I

Introduction

1 The Human Rights Turn in Counterterrorism and the Endurance of the Discourse of Terrorism

Aggressive approaches to maintaining security against terrorism very often lead governments to compromise other values that they profess – among them, the rule of law and human rights, which are elements of liberal democracy. Thus, controversies often ensue over the acceptability of governments' counterterrorism efforts from the viewpoint of its consistency with these values. Proponents of an aggressive approach usually overstate the danger of terrorism to our survival, shunting the rule of law and human rights as though they were obstacles to an effective emergency response. Increasingly, however, today's champions of counterterrorism are less hysterical. They no longer pit counterterrorism against legal standards imposed by human rights and the rule of law and instead present specific measures as serving both security and liberty. According to a study of hundreds of policy statements and legal texts on terrorism in the United States and the European Union, officials less often justify counterterrorism in terms of trade-offs between liberty and security or through the notion of exceptionalism and more often in terms that avoid such language.[1]

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[1] Instead, they are framed more often in terms of 'pragmatism' or 'operational effectiveness'. 'Governmental actors employ a far more complex argumentative structure. ... [A]n important role is played by the operational effectiveness justification, which, in and of itself, does not entail the need to engage norms and values. ... [T]he assurance of security is not formulated as being *at the expense* of human rights but, paradoxically, *while preserving* them.: Daniela Pisoiu, 'Pragmatic Persuasion in Counterterrorism' (2012) 5 Critical Studies on Terrorism 297, 309.

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Unsurprisingly, the news media are attracted to the bellicose, human rights-defying rhetoric that is often still heard from politicians. But, for some time now, there has also been a quieter discourse of an alternative human rights-compatible model of counterterrorism that is espoused by mainstream international lawyers and world leaders of different stripes alike. In this discourse, respecting human rights and upholding the rule of law are seen not as distractions but rather as important ingredients of a rational approach to counterterrorism. Counterterrorism is affirmed as an imperative and a more or less permanent condition. Law and human rights are seen as having crucial roles to play, not the least of which is the management of the violence that is expected to ensue from pursuing terrorists.

The United Nations (UN) General Assembly's Global Counterterrorism Strategy (2006), which espouses an alternative to the 'war on terror' model of counterterrorism, evidences a measure of global consensus on this new credo. Instead of a 'war on terror' (which often also means 'war on law'), the slogan now is 'countering terrorism while respecting human rights'.[2] The document dedicated one of the four pillars of its plan of action to 'Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.'[3] Both the UN General Assembly and the Security Council regularly issue resolutions concerning fighting terrorism in a manner consistent with human rights. These resolutions are of such a character that an argument has been made that 'a general obligation to protect human rights in the context of counter-terrorism' is now 'an emerging rule of customary international law' that binds states whether or not they are signatories to the relevant treaties.[4] A typical statement of a UN agency working in the thematic area that has been called 'promotion and protection of human rights while countering terrorism' declares:

[2] UNGA Res 60/288, 'The United Nations Global Counter-Terrorism Strategy' (8 September 2006), UN Doc A/RES/60/288.

[3] ibid Annex IV.

[4] Joseph Isanga, 'Counter-Terrorism and Human Rights: The Emergence of a Rule of Customary International Law from UN Resolutions' (2008) 37 Denv J Intl L & Pol'y 233. See, e.g. UNGA Res 56/160, 'Human Rights and Terrorism' (13 February 2002), UN Doc A/RES/56/160; UNGA Res 57/219, 'Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (27 February 2003), UN Doc A/RES/57/219; UNGA Res 59/191, 'Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (10 March 2005), UN Doc A/RES/59/191; UNSC Res 1535 (26 March 2004), UN Doc S/RES 1535; UNSC Res 1566 (8 October 2004), UN Doc S/RES/1566; UNSC Res 1624 (14 September 2005), UN Doc S/RES/1624.

> [T]o effectively combat terrorism while respecting human rights and fundamental freedoms is not only possible but also necessary. Indeed, effective counter-terrorism measures [on the one hand] and respect for the rule of law, human rights and fundamental freedoms [on the other hand] are complementary and mutually reinforcing objectives which must be pursued together as part of States' duty to protect individuals within their jurisdiction.[5]

The United Nations Counter-Terrorism Committee has adopted a 'pro-active policy on human rights' that entails that its Executive Directorate should take into account relevant human rights concerns in all its activities.[6] The consistency between counterterrorism measures and states' obligations under international law, particularly human rights law, is said to be 'an essential part of a successful counter-terrorism effort',[7] and its importance is underlined in a number of Security Council resolutions and in the reports of the Counter-Terrorism Committee.[8] As these brief references show, the rhetoric of both counter-terrorism and human rights institutions have intersected, so that what used to be sources of criticism of counterterrorism measures have become sources of legitimacy and approval.

