

ANTI-TERRORISM, THE *CHARTER*, AND INTERNATIONAL LAW

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States have a duty to protect their societies and to take effective measures to combat terrorism. The implementation of counter-terrorism measures may, where permissible, necessary, and proportionate, limit the full enjoyment of human rights. This is an integral feature of human rights law that provides for various means of rights limitation, as well as appropriate safeguards to guard against over-reaching or arbitrary limits. Determination of the proper boundaries, however, is a difficult task to achieve. This article considers the position in Canada. It concludes that so long as limitations upon rights and freedoms are consistent with section 1 of the Charter of Rights and Freedoms, such limitations are also consistent with international standards and guidelines on the subject of human rights compliance while countering terrorism, including those of the UN's former High Commissioner for Human Rights.

Les Etats ont le devoir de protéger leurs sociétés et de prendre les mesures qui s'imposent pour lutter contre le terrorisme. La mise en oeuvre de mesures antiterroristes peut, là où elles sont permises, nécessaires et proportionnelles, limiter la pleine réalisation des droits de la personne. C'est une caractéristique intégrale des droits de la personne qui stipule plusieurs moyens de limiter les droits ainsi que des mesures de protection appropriées pour éviter les interventions à outrance ou les limites arbitraires. Il est toutefois difficile de déterminer les bonnes limites. Cet article examine la situation au Canada et en arrive à la conclusion que dans la mesure où les limites imposées aux droits et libertés sont conformes à l'article 1 de la Charte des droits et libertés, elles respectent aussi les normes et directives internationales en matière de respect des droits de la personne tout en luttant contre le terrorisme, incluant ceux du Haut Commissaire des Nations Unies aux droits de l'homme.

In the wake of the London terrorist bombings of July 2005, there has been resurgence in discussion of Canada's preparedness to respond to, and prevent, terrorist attacks.¹ The unsurprising media focus on the casualties of the London attacks, and upon Canada's intelligence and security services, has left little room for discussion of Canada's counter-terrorist legislation and the question of human rights protection. Having said this, human rights issues involved in Canada's legislative responses to September 11, 2001, did form the

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1 See e.g. John Geddes & Charlie Gillis, "How Safe Are We?" *Macleans.ca* (12 July 2005), online: <http://www.macleans.ca/topstories/canada/article.jsp?content=20050718_109096_109096>.

basis of much writing in the initial months after the drafting and enactment of the *Anti-terrorism Act*.² This article seeks to reignite that discussion and, in particular, to lend an international perspective to the question of measuring Canada's anti-terrorist legislation against human rights standards.

When talking of anti-terrorism (or "counter-terrorism," as many also refer to it) and the issue of compliance with human rights standards, there can be entrenched reactions to the subject on the part of liberals (potentially seeing counter-terrorism as draconian and utilized as an excuse to extend state powers) and on the part of conservatives (who might argue that there is little or no place for human rights considerations in the context of security and the combating of terrorism). Ideologically, then, are the two objectives of countering terrorism on the one hand, and maintaining and promoting democracy, due process, and human rights on the other, incompatible and irreconcilable? This dilemma underlies the examination here, with the conclusion being that this conflict of wills and objectives *is* reconcilable and, indeed, mutually reinforcing. Two principal reasons are advanced for this conclusion. Firstly, terrorism has adverse impacts upon human rights and the functioning of civil society and the international community as a whole.³ Thus, to counter terrorism is to counter those adverse effects. Secondly, and going to the heart of this article, while it is clear that there are obligations to counter terrorism in a manner that is consistent with human rights,⁴ this position is not absolute in its terms nor does it require a blind application of human rights above all other factors. In saying that measures taken to combat terrorism must comply with human rights standards, it must be remembered that human rights standards themselves allow for limitations.⁵

2 S.C. 2001, c. 41 [*Anti-terrorism Act*]. See e.g. Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001); David Dyzenhaus, "Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security" (2003) 28 *Australian J. of Legal Philosophy* 1; Joanna Harrington, "Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection" (2003) 48 *McGill Law J.* 55; David Jenkins, "In Support of Canada's Anti-Terrorism Act: A Comparison of Canadian, British and American Anti-Terrorism Law" (2003) 66 *Saskatchewan Law Rev.* 419; David M. Paciocco, "Constitutional Casualties of September 11: Limiting the Legacy of the Anti-Terrorism Act" (2002) 16 *Supreme Court Law Rev.* (2d) 185 [Paciocco]; Kent Roach, "Canada's New Anti-Terrorism Law" (2002) *Singapore J. of Legal Studies* 122; and Kent Roach, "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism" (2002) 47 *McGill Law J.* 893.

3 See Part III.D, below.

4 See Part I, below.

5 See Andrew S. Butler, "Limiting Rights" (2002) 33 *Victoria Univ. of Wellington Law Rev.* 113 at 132, who discusses the notion that "limits are fundamental too" [Butler]. See also United Nations Office of the High Commissioner for Human Rights (UNOHCHR), *Digest of Jurisprudence of*

In the Canadian context, the principal proposition of this article is a simple one: so long as any limitations upon rights and freedoms within Canada's legislation can withstand a proper application of the limitations test in section 1 of the *Canadian Charter of Rights and Freedoms*,⁶ then Canada can be confident that it is also complying with international standards on the interface between counter-terrorism and human rights. This proposition emphasizes the importance of ensuring that proper consideration is given to the *Charter* in the formulation of anti-terrorist legislation by Parliament, and the testing of it by the judiciary.

I. THE NEED TO COMPLY WITH HUMAN RIGHTS WHEN COUNTERING TERRORISM

Before embarking upon a dialogue on international human rights standards and how they might be applicable to Canadian jurisprudence, it is relevant to give thought to why such a dialogue is called for. When one is considering counter-terrorism, as an aspect of the "war on terror," are human rights standards relevant? Or, given the war-like nature of terrorist conduct, should one adopt Cicero's statement, *inter arma silent leges* (in time of war laws are silent)?⁷

While supporting the notion that countering terrorism is an objective of significant importance, the former United Nations High Commissioner for Human Rights, Mary Robinson, has at the same time warned that the means of achieving counter-terrorist objectives must be measured:

Terrorism is a threat to the most fundamental human rights. Finding common approaches to countering terrorism serves the cause of human rights. Some have suggested that it is not possible to effectively eliminate terrorism while respecting human rights. This suggestion is fundamentally flawed. The only long-term guarantor

the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism (September 2003), online: <<http://www.ohchr.org/english/about/publications/docs/digest.doc>> [*Digest of Jurisprudence*]. The *Digest* itself recognizes (at 3) that "[h]uman rights law establishes a framework in which terrorism can be effectively countered without infringing on fundamental freedoms."

6 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

7 Quoted in Anthony Everitt, *Cicero: The Life and Times of Rome's Greatest Politician* (New York: Random House, 2001) at 96. For further discussion see Daniel Torres, "Inter Arma Silent Leges: An Examination of the Legal Rights of American Citizens Detained as Enemy Combatants in the War on Terror" (2003) 3 *The J. of Philosophy, Science & Law*, online: <<http://www.psljournal.com/archives/papers/interarma.html>>.

of security is through ensuring respect for human rights and humanitarian law. The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends.⁸

This was also a clear message of the *2005 World Summit Outcome*: “[I]nternational cooperation to fight terrorism must be conducted in conformity with international law, including the Charter and relevant international conventions and protocols. States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.”⁹ These sentiments should not be dismissed as representative of human rights advocates alone. They have in fact been echoed by both the UN Security Council and General Assembly. The United Nations High Commission for Human Rights has similarly addressed the issue in its resolutions.

UN General Assembly Resolutions on Counter-terrorism and Human Rights

Since December 1972, the UN General Assembly has adopted a series of resolutions concerning terrorism. Those resolutions take the form of the Assembly’s adoption of measures to eliminate international terrorism¹⁰ and

8 Mary Robinson, “Introductory Statement by Mary Robinson, United Nations High Commissioner for Human Rights,” Press Release (20 March 2002), online: UNOHCHR <<http://www.ohchr.org/english/press/newsFrameset-2.htm>>. See also the later statement of Kenneth Roth, Executive Director of Human Rights Watch, who stated that “terrorists believe that the ends justify the means, that their political or social vision justifies the deliberate taking of civilian lives in violation of the most basic human rights norms. To fight terrorism without regard to the constraints of human rights is to endorse that warped logic.” Kenneth Roth, “Counter-terrorism and Human Rights: An Essential Alliance” (Paper presented to the Princeton Project on National Security Conference on The Nexus of Terrorism and WMDs: Developing a Consensus, 12-14 December 2004, Princeton University) [unpublished] at 3.

9 *2005 World Summit Outcome* GA Res. 60/1, UN GAOR, 69th Sess., 8th Plen. Mtg., UN Doc. A/Res/60/1 (2005) at para. 85.

