67.

¹⁷ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001* (United Nations, 2008).

¹⁸ Council of Europe, *Guidelines on Human Rights and the Fight against Terrorism* (Directorate General of Human Rights, 2002); Inter-American Commission on Human Rights, “Report on terrorism and human rights,” OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., para. 53; Organization for

Security and Cooperation in Europe, *Countering Terrorism, Protecting Human Rights: a Manual*, (Warsaw: OSCE Office for Democratic Institutions and Human Rights OHCHR, 2007); “Digest,” fn. 69, 105.

¹⁹ OHCHR, “Digest,” fn 34, 35, 41, 42, 44, 45, 46, 47, 55, 65, 66, 77, 78, 90, 93, 97, 104, 105.

²⁰ *Ibid.*, 13.

²¹ OSCE, *Countering Terrorism*, 91-92.

²² Rome Statute of the International Criminal Court (entered into force 2002), Articles 7 and 8.

²³ Rostand, Millar, and Ipe, “Human Rights and the Implementation.”

²⁴ See, e.g., S/RES/1960 (2010) Women and peace and security, 16 December, 2010;

S/RES/1973 (2011) The situation in Libya, 17 March, 2011.

²⁵ E.J. Flynn, “The Security Council’s Counter-Terrorism Committee,” has labeled this period “The Door Opens.”

²⁶ For the language of mutual reinforcement, see A/RES/60/251 Human Rights Council, 3 April, 2006; A/RES/60/288 The United Nations Global Counter-Terrorism Strategy, 20 September, 2006; S/PRST/2010/19 Threats to international peace and security caused by terrorists acts, 27 September, 2010; CTED, “Thematic Discussion on Human Rights and Resolution 1373,” 7 October 2010, found at http://www.un.org/en/sc/ctc/docs/2010/2010_10_07_humanrights.ppt, accessed on June 15, 2011; CTED, Background paper, “Thematic discussion of the Counter-Terrorism Committee on the human rights aspects of counter-terrorism in the context of resolution 1373 (2001)”, October 2010.

²⁷ Flynn, “The Security Council’s Counter-Terrorism Committee.”

²⁸ S/RES/1535/2004 Threats to international peace and security caused by terrorist acts, 26 March 2004.

²⁹ Qtd., in Rosand, Miller, and Ipe, “Human Rights and the Implementation,” p. 7.

³⁰ CTED Organization Plan, S/2004/642, 12 August, 2004; CTC Work Program, S/2005/663, 21 October, 2005.

³¹ S/RES/1624 (2005) Threats to international peace and security, 14 September, 2005, para. 4; Flynn, “The Security Council’s Counter-Terrorism Committee.”

³² S/RES/1456 (2003) High-level meeting of the Security Council: Combating Terrorism, 20 January, 2003; S/RES/1624 (2005).

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³⁴ A/RES/60/288 The United Nations Global Counter-Terrorism Strategy, 20 September, 2006.

³⁵ *Ibid.*, Annex, Art. IV title.

³⁶ *Ibid.*, Annex, Art. II, para. 3.

³⁷ *Ibid.*, Annex, Art. I, introduction, and para. 7, and Art. IV, para. 7.

³⁸ A/RES/60/251 Human Rights Council, 3 April, 2006.

³⁹ See, for example, “Report of the Working Group on the Universal Periodic Review: Turkey,” A/HRC/15/13, 17 June, 2010, including relative items in its “Summary” of the state’s report and the HRC’s interactions with the state including paras. 6, 24, 41, 63, 66, 70, 71; and relevant recommendations by the Working Group 102.38.

⁴⁰ CTC Work Program 2005 on State Visits, S/2005/663, 21 October, 2005.

⁴¹S/AC.40/2006/PG.2 Policy Guidance regarding Human Rights and the Counter-Terrorism Committee, 25 May, 2006.

⁴² Adapted from “United Nations Counter-Terrorism Committee,” PowerPoint presentation, December, 2007, www.un.org/en/sc/ctc/docs/statements/2007_12_cted_pia.ppt.

⁴³ George Andreopoulos, International Criminal Justice: Theoretical and Legal Perspectives (New York: Springer Verlag, 2011), p. 161.

⁴⁴ Flynn, “The Security Council’s Counter-Terrorism Committee,” p. 371.

⁴⁵ “Organizational plan for the Counter-Terrorism Committee Executive Directorate,” S/2008/80, endorsed by the SC in S/RES/1805 (2008) Threats to international peace and security caused by terrorist acts, 20 March, 2008.

⁴⁶ Ibid.; “Procedures of the Sub-committees of the Counter-Terrorism Committee (CTC) Regarding the Preliminary Implementation Assessments (PIA),” found at http://www.un.org/en/sc/ctc/docs/2007_10_25_pia_procedures.pdf, accessed on June 15, 2011.