The present study interrogates human rights-compliant counterter-rorism – a vision of an alternative model of counterterrorism that is compatible with and respectful of human rights. It asks to what extent human rights-compliant counterterrorism is a realistic goal worthy of promotion by human rights advocates. The book problematises this vision by articulating two main concerns: first, what is at stake in the promotion of human rights-compliant counterterrorism is not just the survival of human rights norms in the face of terrorism but the

[5] United Nations Office on Drugs and Crime, 'Promoting and Protecting Human Rights and Fundamental Freedoms While Countering Terrorism' <www.unodc.org/unodc/en/terrorism/news-and-events/human-rights-while-countering-terrorism.html> accessed 11 November 2015.

[6] UNSC Counter-Terrorism Committee, 'Protecting Human Rights While Countering Terrorism' < www.un.org/en/sc/ctc/rights.html> accessed 12 January 2016.

[7] UNSC Res 1963 (20 December 2010), UN Doc S/RES/1963, para 10.

[8] UNSC Res 1624 (n 4); UNSC Res 1805 (20 March 2008), UN Doc S/RES/1805; UNSC Res 1963 (n 7); UNSC, 'Report of the Counter-Terrorism Committee to the Security Council for its consideration as part of its comprehensive review of the Counter-Terrorism Committee Executive Directorate' (16 December 2005), UN Doc S/2005/200, Annex, para 13; UNSC, 'Report of the Counter-Terrorism Committee to the Security Council for its consideration as part of its comprehensive review of the Counter-Terrorism Committee Executive Directorate' (18 December 2006), UN Doc S/2006/989, Annex, paras 26, 27.

reproduction and further entrenchment of the concept of terrorism and all that it entails; and, second, the role of human rights law in counter-terrorism is ambiguous rather than clear cut – that is, human rights have consequences that can lead to both amelioration and perpetuation of abuses.

2 The Central Argument and Contributions of the Book

The central argument of the book is that the coming together of the discourses of human rights and counterterrorism has ambiguous effects. Human rights-compliant counterterrorism may have been envisioned by global actors as a progressive project to ameliorate abuses by taming counterterrorism through rights. However, its promotion can serve to undermine rather than strengthen the protection of human rights. Advocacy for human rights-compliant counterterrorism involves human rights advocates in improving counterterrorism so that it is acceptable from a human rights perspective. However, counterterrorism simplifies how conflict is seen and dealt with. Thus, in places in which the characterisation of sub-state violence as 'terrorism' and the state's actions as 'counterterrorism' should be challenged for being superficial, those who promote human rights compliance risk entrenching 'counterterror-ism'. While this happens, the practice of counterterrorism may not be significantly transformed.

In substantiating this argument, the book makes two types of con-tributions. First, it shows the impact of counterterrorism on local prac-tices on the ground in two countries, and particularly how it transforms the nature of conflicts between governments, on the one hand, and their opponents, adversaries or critics, on the other. It underscores that the reproduction of the concept of 'terrorism' in the Philippines and Indonesia is not about the suppression of intolerable or unjustifiable political violence per se. It has more to do with the justification for tolerating governments' own violence towards undesired movements within society. Secondly, the book shows the varied impact of human rights on counterterrorism. In this second task, I look at human rights as discourses produced by both governments and non-governmental actors and examine how those discourses interact with the rhetoric and practice of counterterrorism. This evaluation underlines the ambiguous effect of human rights on counterterrorism. Human rights can be used to restrain counterterrorism, but they can also lead to the legitimisation of counter-terrorism frameworks and the violence that flows therefrom.