10 The very first resolution of the General Assembly concerning itself solely with the issue of terrorism was adopted on 18 December 1972 against the background of the disruption of the 1972 Olympic Games at Munich: GA Res. 3034 (XXVII), UN GAOR, 27th Sess., 2114th Plen. Mtg., UN Doc. A/Res/XXVII/3034 (1972) 119 [GA Res. 3034 (XXVII)]. Its very title illustrates the overwhelming view that terrorism is a matter affecting security and the enjoyment of rights: “Measures to prevent international terrorism which endangers or takes innocent lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes.” The same title was used to name eight subsequent resolutions of the General Assembly, from 1976 to 1989: GA Res. 31/102, UN GAOR, 31st Sess., 99th Plen. Mtg., UN Doc. A/Res/31/102 (1976) 185 [GA Res. 31/102]; GA

resolutions addressing the topic of terrorism and human rights.¹¹ Within the first set of resolutions on terrorism, the last decade has seen the Assembly espouse a *Declaration on Measures to Eliminate International Terrorism*, first adopted in early December 1994 under its Resolution 49/60.¹² Resolution 49/60 pronounced that terrorism constitutes a grave violation of the purpose and principles of the United Nations.¹³ The 1994 *Declaration* was reaffirmed in the following two years, with a *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism*, adopted in 1996.¹⁴

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- Res. 32/147, UN GAOR, 32nd Sess., 105th Plen. Mtg., UN Doc. A/Res/32/147 (1977) 212 [GA Res. 32/147]; GA Res. 34/145, UN GAOR, 34th Sess., 105th Plen. Mtg., UN Doc. A/Res/34/145 (1979) 244 [GA Res. 34/145]; GA Res. 36/109, UN GAOR, 36th Sess., 92nd Plen. Mtg., UN Doc. A/Res/36/109 (1981) 241 [GA Res. 36/109]; GA Res. 38/130, UN GAOR, 38th Sess., 101st Plen. Mtg., UN Doc. A/Res/38/130 (1983) 266 [GA Res. 38/130]; GA Res. 40/61, UN GAOR, 40th Sess., 108th Plen. Mtg., UN Doc. A/Res/40/61 (1985) 301 [GA Res. 40/61]; GA Res. 42/159, UN GAOR, 42nd Sess., 94th Plen. Mtg., UN Doc. A/Res/42/159 (1987) 299; and GA Res. 44/29, UN GAOR, 44th Sess., 72nd Plen. Mtg., UN Doc. A/Res/44/29 (1989) 301 [GA Res. 44/29].
- 11 The second series of General Assembly resolutions began in late December 1993, with the Assembly adopting resolution 48/122, entitled *Human Rights and Terrorism*, GA Res. 48/122, UN GAOR, 48th Sess., 85th Plen. Mtg., UN Doc. A/Res/48/122 (1993) [GA Res. 48/122]. Echoing many of the expressions of concern contained in the declarations on measures to eliminate terrorism, the preamble to this later resolution spoke of the serious concern of the General Assembly at the gross violations of human rights perpetrated by terrorist groups. Resolutions between 1995 and 2005 did the same, adding that terrorism creates an environment that destroys the right of people to live in freedom from fear: GA Res. 50/186, UN GAOR, 50th Sess., 99th Plen. Mtg., UN Doc. A/Res/50/186 (1995) at preambular paras. 3-5, 11 and operative para. 2 [GA Res. 50/186]; GA Res. 52/133, UN GAOR, 52nd Sess., 70th Plen. Mtg., UN Doc. A/Res/52/133 (1997) at preambular paras. 6-8, 10 and operative para. 3 [GA Res. 52/133]; GA Res. 54/164, UN GAOR, 54th Sess., 83rd Plen. Mtg., UN Doc. A/Res/54/164 (1999) at preambular paras. 7-9, 12 and operative para. 3 [GA Res. 54/164]; GA Res. 56/160, UN GAOR, 56th Sess., 88th Plen. Mtg., UN Doc. A/Res/56/160 (2001) at preambular paras. 11-13 [GA Res. 56/160]; GA Res. 58/174, UN GAOR, 58th Sess., 77th Plen. Mtg., UN Doc. A/Res/58/174 (2003) at preambular paras. 12-14 [GA Res. 58/174]; and GA Res. 59/195, UN GAOR, 59th Sess., 74th Plen. Mtg., UN Doc. A/Res/59/195 (2004) at preambular paras. 12-13. The preamble to the Assembly's resolution 56/160 added (at para. 24): "Noting the growing consciousness within the international community of the negative effects of terrorism in all its forms and manifestations on the full enjoyment of human rights and fundamental freedoms and on the establishment of the rule of law and domestic freedoms as enshrined in the *Charter of the United Nations* and the International Covenants on Human Rights."
 - 12 GA Res. 49/60, UN GAOR, 49th Sess., 84th Plen. Mtg., UN Doc. A/Res/49/60 (1994) [1994 *Declaration*]. The *Declaration* was based on the notion of peace and security and the principle of refraining from the threat or use of force in international relations (through its preamble). It called on states to refrain from organizing, instigating, assisting or participating in terrorist acts, and from acquiescing in or encouraging activities within their territories directed towards the commission of such acts (para. 4).
 - 13 *Ibid.* at para. 2.
 - 14 GA Res. 51/210, UN GAOR, 51st Sess., 88th Plen. Mtg., UN Doc. A/Res/51/210 (1996) at Annex [GA Res. 51/210] [1996 *Declaration*]. The 1994 *Declaration*, *ibid.*, and 1996 *Declaration* were reaffirmed within: GA Res. 52/165, UN GAOR, 52nd Sess., 72nd Plen. Mtg., UN Doc. A/Res/52/165 (1997) at para. 7; GA Res. 54/110, UN GAOR, 54th Sess., 75th Plen. Mtg. UN

Both sets of resolutions contain various statements about the need, when implementing counter-terrorist measures, to comply with international human rights standards. A standard phrasing of this idea was seen early on in Resolution 50/186 of 1995:

Mindful of the need to protect human rights of and guarantees for the individual in accordance with the relevant international human rights principles and instruments, particularly the right to life,

Reaffirming that all measures to counter terrorism must be in strict conformity with international human rights standards . . . ,

Calls upon States to take all necessary and effective measures in accordance with international standards of human rights to prevent, combat and eliminate all acts of terrorism wherever and by whomever committed.¹⁵

While still requiring measures to be taken consistently with human rights standards, a slightly less robust expression of these ideas was seen following the events of September 11, 2001.¹⁶ That should not, however, be taken as a signal that the General Assembly was willing to turn a blind eye to adverse impacts of counter-terrorism upon human rights. More recently, the issue became the subject of annual resolutions on that subject alone, each entitled *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*.¹⁷ The first operative paragraph of

Doc A/Res/54/110 (1999), para. 8; GA Res. 55/158, UN GAOR, 55th Sess., 84th Plen. Mtg., UN Doc. A/Res/55/158 (2000) at para. 9; GA Res. 56/88, UN GAOR, 56th Sess., 85th Plen. Mtg., UN Doc. A/Res/56/88 (2001) at para. 10 [GA Res. 56/88]; GA Res. 57/27, UN GAOR, 57th Sess., 52nd Plen. Mtg., UN Doc. A/Res/57/27 (2002) at para. 10 [GA Res. 57/27]; GA Res. 58/81, UN GAOR, 58th Sess., 72nd Plen. Mtg., UN Doc. A/Res/58/81 (2003) at para. 10 [GA Res. 58/81]; and GA Res. 59/46, UN GAOR, 59th Sess., 65th Plen. Mtg., UN Doc. A/Res/59/46 (2004) at para. 12 [GA Res. 59/46].

- 15 *Supra* note 11 at preambular paras. 13-14 and operative para. 3. See also GA Res. 52/133, *supra* note 11 at preambular paras. 12-13 and operative para. 4; GA Res. 54/164, *supra* note 11 at preambular paras. 15-16 and operative para. 4; GA Res. 56/160, *supra* note 11 at preambular paras. 22-23 and operative paras. 5-6; and GA Res. 58/174, *supra* note 11 at preambular paras. 20-21 and operative para. 7.
- 16 As first seen in GA Res. 56/88, *supra* note 14 at preambular para. 9 and operative para. 3. The preambular paragraph returned to the language of combating terrorism "in accordance with the principles of the Charter," and operative para. 4 talked of combating terrorism in accordance with international law "including international standards of human rights." See also similar statements within GA Res. 57/27 at preambular para. 8 and operative para. 6; GA Res. 58/81 at preambular para. 9 and operative para. 6; GA Res. 58/136, UN GAOR, 58th Sess., 77th Plen. Mtg., UN Doc. A/Res/58/136 (2003) at preambular para. 10 and operative para. 5; and GA Res. 59/46 at preambular para. 10 and operative para. 3.
- 17 GA Res. 57/219, UN GAOR, 57th Sess., 77th Plen. Mtg., UN Doc. A/Res/57/219 (2002); GA Res. 58/187, UN GAOR, 58th Sess., 77th Plen. Mtg., UN Doc. A/Res/58/187 (2003); and GA Res. 59/191, UN GAOR, 59th Sess., 74th Plen. Mtg., UN Doc. A/Res/59/191 (2004).

each resolution affirms "that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law."¹⁸

These directions on the part of the General Assembly are reasonably strong in the language they use. These resolutions do not, however, hold the same weight as international treaties or obligatory resolutions of the Security Council. Article 10 of the *UN Charter* specifically provides that resolutions and declarations of the General Assembly are recommendatory only: "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

This principle is equally applicable to resolutions of the Commission on Human Rights, a subsidiary organ of the Economic and Social Council (which is only empowered to make recommendations).¹⁹ Thus, the resolutions to be discussed represent guiding principles and non-binding recommendations (what might be termed "soft law"), rather than binding resolutions, treaty provisions, or norms of customary international law ("hard law"). Notwithstanding this non-binding status, the author takes the view that, having regard to their consistent approach, these resolutions are highly influential and, importantly, representative of international comity. It is also relevant to recall that resolutions may constitute evidence of customary international law, if supported by state conduct that is consistent with the content of the resolutions and with the accompanying *opinio juris* required to prove the existence of customary law.²⁰

18 *Ibid.* at operative para. 1.