⁴⁷ CTED, *Survey of Implementation of Res. 1373 (2001)*, S/2009/620, 3 December, 2009.

⁴⁸ Martin Scheinin, Special Rapporteur on the Promotion and Protection of Human rights and Fundamental Freedoms while Countering Terrorism, “Statement to the Counter-Terrorism Committee of the Security Council,” 20 October 2008.

⁴⁹ United Nations Counter-Terrorism Implementation Task Force Working Group, “Protecting Human Rights While Countering Terrorism,” Expert Seminar on “The impact of terrorism and counter-terrorism measures on the enjoyment of economic, social and cultural rights (ESCR),” 507 November, 2008.

⁵⁰ Rosand, Miller, and Ipe, “Human Rights and the Implementation,” 8.

⁵¹ Address by Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights, to the Counter-Terrorism Committee of the Security Council, 29 October, 2009, found at

http://www.un.org/en/sc/ctc/docs/rights/2009_10_09_hchr_brief.pdf, accessed on 22 June, 2011..

⁵² Cf. CTED, “United Nations Security Council Resolution 1624 (2005): Compilation of International Good Practices, Codes, and Standards,” [n.d.], found at

<http://www.un.org/en/sc/ctc/docs/bestpractices/res1624.pdf>, accessed on 15 June, 2011.

⁵³ See S/PV.6217 Verbatim record of briefing by chairmen of subsidiary bodies of the Security Council, 6217th meeting, 13 November, 2009.

⁵⁴ Carmen Draghici, “Suspected Terrorists’ Rights Between the Fragmentation and Merger of Legal Orders: Reflection in the Margin of the *Kadi* ECJ Appeal Judgment,” *Washington University Global Studies Law Review* 8, no. 627 (2009), pp. 627-58.

⁵⁵ The Al Qaeda and Taliban Sanctions Committee was established in S/RES/1267 (1999) The situation in Afghanistan; the focal point was established in S/RES/1730 (2006) General issues relating to sanctions, 19 December, 2006.

⁵⁶ Yvonne Terlingen, “The United States and the UN’s Targeted Sanctions of Suspected Terrorists: What Role for Human Rights?” *Ethics and International Affairs* 24, no. 2 (2010), pp. 131-142.

⁵⁷ Draghici, “Suspected Terrorists’ Rights;” Terlingen, “The United States.”

⁵⁸ SC/RES 1904 (2009) Threats to international peace and security caused by terrorist acts, 17 December, 2009, para. 14; For a description of the narrative summaries, see the Sanctions Committee website, found at <http://www.un.org/sc/committees/1267/narrative.shtml>, accessed on 15 June, 2011

⁵⁹ Ibid.

⁶⁰ S/RES/1904 (2009) Threats to international peace and security caused by terrorist acts, 17 December, 2009; Office of the Ombudsperson of the Security Council's 1267 Committee, <http://www.un.org/en/sc/ombudsperson/>, accessed on June 15, 2011.

⁶¹ "Press Conference to Present Ombudsperson of Security Council's 1267 Committee," UN Department of Public Information, 15 July, 2010.

⁶² Office of the Ombudsperson website.

⁶³ Terlingen, "The United States."

⁶⁴ CTED, "Thematic Discussion on Human Rights and Resolution 1373," 7 Oct. 2010, http://www.un.org/en/sc/ctc/docs/2010/2010_10_07_humanrights.ppt; CTED, Background paper, "Thematic discussion of the Counter-Terrorism Committee on the human rights aspects of counter-terrorism in the context of resolution 1373 (2001)", Oct. 2010.

⁶⁵ "Report of the Counter-Terrorism Committee to the Security Council for its comprehensive consideration of the work of the CTED," S/2010/616, 7 December, 2010.

⁶⁶ CCPR/C/ISR/CO/3, Concluding observations of the Human Rights Committee: Israel, 3 September, 2010.

⁶⁷ A/65/40 Annual Report of the Human Rights Committee, vol. 1, July, 2010, p. 69.

⁶⁸ A/63/40 Annual Report of the Human Rights Committee, vol. 1, November, 2007, p. 81.

⁶⁹ Human Rights Committee, General Comment No. 29, " (Article 4) Derogations During a State of Emergency," CCPR/C/21/Rev.1/Add.11, 31 August, 2001.

⁷⁰ A good listing of such responses can be found in CTED, "United Nations Security Council Resolution 1624 (2005): Compilation of International Good Practices, Codes, and Standards," [n.d.], <http://www.un.org/en/sc/ctc/docs/bestpractices/res1624.pdf>.