3 The Political Stakes in Maintaining a Critique of Terrorism Discourse

The critique of the discourse of terrorism is an important part of truly rolling back the 'war on terror' and liberalising the way in which we think and deal with a variety of challenges to states. Since the onset of the 'war on terror', terrorism has become the preferred lens through which governments, as well as international organisations, have viewed and dealt with all sorts of challenges to the status quo. The leading Western states, including the United States under the various terrorist blacklists that it maintains, regard not only groups such as al-Qaeda or the Islamic State of Iraq and Syria (ISIS) as terrorist organisations. Nor indeed are such organisations only Islamic groups; they are also secular organisations waging comprehensive revolutions for national liberation or socialism in developing countries, and single-issue groups such as the United States-based Earth Liberation Front, accused of using property damage to hinder or stop the exploitation of animals and environmental destruction, just to take a small sample.[9] Countries as diverse as Turkey, Russia and China have either applied their own antiterrorism laws or convinced others to include domestic groups in terrorist blacklists to crack down on a broad range of dissidents.[10]

The label 'terrorist' allows governments to direct our attention to these various groups' violence, and to evince a uniform condemnation of such violence. At the same time, we conveniently do not have to pay attention to the specificities of these groups' struggles and differences among them or the role that governmental violence may have played in bringing about non-state political violence. In this sense, the global push for counterterrorism is pro-state and pro-status quo. It is also depoliticising, in that it represents a will to inscribe the various politics against the state in a simpler apolitical register of good and evil. The concept of terrorism is, finally, pro-violence, because even as it expresses utter disapproval for

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[9] See, e.g. 'Foreign Terrorist Organizations' (*US Department of State*) <www.state.gov/j/ct/rls/other/des/123085.htm> accessed 24 October 2017. On the ELF and other animal rights groups tagged as terrorists, see John Sorenson, 'Constructing Terrorists: Propaganda about Animal Rights' (2009) 2 Critical Studies on Terrorism 237.

[10] See, e.g. Human Rights Watch, 'Protesting as a Terrorist Offense: The Arbitrary Use of Terrorism Laws to Prosecute and Incarcerate Demonstrators in Turkey' (2010); James Beckman, *Comparative Legal Approaches to Homeland Security and Anti-Terrorism* (Routledge 2016) 129 (Russia's antiterror law against Chechnya); Human Rights Watch, 'Devastating Blows: Religious Repression of Uighurs in Xinjiang' (2005) HRIC Special Report 16 (China/UNSC terrorist tagging of Uighurs).

certain defined forms of violence, it makes possible the endorsement of violence that embodies its opposite. As Helen Dexter puts it:

> The categorisation of terrorism as something distinct, as an exception or anomaly in political violence, allows for the strategic and moral critique of some violence without engaging in the moral and strategic critique of violence per se. This allows for the possibility that our violence is different. By condemning some violence, the category of terrorism also serves to legitimise violence by suggesting that an alternative violence is possible, violence that only targets the guilty, that only produces what is intended, that does not communicate a message (of fear) and that serves a progressive purpose.[11]

The reproduction of the category 'terrorism' does not only serve to condemn exceptional or unjustifiable violence. As it fosters blindness to the complexity of the nature and causes of resistance to the state, it is eventually resistance to the state itself that it allows to be condemned. We ignore the historical, social, economic, political, international and other contexts for such violence lest we discover that terrorism is not unjustifiable and exceptional after all.

Now, even though human rights-compliant counterterrorism is a repudiation of the excesses of the 'war on terror' and provides another approach to counterterrorism, it reproduces the concept of terrorism. The representation of counterterrorism no longer as a war but as a normal human rights-sensitive technical endeavour does not really change who gets to call whom terrorist (i.e. who gets to condemn the other's violence and who gets to shield their own violence from scrutiny). It does not change the terrorism discourse's capacity to induce the problem that it seeks to suppress. Ironically, it may even be a more efficient way to mobilise acceptance of violence against specific groups, because violence is reimagined as being fundamentally consistent with our values.[12]

4 The Fragmentation of Human Rights Discourse

Virtually everyone – the powerless and the powerful alike – has come to speak the language of human rights. The result is that human rights embody radically different visions of the good society and are used for

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[11] Helen Dexter, 'Terrorism and Violence: Another Violence Is Possible?' (2012) 5 Critical Studies on Terrorism 121, 123.
[12] Pisoiu (n 1).

contradictory purposes. Thus, to understand fully what work human rights in human rights-compliant counterterrorism are doing, we must be aware that competing visions and purposes can be invested in them.