19 *Charter of the United Nations*, art. 62(2).

20 An example of the use of resolutions of the General Assembly to determine the content of customary rules can be seen in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 392, where the International Court of Justice gave consideration to two resolutions of the General Assembly as evidence of the content of the principle of non-intervention: the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res. 2131, UN GAOR, 20th Sess., 1408th Plen. Mtg., UN Doc. A/Res/2131 (1965); and the *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), UN GAOR, 25th sess., 188th Plen. Mtg., UN Doc. A/Res/2625 (1970).

The United Nations Commission on Human Rights

Not surprisingly, the UN Commission on Human Rights has paid considerable attention to the issue of the adverse consequences that counter-terrorism might have upon the maintenance and promotion of human rights. It did so even before the flurry of anti-terrorist legislation that followed the September 11 attacks and Security Council Resolution 1373 of 2001.²¹ In the resolutions of the Commission and its Sub-Commission on the Protection and Promotion of Human Rights, it was affirmed that all states have an obligation to promote and protect human rights and fundamental freedoms, and that all measures to counter terrorism be in strict conformity with international law, including international human rights standards.²²

The June 2005 report of the Commission's Special Rapporteur on the Promotion and Protection of Human Rights also addresses the matter.²³ Although the mandate given to the Special Rapporteur (well before September 11, 2001) was to consider the impact of terrorism upon human rights,²⁴ she commented that a state's over-reaction to terrorism can itself impact upon human rights. She has pointed to the rights to freedom of speech, association, belief, religion and movement, and the rights of refugees as being particularly vulnerable to "undue suspension in the guise of anti-terrorist measures."²⁵

Post-September 11, resolutions of the Commission on Human Rights have been more strongly worded. Two resolutions on the subject were adopted in 2004 alone. First, the issue was addressed within the Commission's

21 SC Res. 1373, UN SCOR, 4385th Mtg., UN Doc. S/Res/1373 (2001) [SC Res. 1373].

22 CHR Res. 2001/37, UN ESCOR, 57th Sess., 72nd Mtg., UN Doc. E/CN.4/Res/2001/37 (2001) at preambular paras. 18-19 and operative paras. 7-8. Preambular para. 19 was later reflected in Sub-Commission on Human Rights resolution 2001/18, 53rd Sess., 26th Mtg., UN Doc. E/CN.4/Sub.2/2001/18 (2001) at preambular para. 13.

23 Sub-Commission on the Promotion and Protection of Human Rights, Special Rapporteur Kalliopi Koufa, *Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism. A Preliminary Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism*, UN Doc. E/CN.4/Sub.2/2005/39 (22 June 2005) [*Draft of Principles and Guidelines*].

24 This mandate was consequent with the request of the General Assembly for the Commission to do so (see *Human Rights and Terrorism*, GA Res. 49/185, UN GAOR, 49th Sess., 94th Plen. Mtg., UN Doc. A/Res/49/185 (1994) at para. 6) and with the Commission's own decision to consider the issue (see CHR Res. 1994/46, UN ESCOR, 50th Sess., 56th Mtg., UN Doc. E/CN.4/Res/1994/46 (1994)).

25 Sub-Commission on the Promotion and Protection of Human Rights, Special Rapporteur Kalliopi Koufa, *Progress Report on Terrorism and Human Rights*, UN ESCOR, 53rd Sess., UN Doc E/CN.4/Sub.2/2001/31 (2001), paras. 109-10.

annual resolution on human rights and terrorism.²⁶ In a resolution later that month, the Commission reaffirmed that states must comply with international human rights obligations when countering terrorism and called on states to raise awareness of the importance of doing so among their national authorities involved in countering terrorism.²⁷

This activity in 2004 followed the compilation, in September 2003, of a *Digest of Jurisprudence* on the protection of human rights while countering terrorism, its aim being to assist policy makers and other concerned parties in developing counter-terrorist strategies that respect human rights.²⁸ The *Digest* considers decisions and views of UN treaty-monitoring bodies, such as the Human Rights Committee, and those of other regional bodies, including the European Court of Human Rights and the Inter-American Court of Human Rights. It addresses general considerations, states of emergency and specific rights. Within the general considerations, two types of jurisprudence are relevant to this article. The first is that which emphasizes the duty of states to protect those within their territories from terrorism.²⁹ The second is the identification of jurisprudence observing that the lawfulness of counter-terrorism measures depends upon their conformity with international human rights law.³⁰

26 CHR Res. 2004/44, UN ESCOR, 60th Sess., UN Doc. E/CN.4/Res/2004/44 (2004) at preambular para. 24 and operative paras. 10-12. See in particular the call (at para. 10) for UN member states:

to take appropriate measures in conformity with the relevant provisions of national and international law, including international human rights standards, before granting refugee status, with the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts, and to ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.

27 CHR Res. 2004/87, UN ESCOR, 60th Sess., UN Doc. E/CN.4/Res/2004/87 (2004) at paras. 1-2.

28 *Supra* note 5. The *Digest* introduces the compilation by saying (at 3):

No one doubts that States have legitimate and urgent reasons to take all due measures to eliminate terrorism. Acts and strategies of terrorism aim at the destruction of human rights, democracy, and the rule of law. They destabilise governments and undermine civil society. Governments therefore have not only the right, but also the duty, to protect their nationals and others against terrorist attacks and to bring the perpetrators of such acts to justice. The manner in which counter-terrorism efforts are conducted, however, can have a far-reaching effect on overall respect for human rights.

29 *Ibid.* at 11-12.

30 *Ibid.* at 13-15.

UN Security Council Resolutions on Counter-terrorism and Human Rights

In general terms, Security Council resolutions concerning terrorism have restricted their attention to the threat of terrorism to international peace and security, reflecting the role of the Council as the organ of the United Nations charged with the maintenance of peace and security.³¹ That role is reflected in the language and scope of Security Council resolutions on terrorism which, compared with General Assembly resolutions on the subject, are much narrower in focus. In general terms, Security Council resolutions concern themselves with the adverse impacts of terrorism upon the security of states and the maintenance of peaceful relations, while the General Assembly takes a much broader approach to the subject given its plenary role and wider mandate.

Apart from two notable exceptions, the only inference that might be taken from Security Council resolutions about counter-terrorism measures and their need to comply with human rights is from general statements that counter-terrorism is an aim that should be achieved in accordance with the Charter of the United Nations and international law.³² This implies that such measures must themselves be compliant with the principles of the *UN Charter* and might be taken as requiring compliance with international human rights law.³³ In that regard, members of the United Nations have

31 Under art. 24 of the *Charter of the United Nations*, the Security Council is charged with the maintenance of international peace and security, para. 1 providing: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

32 See e.g.: SC Res. 1373, *supra* note 21 at preambular para. 5; SC Res. 1438, UN SCOR, 4624th Mtg., UN Doc. S/Res/1438 (2002) at preambular para. 2 [SC Res. 1438]; SC Res. 1440, UN SCOR, 4632nd Mtg., UN Doc. S/Res/1440 (2002) at preambular para. 2 [SC Res. 1440]; SC Res. 1450, UN SCOR, 4667th Mtg., UN Doc. S/Res/1450 (2002) at preambular para. 4 [SC Res. 1450]; SC Res. 1455, UN SCOR, 4686th Mtg., UN Doc. S/Res/1455 (2003) at preambular para. 3 [SC Res. 1455]; SC Res. 1456, UN SCOR, 4688th Mtg., UN Doc. S/Res/1456 (2003) at preambular para. 8 [SC Res. 1456]; SC Res. 1535, UN SCOR, 4936th Mtg., UN Doc. S/Res/1535 (2004) at preambular para. 4 [SC Res. 1535]; SC Res. 1540, UN SCOR, 4956th Mtg., UN Doc. S/Res/1540 (2004) at preambular para. 14 [SC Res. 1540]; SC Res. 1566, UN SCOR, 5053rd Mtg., UN Doc. S/Res/1566 (2004) at preambular para. 3 [SC Res. 1566]; and SC Res. 1611, UN SCOR, 5223rd Mtg., UN Doc. S/Res/1611 (2005) at preambular para. 2.