Historically, social movements have been expositors of human rights discourse. They have used human rights' promise of universal equality to demand recognition for previously excluded and oppressed groups. They have used human rights in various struggles for social justice to articulate claims to an expanding set of social goods and challenge extant power structures.[13] In particular, Third World movements have used the language of the collective human right to self-determination against foreign occupation and domination to articulate a 'utopia of development'.[14]

However, human rights are not the preserve of progressives. As the explosion of human rights treaties and conventions since the Universal Declaration of Human Rights (UDHR) shows, states and international organisations have been all too eager to enact human rights as law. Often, states enact rights even though they do not intend to abide by them in practice.[15] But the problem is not limited to the proliferation of empty rights talk and lack of implementation, which perhaps could be addressed by more social movement mobilisation to realise rights. Precisely because claims to rights by the powerless have been addressed to states or the powerful, the latter have been instrumental in demarcating rights, determining their contents, and fixing their meaning in legislation and jurisprudence. Rights typically begin their lives as tools of resistance against abuses by the state, but as they succeed in being institutionalised, they can morph into tools of regulation or domestication by the state.[16] For Nicola Perugini and Neve Gordon, the situation is compounded by the fact that conservatives, and institutions such as the military, which used to shun human rights rhetoric, have embraced it and deployed it for the purpose of

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[13] Neil Stammers, *Human Rights and Social Movements* (Pluto Press 2009); Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (CUP 2003).

[14] Antony Anghie, 'Whose Utopia?: Human Rights, Development, and the Third World' (2013) 22 Qui Parle: Critical Humanities and Social Sciences 73.

[15] Richard Falk, 'Theoretical Foundations of Human Rights' in Richard Pierre Claude (ed), *Human Rights in the World Community: Issues and Action* (2nd edn, University of Pennsylvania Press 1992) 31. In this case, states subscribe to human rights conventions in order to buy legitimacy in the eyes of other states: Thomas Risse, Stephen C Ropp and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (CUP 1999).

[16] Stammers calls this the 'paradox of institutionalisation': Neil Stammers, 'Social Movements and the Social Construction of Human Rights' (1999) 21 Hum Rts Q 980, 996.

justifying or rationalising violent practices against subordinate groups. The situation has become so mixed up. Liberal and conservative deployments of human rights have so converged, mirrored and inverted each other that it is often difficult to tell them apart – at least in their effects.[17]

In the era of economic globalisation, multilateral financial institutions also deploy human rights discourse to protect multinational corporations, markets and concentrations of wealth and economic power, appropriating and completely reversing the intent of rights as they were originally formulated in the UDHR.[18] Thus, for Upendra Baxi, the 'carnivalistic' production of human rights laws since the UDHR is as much a cause for concern as it is of celebration, especially since it is paralleled by an explosion of the 'politics of cruelty'.[19] In the face of this confusion – 'complexity, compromise, contradiction and obfuscation'[20] – he proposes an attitude to human rights that is at once supportive and critical. A 'critical human rights realism', as Baxi calls it, demands a critique of much of the talk and practices associated with human rights so as to clear the way for the recovery of their original progressive intention.[21]

Now, when we consider human rights scholarship in the context of counterterrorism, very little of this sense of realism can be discerned, and instead the prevailing attitude is one in which human rights are invested with a lot of hope as an instrument for reform. The few exceptions are the legal scholars who take a critical stance towards the potential of human rights to act as a check on abuses through judicial review of counterterrorism measures.[22] For example, Wesley Pue points out that human rights declarations can be used as a 'Trojan horse', or cover, to pass off even the most draconian antiterrorism legislation as fundamentally sound. He contends that this was what happened in Canada when the Attorney-General appropriated the Canadian Charter of Rights and Freedoms in

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[17] Nicola Perugini and Neve Gordon, *The Human Right to Dominate* (OUP 2015) 1–12.

[18] Upendra Baxi, *The Future of Human Rights* (OUP India 2012) 132; Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (1999) 32 NYU J Intl L & Pol 243, 253.

[19] William Twining, 'Human Rights: Southern Voices – Francis Deng, Abdullahi An-Na'im, Yash Ghai, Upendra Baxi' (2005) 11 Rev Const Stud 203, 272.

[20] ibid 261.

[21] ibid 262.