33 This is the argument of Treasa Dunworth in "New Zealand's Legislative Responses to September 11" (Paper presented to the 10th Annual Meeting of the Australian and New Zealand Society of International Law on New Challenges and New States: What Role for International Law? 16 June 2002, Australian National University, Canberra) [unpublished]. See also Association for the Prevention of Torture (APT), "APT Position Paper: Protection of the Human Rights and of Fundamental Freedoms in the Fight Against Terrorism," online: <<http://www.apr.ch/pub/library/>

undertaken, under article 55(c) and through the preamble to the *UN Charter*, to observe human rights and fundamental freedoms for all without distinction as to race, language, or religion.

The first, more express exception mentioned is the *Declaration of the Security Council meeting with Ministers of Foreign Affairs* on 20 January 2003, adopted under Resolution 1456.³⁴ Resolution 1456 directs its attention to the question of compliance with human rights, paragraph 6 providing: "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."³⁵ While persuasive in its wording in this regard, its status should be noted. Security Council resolutions, when couched in mandatory language, are binding upon members of the United Nations.³⁶ In the *Declaration* adopted under Resolution 1456, the text of (including the mentioned paragraph 6) is preceded by the sentence: "The Security Council therefore *calls for* the following steps to be taken."³⁷ Such an expression, although influential, is exhortatory and therefore not a binding *decision* within the contemplation of article 25 of the *Charter*.³⁸

The second resolution to be considered is, however, both direct and binding in its terms. Security Council resolution 1624 of 2005 provides, after setting out the obligations of states to counter various aspects of terrorism, that "[s]tates *must* ensure that any measures taken to implement paragraphs 1, 2 and 3 of this resolution comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law."³⁹ The latter provision is not preceded by exhortatory language, but instead constitutes a clearly binding *decision* of the Security Council within the terms of article 25 of the *UN Charter*.

ppter_en.htm>.

34 SC Res. 1456, *supra* note 32.

35 *Ibid.* at para. 6.

36 UN Member States have agreed to be bound by decisions of the Security Council: see art. 25 of the *UN Charter*.

37 SC Res. 1456, *supra* note 32, opening and un-numbered paragraph [emphasis added].

38 In the *Namibia Advisory Opinion*, the International Court of Justice took the position that a resolution couched in non-mandatory language should not be taken as imposing a legal duty upon a member state. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1990)*, Advisory Opinion, [1971] I.C.J. Rep. 53.

39 SC Res. 1624, UN SCOR, 5261st Mtg., UN Doc. S/Res/1624 (2005) at para. 4 [emphasis added].

Canada's International Obligations

It cannot be disputed that all states, including Canada, have a duty to protect their nationals and, in the context of countering terrorism, Canada also has obligations under the twelve universal conventions on terrorism currently in force.⁴⁰ Notwithstanding this, the latter discussion points to a very clear conclusion that states must comply with human rights standards when countering terrorism. The combination and consistency of directions to this effect from different quarters of the United Nations is firm. As a member of the United Nations, Canada has agreed to observe human rights and fundamental freedoms for all,⁴¹ and it should – at the very least – be *guided* by the recommendatory statements to this effect within General Assembly and Commission on Human Rights resolutions, and with the Security Council call upon members of the UN to counter terrorism in a manner consistent with their international human rights obligations. Of note, there is a potential argument that the resolutions, due to their consistent and repeated adoption, evidence the existence of *binding* norms of customary international law.⁴² This argument is taken no further here, since it would involve a detailed consideration of the contents of the relevant resolutions, the voting patterns of states in the adoption of the resolutions, and the corresponding conduct of states (including implementing legislation and the enforcement of it). What can be said is that, if such customary norms exist, they are opposable to Canada since this country has not protested against their development.⁴³

As for international treaties, Canada has obligations to maintain and promote human rights under the various international human rights treaties to which it is party.⁴⁴ It is notable, although limited to the issue

40 See further Alex Conte, *Security in the 21st Century: The United Nations, Afghanistan and Iraq* (London: Ashgate Publishing Ltd, 2005) at c. 2. Note also that although not yet in force, the *International Convention for the Suppression of Acts of Nuclear Terrorism* was adopted by the United Nations General Assembly on 13 April 2005: GA Res. 59/290, UN GAOR, 59th Sess., 91st Plen. Mtg., UN Doc. A/Res/59/290 (2005).

41 *Charter of the United Nations*, art. 55(c).

42 Norms of customary international law are established through state practice (being practice that is uniform and consistent, generally applied, and established over time) and which is carried out by states in the belief that such practice is required by law (*opinio juris*): see Malcolm Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003) at 77-80.

43 A state that objects persistently during the formation of a rule of customary international law prior to its crystallization may assert that the resulting custom is not applicable to it. See e.g. *Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)* (1951), 18 I.L.R. 86.

44 Canada is a party to all six of the principal international human rights conventions adopted

of racial discrimination, that the UN Committee on the Elimination of Racial Discrimination, in its concluding observations on the thirteenth and fourteenth periodic reports of Canada,⁴⁵ specifically requested that Canada “ensure that the application of the *Anti-terrorism Act* does not lead to negative consequences for ethnic and religious groups, migrants, asylum-seekers and refugees, in particular as a result of racial profiling.”⁴⁶

II. INTERNATIONAL GUIDELINES ON COMPLIANCE WITH HUMAN RIGHTS

The foregoing discussion has identified various statements in which compliance with human rights when countering terrorism has been mandated. The question to be considered now is how, in general, this is to be achieved. Does “compliance” with human rights standards mean absolute compliance? Or is a level of limitation upon rights acceptable? An examination of international guidelines on the subject reveals a consensus that the latter approach is to be adopted, so that rights and freedoms may be limited in pursuit of counter-terrorism where this is necessary and if effected in a proportionate manner.

under the auspices of the United Nations: the *Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 211 (entered into force 4 January 1969); the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976); the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976); the *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981); the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 112 (entered into force 26 June 1987); and the *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 43 (entered into force 2 September 1990).

45 UN Doc. CERD/C/320/Add.5.

46 Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*, 1547 Mtg. (1 November 2002), in UN Doc. A/57/18 at para. 338. The potential for negative consequences flowing from racial profiling raises interesting issues, with the Committee clearly having taken the view that no negative consequences should flow from such profiling. For further discussion on the subject of racial profiling, see: Alex Conte & Boaz Ganor, *Legal and Policy Issues in Establishing an International Framework for Human Rights Compliance When Countering Terrorism* (Herzlia, Israel: International Policy Institute for Counter-Terrorism, 2005) at 39-43, online: <http://www.ict.org.il/pdf/Ganor_Conte_Nov05.pdf> [Conte & Ganor]; Samuel R. Gross & Debra Livingston, “Racial Profiling Under Attack” (2002) 102 Columbia Law Rev. 1413; Samuel R. Gross & Katherine Y. Barnes, “Road Work: Racial Profiling and Drug Interdiction on the Highway” (2002-2003) 101 Michigan Law Rev. 651; and Nelson Lund, “The Conservative Case Against Racial Profiling in the War on Terrorism” (2002-2003) 66 Albany Law Rev. 329.

As part of its series of occasional papers, the International Commission of Jurists (ICJ) commissioned a paper on terrorism and human rights soon after September 11.⁴⁷ The paper concluded with a list of minimum criteria that states must observe in the administration of justice when countering terrorism, including: observance of the primacy of the rule of law and of international human rights obligations, the need to strictly comply with international law when declaring a state of emergency and using emergency powers, maintaining and guaranteeing at all times rights and freedoms that are non-derogable,⁴⁸ the adoption of precise definitions of criminal offences, ensuring that tribunals repressing terrorist acts are independent and impartial, and maintaining proper criminal process rights.⁴⁹ At its biennial conference in August 2004, the ICJ was also instrumental in the adoption of the *Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*.⁵⁰ The *Berlin Declaration* recognizes the need to combat terrorism and the duty of states to protect those within their jurisdiction.⁵¹ It also affirms that contemporary human rights law affords states a reasonably wide margin of flexibility to combat terrorism so long as this does not contravene the essence of rights.⁵²

In July 2002, the Committee of Ministers to the Council of Europe adopted guidelines on human rights and the fight against terrorism.⁵³ In the preface to its guidelines, Secretary General Walter Schwimmer warned that although the suppression of terrorism is an important objective, states must not use indiscriminate measures to achieve that objective.⁵⁴ Drawing

47 ICJ, *Terrorism and Human Rights* (Geneva: ICJ, 2002).

48 Including, according to the paper, the prohibition against torture and ill-treatment; the prohibition of discrimination based on race, colour, sex, language, political opinion, religion, or social origin; the prohibition of arbitrary deprivation of life; the prohibition of arbitrary deprivation of liberty; and the rights to an independent and impartial tribunal, the presumption of innocence, and judicial guarantees. *Ibid.* at 248-49. The non-derogability of rights is, in the author's view, a controversial issue and often stated in simplistic terms. This article does not seek to address that issue.

49 *Ibid.* at 248-51.

50 ICJ, *Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* (28 August 2004), online: <http://www.icj.org/IMG/pdf/Berlin_Declaration.pdf> [*Berlin Declaration*].

51 *Ibid.* at preambular para. 2 and operative para. 1.

52 *Ibid.* at preambular para. 5.

53 Council of Europe, *Guidelines on Human Rights and the Fight Against Terrorism*, online: Council of Europe Publishing <http://book.coe.int/sysmodules/RBS_fichier/admin/download.php?fileid=1417>.

54 *Ibid.* at 5. The Secretary-General commented that: "For a State to react in such a way would be to fall into the trap set by terrorism for democracy and the rule of law. It is precisely in situations on crisis, such as those brought about by terrorism, that respect for human rights is even more important, and that even greater vigilance is called for."

from the jurisprudence of the European Court of Human Rights,⁵⁵ and the UN Human Rights Committee, the Council's guidelines set out general rules on the interaction between counter-terrorism and human rights, as well as addressing specific rights and freedoms, with commentary on each stated guideline. Five of the more specific guidelines warrant mention. The first reflects the idea that counter-terrorism is an important objective in a free and democratic society. Article I accordingly talks of a positive obligation upon states to protect individuals within their territory from the scourges of terrorism.⁵⁶ The second and third articles are directly relevant to the question of compliance with human rights. Article II prohibits the arbitrary limitation of rights,⁵⁷ and article III requires limiting measures to be lawful, precise, necessary, and proportional.⁵⁸ Further guidance on possible derogations is found in article XV, concerning derogations during situations of war or states of emergency threatening the life of a nation. Finally, article XVI underlines that states may never act in breach of peremptory norms of international law.

The substance of these statements and directions is also reflected in other international documents on the subject. Notable examples are: the *Preliminary Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism* of the Commissioner on Human Rights Sub-

55 Which has compulsory jurisdiction over states that are party to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222 (entered into force 3 September 1953), art. 46.

56 The Council's human rights guidelines, *supra* note 53, point to decisions of the European Court, in which it recognized this duty and the particular problems associated with the prevention and suppression of terrorism. See *e.g. Ireland v. the United Kingdom* (1978), 25 Eur. Ct. H.R. (Ser. A) 5 at para. 11; *Askoy v. Turkey* (1996), 26 Eur. Ct. H.R. (Ser. A) 2260 at paras. 70 and 84; *Zana v. Turkey* (1997), 57 Eur. Ct. H.R. (Ser. A) 2533 at paras. 59-60; *Incal v. Turkey* (1998), 78 Eur. Ct. H.R. (Ser. A) 1547 at para. 58; *United Communist Party of Turkey and Others v. Turkey* (1998), 75 Eur. Ct. H.R. (Ser. A) 1233 at para. 59; and *Brogan and Others v. the United Kingdom*, Eur. Ct. H.R., 29 November 1999, para. 48. In *Klass and Others v. Germany* (1978), 28 Eur. Ct. H.R. (Ser. A) 4 at para. 59, for example, the Court said: "The Court agrees with the [European] Commission that some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention".

57 Article II provides: "All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision." *Ibid.* Compare this with the *Commissioner's Guidelines*, *infra* note 63 at paras. 3, 4(i), and 4(j).

58 Article III provides: 1) "All measures taken by States to combat terrorism must be lawful"; and 2) "When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued." *Ibid.* Compare this with the *Commissioner's Guidelines*, *infra* note 63 at paras. 4(a), (e), (f), and (g).

Commission on the Promotion and Protection of Human Rights,⁵⁹ the report of independent expert Dr. Robert Goldman to the Commission on Human Rights in February 2005 (and the subsequent resolution of the Commission establishing a Special Rapporteur to monitor counter-terrorism measures worldwide that might threaten human rights),⁶⁰ the Council of Europe *Guidelines on the Protection of Victims of Terrorist Acts*,⁶¹ and the report of the Inter-American Commission on Human Rights.⁶²

These various general statements are useful and support, in the writer's view, the notion that "compliance" with human rights means that any limitations upon rights when countering terrorism are to be effected by necessary and proportional means. The difficulty, from a pragmatic perspective, is that they do not express *how* such limitations are to be formulated. A document that does identify a number of specific, practical requirements in achieving a proper balance between counter-terrorist objectives and human rights is seemingly little known. In her report and follow-up to the 2001 World Conference on Human Rights, the then-UN High Commissioner for Human Rights, Mary Robinson, prepared guidelines for the use of the Security Council Counter-Terrorism Committee (the *Commissioner's Guidelines*).⁶³ The Counter-Terrorism Committee, established under the Council's Resolution 1373 of 2001, was charged with receiving reports from UN member states on their compliance with the counter-terrorist obligations specified within that Resolution.⁶⁴ The Commissioner sought to have the Committee issue the *Guidelines* to states, so that they might be directed in specific and useful terms on *how* to counter terrorism in a manner consistent with human rights.

59 Koufa, *supra* note 23.

60 See Robert Goldman (as independent expert to the Commission on Human Rights), *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, 61st Sess., UN Doc. E/CN.4/2005/103; and CHR Res. 2005/80, UN ESCOR, 61st Sess., 60th Mtg., UN Doc. E/CN.4/Res/2005/80.

61 CM/Del/Dec(2005)917/4.2/appendix2E/07 March 2005. These *Guidelines* have been reprinted alone, with the *Guidelines on Human Rights*, *supra* note 55, in *Human Rights and the Fight Against Terrorism* (Strasbourg: Council of Europe Publishing, March 2005), online: <http://www.coe.int/T/E/Human_Rights/5694-8.pdf>.

62 *Report on Terrorism and Human Rights*, Doc. OEA/Ser.L/V/II.116 (22 October 2002), online: <<http://www.cidh.org/Terrorism/Eng/toc.htm>>.

63 Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, *Human Rights: A Uniting Framework*, UN ESCOR, 58th Sess., UN Doc. E/CN.4/2002/18 (2002), Annex entitled *Proposals for "further guidance" for the submission of reports pursuant to paragraph 6 of Security Council resolution 1373 (2001). Compliance with international human rights standards*, I General Guidance: Criteria for the Balancing of Human Rights Protection and the Combating of Terrorism, available online: <http://www.legislationline.org/legislation.php?tid=46&clid=4447> [Commissioner's Guidelines].

64 *Supra* note 22 at para 6.

The Committee ultimately declined to issue the *Commissioner's Guidelines*, on the basis that the question was not within its mandate,⁶⁵ although this does not do away with the utility of the content of the *Guidelines* for present purposes. The *Commissioner's Guidelines* are consistent with the premises of other guidelines mentioned. They emanate from the highest political office of the United Nations concerned with the issue of human rights. Their content is therefore influential.

The *Commissioner's Guidelines* begin by making statements that go to answering the ideological question posed in the introduction to this article: are the objectives of countering terrorism and maintaining human rights compatible? The *Guidelines* recognize that counter-terrorist obligations have been imposed upon states by the Security Council and reaffirms that such action must be in compliance with human rights principles contained in international law.⁶⁶ They confirm the notion that human rights law allows for a balance to be struck between the enjoyment of rights and freedoms and legitimate concerns for national security through the limitation of rights in specific and defined circumstances.⁶⁷ Paragraphs 3 and 4 of the *Guidelines* set out precise instructions on how to formulate counter-terrorist measures that might seek to limit human rights:

3. Where this is permitted, the laws authorizing restrictions:
 - a) Should use precise criteria;
 - b) May not confer an unfettered discretion on those charged with their execution.
4. For limitations of rights to be lawful they must:
 - a) Be prescribed by law;
 - b) Be necessary for public safety and public order, i.e. the protection of public health or morals and for the protection of the rights and freedoms of others, and serve a legitimate purpose;
 - c) Not impair the essence of the right;
 - d) Be interpreted strictly in favour of the rights at issue;
 - e) Be necessary in a democratic society;
 - f) Conform to the principle of proportionality;

65 This refusal was anticipated in the remarks of the then-Chair of the Counter-Terrorism Committee in his briefing of the Security Council. Sir Jeremy Greenstock, *Threats to International Peace and Security Posed by Terrorism*, 18 January 2002, UN Doc. S/PV.4453. He stated: "The Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate. But we will remain aware of the interaction with human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organizations to study States' reports and take up their content in other forums." *Ibid.* at 5.

66 *Commissioner's Guidelines*, *supra* note 63 at para 1.