[22] Joo-Cheung Tham and KD Ewing, 'Limitations of a Charter of Rights in the Age of Counter-Terrorism' (2007) 31 MULR 462; W Wesley Pue, 'Protecting Constitutionalism in Treacherous Times: Why "Rights" Don't Matter' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU E Press 2008).

order to defend or 'charter-proof' the antiterrorism legislation.[23] He cautioned:

> The violation of 'rights', at least as we now understand that notion, forms a surprisingly small portion of what is wrong with 'anti-terrorism' legislation in major Western countries. Consequently, the presence or absence of constitutionally entrenched 'rights' protection ('charters', 'bills', or 'human rights' legislation) determines only a small degree of the variance of outcomes when draconian state powers are subjected to judicial review ... [O]nly the tiniest sliver of state action is ever subjected to judicial review. This gives any discussion of what happens in the courts a somewhat abstract, other worldly character, grotesquely distanced from the quotidian routine in which subjects encounter state authority.[24]

Similarly, Tham and Ewing warned that human rights law can be used to legitimise counterterrorism laws that harm people, precisely through the judicial endorsement of counterterrorism:

> The protection of human rights will be put at risk by the possibility that excessive counterterrorism laws will be determined by courts to be consistent with the human rights legal instruments and, by implication, treated as if they were compatible with the protection of human rights ... [R]ather than being seen as 'infringing human rights', the repression is [treated as] (fully) compatible with them ... so internment, censorship, proscription and the like, are [seen as] *consistent with* rather than *departures from* human rights standards ...[25]

   The commonality between these authors is that they are aware that challenges to counterterrorism measures in judicial settings using human rights as law can only go so far. The main problem, according to Tham and Ewing, is that the characterisations of the threat as terrorism and therefore of state action as counterterrorism are not open to challenge. This is because the executive has a monopoly on assessments relating to national security:

> [T]hose seeking to protect human rights will be doing so with one hand tied behind their back. Having to accept governmental assessment of the nature and extent of a threat, they are then left with a limited arsenal of arguments centring on whether counterterrorism laws abridging rights constitute 'reasonable limits' and are 'proportionate'. They will not be in a position to seriously contest 'the importance of the purpose of the limitation'.[26]

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[23] Pue (n 22) 57.
[24] ibid 48.
[25] Tham and Ewing (n 22) 484.
[26] ibid.

Like Pue, Tham and Ewing, I am concerned with what remains unchallenged – namely the discourse of terrorism itself, as advocates deploy human rights to criticise counterterrorism measures. This book seeks to further a sense of realism towards the role of human rights in counterterrorism. I approach human rights not as a unitary discourse of emancipation, but as a fractured one – i.e. a discourse that can be combined with different kinds of politics pursuing contradictory goals. Hence, I look at human rights as being capable of being combined with an apology or justification for the very violence of counterterrorism that the reformist deployment of human rights is meant to ameliorate. Thus, I look at different deployments of human rights, in the discourses of both local human rights advocates, who utilise them with the aim of repelling state violence, and of governments and armed forces, who appropriate rights to rationalise and justify the very same violence.

5   Counterterrorism and Human Rights in the Philippines and Indonesia

Why study the Philippines and Indonesia? They are important sites for the advancement of counterterrorism that has been shaped by the United States-led 'war on terror'. These two countries are afflicted by armed conflicts between the government and opposed groups – conflicts that are rooted in complex histories of violence and implicating festering political, economic and social problems. They are laboratories for observing the rise of terrorism discourse and its impact on armed conflicts.

At the onset of the United States-led 'war on terror', pundits argued that the South East Asian region, and particularly Indonesia and the Philippines, should or could be the 'second front of the War on Terror', i.e. second to Afghanistan and Iraq.[27] Doubts have been expressed as to whether these countries are really hotbeds of terrorism.[28] Nevertheless, the push for the 'war on terror' facilitated the spread of the concept of

[27] John Gershman, 'Is Southeast Asia the Second Front?' (2002) 81 Foreign Affairs 60.
[28] Azyumardi Azra, 'Bali and Southeast Asian Islam: Debunking the Myths' in Kumar Ramakrishna and See Seng Tan (eds), *After Bali: The Threat of Terrorism in Southeast Asia* (World Scientific 2003); Kumar Ramakrishna and See Seng Tan, 'Introduction: Is Southeast Asia a "Terrorist Haven"?' in Ramakrishna and Seng Tan (eds) (n 28); M.G. Clive Williams, 'The Question of "Links" between Al Qaeda and Southeast Asia' in Ramakrishna and Seng Tan (eds) (n 28); John Sidel, 'The Islamist Threat in South East Asia: Much Ado About Nothing?' (2008) 39 Asian Affairs 339; John T Sidel, *The Islamist Threat in Southeast Asia: A Reassessment* (Institute of Southeast Asian Studies, East-West Center Washington) 2007.