67 *Ibid.* at para. 2.

- g) Be appropriate to achieve their protective function, and be the least intrusive instrument amongst those which might achieve that protective function;
- h) Be compatible with the object and purposes of human rights treaties;
- i) Respect the principle of non-discrimination;
- j) Not be arbitrarily applied.⁶⁸

Having regard to their substantive similarities with other guidelines discussed and the practical benefits of concrete factors against which counter-terrorist legislation and policies can be measured, the *Commissioner's Guidelines* form a very useful tool for executive and parliamentary decision-makers, and the judiciary.

III. PARALLELS WITH THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS⁶⁹

As might have been appreciated from the foregoing discussion, the factors identified within paragraphs 3 and 4 of the *Commissioner's Guidelines* bear a striking resemblance to the various steps required in order to satisfy the *Charter's* general limitation provision under section 1. What will be seen as a result of the following comparison between the *Commissioner's Guidelines* and the general limitations clause is that its application will result in compliance with the aforementioned *Commissioner's Guidelines*. Thus, if a legislative limitation upon *Charter* rights and freedoms can be justified under section 1, such a limitation is consistent with the *Commissioner's Guidelines* on countering terrorism in a manner consistent with human rights. This is not insignificant. Although this article does not seek to undertake an examination of specific provisions within Canada's counter-terrorist legislative regime, it is sufficient to note that commentators such as Professor David Paciocco have identified provisions of the *Anti-terrorism Act*⁷⁰ that in his view violate the *Charter* in a manner that cannot be saved by section 1.⁷¹ If he is correct, then the provisions in question are not only subject to invalidation under the *Charter*, but Canada also stands in breach of international consensus on the subject.

It should be recognized, at this stage, that not all *prima facie* breaches of *Charter* rights will fall to be considered within the context of the section 1 limitations provision. This will be the case where a limitation is capable

68 *Ibid.* at paras. 3-4.

69 *Supra* note 6.

70 *Supra* note 2.

71 Paciocco, *supra* note 2. In particular, he identifies the definition in s. 83.01(b) of "terrorist group," the preventative and recognizance provisions, and the investigative detention provisions.

of justification on a definitional, rather than an *ad hoc* (general) basis. The point of distinction here is that a definitional approach calls for an interpretation of a right or freedom in a manner through which consideration is given to the justifiable limits upon that right or freedom within the process of establishing the definition and extent of the right, while an *ad hoc* approach gives consideration to the issue of justifiable limits as a separate, and consequent, issue.⁷² An example of definitional balancing occurs in the case of the protection, under section 8 of the *Charter*, against *unreasonable* search and seizure (which calls upon a court to determine, on a definitional basis, whether or not a search was reasonable).⁷³ In contrast, section 2(b) of the *Charter* (guaranteeing “freedom of thought, belief, opinion and expression, including freedom of the press and other media communication”) is absolute in its characterization of the freedom so that only subsequent, *ad hoc*, limitations under section 1 of the *Charter* are permissible.⁷⁴

The point is also illustrated in the Supreme Court of Canada’s consideration of terrorism investigative hearings under section 83 of the *Criminal Code*⁷⁵ (as amended by the *Anti-terrorism Act*)⁷⁶ in *Re Application under s. 83.28 of the Criminal Code*.⁷⁷ The Court was required in that case to determine whether section 83.28 of the *Criminal Code* (which authorizes a judicial officer to issue an order to compel a person to attend an investigative hearing) infringed section 7 of the *Charter* and, if so, whether such an infringement was a reasonable limit within the meaning of section 1.⁷⁸ Ultimately, the Court did not need to consider the application of section 1, since it determined that section 83.28 did not infringe section 7 of the *Charter* (since it was in accordance with the principles of fundamental justice).⁷⁹ The Court therefore adopted a definitional balancing (or “rights-specific”) approach in applying section 7, without the need to then undertake an *ad hoc* balancing exercise under section 1.⁸⁰

72 See Butler, *supra* note 5 at 541-44; and Conte & Ganor, *supra* note 46 at 21-23.

73 See *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

74 The impact of the s. 1 justification analysis upon the s. 2(b) freedom, for example, has the result that freedom of expression taking the form of violence or terror, or directed towards violence or terror, is unlikely to find shelter in the guarantees of the *Charter*. See *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 [Suresh].

75 R.S.C. 1985, c. C-46

76 *Supra* note 2.

77 *Re Application under s. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248.

78 *Ibid.* at para. 26.

79 *Ibid.* at para. 106.

80 *Ibid.* See in particular paras. 67-79.

In the context of section 7 litigation, this is not an uncommon approach.⁸¹ The inter-relationship between section 7 and the *Commissioner's Guidelines* is discussed further below.⁸²

As is well known, section 1 of the *Charter* allows for the rights and freedoms set out within the *Charter* to be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The substance of the provision requires any limitation to be in pursuit of a pressing objective in a free and democratic society, in such terms that are proportional. Preliminary to this substantive test are issues concerning the onus of proof, the degree of limitation and the manner of prescription. What follows is an overview of the relevant requirements of the section 1 limitations provision, highlighting the significant aspects of section 1 litigation that relate to the *Commissioner's Guidelines*. Where appropriate, regard is also had to factors that the courts might be inclined to take into account when considering section 1 in the context of counter-terrorism.

The Onus of Proof and the State's International Obligations

Apparent from the wording of section 1, any justification for limiting rights must be "demonstrated." The onus of demonstrating such a justification thus rests on the party seeking to uphold the limitation, which will be the Crown.⁸³ In the context of Canada's counter-terrorist legislation, the Crown must therefore satisfy the courts that any limitation upon rights imposed by the legislation is, on a balance of probabilities,⁸⁴ reasonable, prescribed by law, and justified in a free and democratic society. This onus fits with the first-stated principle of the *Commissioner's Guidelines*: that states must, in their implementation of counter-terrorist measures, be guided and comply with international human rights law.⁸⁵ It is also consistent with the directions of the Security Council, General Assembly and Commission on Human Rights discussed earlier.⁸⁶

81 The focus of this article is upon the ad hoc balancing approach under s. 1 of the *Charter* and, for this reason, discussion will not be had to the definitional approach utilized when considering qualified rights. On that subject, however, see Peter W. Hogg, *Constitutional Law of Canada*, 2005 Student Ed. (Toronto: Thompson Carswell, 2005) at 35.14 ("Application to qualified rights") [Hogg].

82 See Part IV below.

83 See *Re S. 12(1) of the Juvenile Delinquents Act (Canada)* (1983), 41 O.R. (2d) 113 at 124; and *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136-37 (Dickson C.J.) [*Oakes*]. This onus is placed upon the Crown once it has been established that a *Charter* right has been infringed (the burden of which rests on the person complaining that their right(s) have been impinged upon). See Hogg, *supra* note 81 at 795.

84 See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 [*RJR-MacDonald*].

85 *Commissioner's Guidelines*, *supra* note 63 at para. 1.

86 See Part I above.

Achieving "Limits" Upon Rights

A further preliminary point concerns the question of whether an interference with a right or freedom is a "limit," within the contemplation of section 1, or a total exclusion or "denial" of the right. In *Attorney General (Quebec) v. Quebec Protestant School Boards*,⁸⁷ the Supreme Court had to consider the validity of the clause in Québec's *Charter of the French Language* (Bill 101)⁸⁸ that limited admission to English-language schools to children of persons who themselves had been educated in English in Québec. In accepting that the clause was inconsistent with section 23(1)(b) of the *Charter of Rights and Freedoms*,⁸⁹ the Court held that it amounted to an actual denial of the *Charter* right and therefore refused to be drawn into the question of justification under section 1.⁹⁰ Professor Peter Hogg criticizes the distinction between "limits" and "denials" on the basis that there is no legal standard by which *Charter* infringements can be sorted into the two categories.⁹¹ In a later case, *Ford v. Quebec (Attorney General)*,⁹² the Supreme Court described the *Quebec School Boards* case as a "rare case of a truly complete denial of a guaranteed right or freedom" and, in doing so, recognized that most (if not all) legislative qualifications of a right or freedom will amount to a denial of the right or freedom to that limited extent.⁹³ On the other hand, it observed, a limit that permits *no* exercise of a guaranteed right or freedom in a limited area of its potential exercise is not justifiable.⁹⁴ The distinction, despite its lack of certainty, finds reflection in the *Commissioner's Guidelines*. By comparison, paragraph 4(c) of the *Guidelines* demands that limitations imposed by counter-terrorist measures must not impair the *essence* of the right being limited.

The Means of Prescribing Limitations upon Human Rights

The final preliminary issue in the application of section 1, and again arising from the language of that provision, is that any limitation must be "prescribed by law." In the context of considering counter-terrorist legislation

87 [1984] 2 S.C.R. 66 [*Quebec School Boards*].

88 R.S.Q., c. C-11.

89 Section 23(1)(b) guarantees that Canadian citizens "who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province."

90 *Quebec School Boards*, *supra* note 87 at 88.

91 Hogg, *supra* note 81 at 799.

92 [1988] 2 S.C.R. 712 [*Ford*].

93 *Ford*, *ibid.* at 773.

94 *Ibid.* at 773-74.

and policies, such a prescription should exist without controversy. The expression "prescribed by law" has been considered by Canadian courts, as well as the European Court of Human Rights.⁹⁵ Two requirements flow from the expression: (a) the law must be adequately accessible so that the citizen has an adequate indication of how the law limits his or her rights; and (b) the law must be formulated with sufficient precision so that the citizen can regulate his or her conduct.⁹⁶ The same language is found in the *Commissioner's Guidelines*, requiring a limitation to use precise criteria and to be prescribed by law.⁹⁷

Notably, it is settled law in Canada that a prescribed limit may be implied from the operating requirements of a statute. In *R. v. Therens*, Le Dain J. described the meaning of the words "prescribed by law" as follows:

The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. *The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements.* The limit may also result from the application of a common law rule.⁹⁸

The *Commissioner's Guidelines* also require that any law authorizing a restriction upon rights and freedoms may not confer an unfettered discretion on those charged with their execution, and must not be arbitrarily applied.⁹⁹ In the Ontario Court of Appeal, the same condition was applied to find that a statute authorizing film censorship failed to meet the requirements of a limitation "prescribed by law" because the censor board was given an unfettered discretion to ban or cut film.¹⁰⁰ The Supreme Court of Canada has similarly found that a vague statutory provision can offend the requirement that limitations upon rights must be "prescribed by law."¹⁰¹ Subsequently, however, the Supreme Court of Canada has drawn a distinction between two types of statutory conferrals of discretion.¹⁰² The first type of conferral is one that either expressly, or by necessary implication, authorizes decisions that

95 *Sunday Times v. United Kingdom* (1978), 58 I.L.R. 491 at 524-27. The test was later reaffirmed by the European Court in the case of *Silver v. U.K.*, [1983] 5 E.H.R.R. 347.

96 *Ibid.*

97 *Commissioner's Guidelines*, *supra* note 63 at paras. 3(a), 4(a).

98 [1985] 1 S.C.R. 613 at 645 [emphasis added]. This explanation was cited with approval by the Supreme Court in *R. v. Orbanek*; *R. v. Elias*, [2005] 2 S.C.R. 3 at para. 36.

99 *Supra* note 63 at para. 3(b) and (j).

100 *Re Ontario Film and Video Appreciation Society* (1984), 45 O.R. (2d) 80.

101 See *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

102 See *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1077-80 (Lamer C.J.); and *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at paras. 1-4.

would infringe a *Charter* right, in which case the statutory provision will not be held to satisfy the “prescribed by law” test.¹⁰³ The second type of conferral is one that is broad enough to allow the decision-maker to act in a manner that *may* infringe a *Charter* right, in which case it is the decision, not the statute, that must satisfy the section 1 standard of justification.¹⁰⁴

This distinction between the terms of the authority from which a discretion arises versus the making of a decision in exercise of the discretion is contrary to that advocated in the *Commissioner’s Guidelines*, which requires the legal authorization to be in terms that does not confer an unfettered discretion. This is of concern, for example, in the context of the issuing of security certificates in immigration and refugee cases.¹⁰⁵ Under the Canadian approach, the *authority* to issue such certificates cannot be challenged; only the consequent *decision* can be the subject of judicial scrutiny. The *Commissioner’s Guidelines*, however, call for an earlier assessment – the consequences of which demand that unfettered discretions are not to be permitted. This appears to be the only area of divergence between *Charter* section 1 jurisprudence and the *Commissioner’s Guidelines*. It might be ultimately argued that because the Supreme Court approach builds in a checking mechanism to ensure that a discretion is not itself exercised in a manner inconsistent with the *Charter*, the approach consequently achieves the spirit of paragraph 3(b) of the *Commissioner’s Guidelines*.¹⁰⁶

Although not expressly dealt with in determining what is “prescribed by law,” it should be remembered that any legal prescription to comply with the rule of law must respect the principle of non-discrimination and equality before the law.¹⁰⁷ Rather than dealing with this principle in the

103 As in the situations encountered in: *Re Ontario Film and Video Appreciation Society*, *supra* note 100; *R. v. Husky*, [1988] 1 S.C.R. 621; and *R. v. Ladouceur*, [1990] 1 S.C.R. 1257.

104 The approach in such a case, as in *Slaight Communications*, *supra* note 102, will require the broad empowering language to be read down so as not to authorize decisions that would infringe the *Charter*. For further discussion, see Hogg, *supra* note 81 at 801-803.

105 See e.g. *Suresh*, *supra* note 74, where the Supreme Court was required to determine the approach to be taken in reviewing decisions of the Minister of Citizenship and Immigration on whether a refugee applicant’s presence constituted a danger to the security of Canada (based on the opinion of the Canadian Security Intelligence Service that he was a member and fundraiser of the Liberation Tigers of Tamil Eelam, an organization alleged to be engaged in terrorist activity in Sri Lanka).

106 The contrary argument is that this approach is too late in time, and relies on the initiation of litigation by a person affected by the decision.

107 On the interchangeable nature of the terms “constitutionalism” and “rule of law” in Canada, see Hogg, *supra* note 81 at 2. Note that this is slightly different in nature to Dicey’s notion of the rule of law, requiring: (1) the regulation of government action, so that the government can only act as authorized by the law, having the consequence that one can only be punished or interfered with pursuant to the law; (2) the equality of all persons before the law (which is the context in which the

consideration of section 1 of the *Charter*, equality before the law is a distinct right under section 15(1).¹⁰⁸ Similarly, paragraph 4(i) of the *Commissioner's Guidelines* demands that any limitation respect the principle of non-discrimination.

While considering the question of the means by which limitations are to be imposed, it is relevant to have regard to one further matter, even though this is not touched on by the application of section 1 of the *Charter*. In what is clearly an initiative to ensure that states do not use the important objective of countering terrorism as an excuse to extend state powers beyond this objective, the 2005 *Draft Framework and Principles* of the Special Rapporteur to the Sub-Commission on the Promotion and Protection of Human Rights includes the following advice: "Counter-terrorism measures should directly relate to terrorism and terrorism-related acts, not actions undertaken in armed conflict situations or acts that are ordinary crimes."¹⁰⁹ This view is reflected within the guidelines advocated by the Committee of Ministers to the Council of Europe, which direct that where measures taken by states to combat terrorism restrict human rights, those restrictions must be defined as precisely as possible and be necessary for the objective of countering terrorism.¹¹⁰

The Objective of Countering Terrorism

As accepted in Canada, the test for determining whether a limit is "reasonable" and "justified in a free and democratic society" is the one set out in *Oakes*.¹¹¹ Focusing upon the first element of the test, it is clear that counter-terrorism is a sufficiently important objective in a free and democratic society. In its consideration of Bill C-36, the anti-terrorism legislation, for example, the Special Senate Committee spoke of its "unusual importance."¹¹² Although the Supreme Court in *Re Application*

rule of law is referred to in this article); and (3) the requirement of procedural and formal justice. See Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: MacMillan, 1885) at 175-84.

108 Section 15(1) of the *Charter* provides: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." *Supra* note 6.

109 Koufa, *supra* note 23 at para 33.

110 Council of Europe, *Guidelines on Human Rights and the Fight Against Terrorism*, *supra* note 53 at art. III(2).

111 *Oakes*, *supra* note 83 at 138-39.

112 Canada, Special Senate Committee on the Subject Matter of Bill C-36, *First Report of the Committee* (1 November 2001), online: CIRC <<http://circ.jmellon.com/docs/view.asp?id=522>>. See the text

under s. 83.28 of the *Criminal Code*¹¹³ did not have to consider section 1 of the *Charter* and the need to establish an important objective, its discussion of the objectives of the *Anti-terrorism Act*¹¹⁴ intimated a similar view.¹¹⁵ Paciocco himself acknowledges this.¹¹⁶

From an international perspective, the idea that counter-terrorism is a pressing and substantial objective is clearly evident. The very existence of guidelines setting out the grounds upon which rights may be limited when countering terrorism represents a tacit acceptance of this. As trite as it may seem, it is notable in that regard that resolutions of the UN Security Council, General Assembly, and Commission on Human Rights recognize that terrorism has impacts upon both individuals and society as a whole, so that the countering of those adverse effects cannot be doubted as constituting an important objective. Resolutions of those bodies have identified terrorism as an activity that: has links with transnational organized crime, money-laundering, and trafficking in drugs and arms, as well as illegal transfers of nuclear, chemical, and biological materials; is linked to the consequent commission of serious crimes such as murder, extortion, kidnapping, assault, hostage-taking, and robbery; endangers or takes innocent lives; creates an environment that destroys the freedom from fear of the people; threatens the dignity and security of human beings everywhere; has an adverse effect on the establishment of the rule of law; jeopardizes fundamental freedoms; aims at the destruction of human rights; undermines pluralistic civil society; aims at the destruction of the democratic bases of society; destabilizes legitimately constituted governments; has adverse consequences for the economic and social development of states; constitutes a grave violation of the purpose and principles of the United Nations; jeopardizes friendly relations among states; has a pernicious impact upon relations of co-operation among states, including co-operation for development; threatens the territorial integrity and security of states; is a threat to international peace and security; and must be suppressed as an essential element for the maintenance of international peace and security.¹¹⁷

under the headings A) and IIIg).

113 *Supra* note 74.

114 *Supra* note 2.

115 *Ibid.* at paras. 37-40.

116 *Supra* note 2.

117 SC Res. 1189, UN SCOR, 3915th Mtg., UN Doc. S/Res/1189 (1998) at preambular paras. 2-3 and operative para. 2; SC Res. 1269, UN SCOR, 4053rd Mtg., UN Doc. S/Res/1269 (1999) at preambular paras. 1, 8; SC Res. 1368, UN SCOR, 4370th Mtg., UN Doc. S/Res/1368 (2001) at para. 1; SC Res. 1373, *supra* note 21 at paras. 3-5; SC Res. 1377, UN SCOR, 4413rd Mtg., UN Doc. S/Res/1377 (2001) at paras. 3, 5-6; SC Res. 1390, UN SCOR, 4452nd Mtg., UN Doc. S/

"Counter-terrorism," if it is to counter the adverse affects just identified, is clearly a sufficiently important objective in and of itself. Care should be taken, though, not to over-simplify that position. Paragraph 4 of the *Commissioner's Guidelines* is instructive in this regard, stating that limits must: be necessary for public safety and public order, serve a legitimate purpose, and be necessary in a democratic society.¹¹⁸ Perhaps, then, the question of establishing a pressing and substantial objective requires more thought? Is it sufficient to say that counter-terrorism *per se* qualifies as such an objective? It is relevant that the Supreme Court seems to apply a reasonably low threshold when considering this first branch of the *Oakes* test.¹¹⁹ However germane to both establishing that the objective of the provision being tested is sufficiently important, and to the later proportionality test, the author proposes that four enquiries should be undertaken at this stage.

The first two inquiries concern the threat of terrorism to the state. First, one should consider how the provision or counter-terrorist measure links with the *actual* threat of terrorist attacks against the state. Second, and longer-

Res/1390 (2002) at preambular para. 9; SC Res. 1438, *supra* note 32 at preambular para. 2; SC Res. 1440, *supra* note 32 at preambular para. 2; SC Res. 1450, *supra* note 32 at preambular para. 4; SC Res. 1455, *supra* note 32 at preambular para. 7; SC Res. 1456, *supra* note 32 at preambular paras. 1, 3, 6; SC Res. 1526, UN SCOR, 4908th Mtg., UN Doc. S/Res/1526 (2004) at preambular para. 3; SC Res. 1530, UN SCOR, 4923rd Mtg., UN Doc. S/Res/1530 (2004) at preambular para. 2; SC Res. 1535, *supra* note 32 at preambular para. 2; SC Res. 1540, *supra* note 32 at preambular para. 8; SC Res. 1566, *supra* note 32 at preambular para. 7; GA Res., 3034(XXVII), *supra* note 10 at preambular para. 8 and operative para. 1; GA Res. 31/102, *supra* note 10 at para. 1; GA Res. 32/147, *supra* note 10 at para. 1; GA Res. 34/145, *supra* note 10 at para. 1; GA Res. 36/109, *supra* note 10, para. 1; GA Res. 38/130, *supra* note 10 at para. 1; GA Res. 40/61, *supra* note 10 at paras. 1, 3; GA Res. 42/159, *supra* note 10 at paras. 1, 3; GA Res. 44/29, *supra* note 10 at preambular para. 8 and operative paras. 1, 3; GA Res. 48/122, *supra* note 11 at preambular para. 7 and operative para. 1; GA Res. 50/186, *supra* note 11 at preambular para. 12 and operative paras. 2, 5; GA Res. 51/210, *supra* note 14 at paras. 1-2; GA Res. 52/133, *supra* note 11 at preambular paras. 8, 11 and operative para. 3; GA Res. 54/164, *supra* note 11 at preambular paras. 9, 13; and GA Res. 56/160, *supra* note 11 at preambular paras. 18, 24 and operative para. 3.

118 *Supra* note 63 at para. 4.

119 David Stratas *et al.*, *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada* (Aurora, Ont.: Canada Law Book, 1990) at 6-6.3 [Stratus]. Having made that point, the text continues by warning that "the characterization of the objective is all-important. If the true objective of the impugned provision is administrative convenience or the saving of costs, the Court is likely to hold that the objective is not sufficiently pressing and substantial to warrant overriding a guaranteed right or freedom." The language of the *Oakes* test indicates that a reviewing court should adopt a rigorous examination of the legislative intent of any limiting provision (the expression of Dickson C.J. points to three elements: 1. that the legislative objective is consistent with the values of a free and democratic society; 2. that it relates to concerns which are "pressing and substantial"; and 3. that it is directed to the realization of "collective goals of fundamental importance"). *Supra* note 83 at para. 70. Hogg notes that, in practice, this first element has been satisfied in all but one or two of the *Charter* cases that have reached the Supreme Court. *Supra* note 78 at 810.

lasting, consideration needs to be given to its assistance to considering the *potential* threat of terrorism. Measured against both the probability of that potential being actualized and the consequences of such acts, potential threats are to be assessed having regard to the motivation and operational capacity of terrorist networks.¹²⁰ Operational capacity refers to the ability of terrorist networks to gain access to the territory or facilities of the state and perpetrate terrorist acts therein. While border security is a matter that almost all states have paid increased attention to in the new millennium, it must be acknowledged that trans-boundary activity and the relatively simple and inexpensive means of perpetrating terrorist acts¹²¹ means that the operational capacity of most terrorist entities should be viewed as being reasonably high. On the subject of motivation, the question is whether the state is a likely or possible target of terrorist networks. The motivation of Al-Qaida and many Islamic radicals, for example, is not just the spreading of the Muslim faith, but also the elimination of what such groups see as the evil of modernity. To such groups, all modern, non-Muslim states are a potential target.¹²²

The third relevant inquiry in determining the *weight* of the counter-terrorist measure concerns its contribution to the international framework on anti-terrorism. Postmodern terrorism is transnational by nature.¹²³ The international legal framework on counter-terrorism, through its interaction of international conventions, Security Council resolutions and international institutional monitoring and conduct, depends for its effectiveness upon the participation of the entire international community. A considerable measure of its success lies in the universal adoption and implementation of the obligations under that framework in order to prevent any state being either targeted by terrorists or used by them as a base of operations (whether that be the establishment of physical training camps or the laundering of money to fund activities of terrorist organizations).¹²⁴

120 For a more detailed discussion of the assessment of actual and potential threats of terrorism against the state, see Conte & Ganor, *supra* note 46 at 36-38.

121 See e.g. Marc E. Nicholson, "An Essay on Terrorism" (2003) *AmericanDiplomacy.org*, online: University of North Carolina <http://www.unc.edu/depts/diplomat/archives_roll/2003_07-09/nicholson_terr/nicholson_terr.html>.

122 See Conte & Ganor, *supra* note 46 at 36-38.

123 On the topic of the transnational and international character of jihadist and other ideological terrorism in the modern age, see Boaz Ganor, ed., *Post-Modern Terrorism: Trends, Scenarios and Future Threats* (Somerset, NJ: Transaction Publishers, 2006).

124 Former U.S. Ambassador to the United Nations, John Danworth, made this point in an address to the Security Council's Counter-Terrorism Committee in 2004: "[The Committee] must never forget that so long as a few States are not acting quickly enough to raise their capacity to fight terrorism or are not meeting their international counter-terrorism obligations, all of us remain vulnerable" (United Nations Foundation, "Counter-terrorism Cooperation Improving, Security

Finally, it is also relevant to have regard to other national interests furthered by the counter-terrorist measure being examined. Broadly speaking, it is safe to assume that it will be in the national interest of most responsible international actors to contribute to the international framework on counter-terrorism and, thereby, to contribute to the maintenance of a peaceful, secure, and free-functioning international society. On a more specific level, border security, for example, is not just relevant to counter-terrorism, but also to the maintenance of import and export trades, the thwarting of drug-trafficking, and illegal migration. Efforts to stop money laundering contribute to the suppression of organized crime of all types, not just the financing of terrorism. Similarly, the protection of nuclear material is relevant not only to preventing terrorist organizations from gaining access to and using nuclear weapons as tools of terrorism, but also to the objective of disarmament and non-proliferation.

Rational Connection

Within the second limb of the *Oakes* test, one must first be satisfied that the limiting measure is rationally connected to the achievement of the objective being pursued. In simple terms, all this requires is that the measures logically further the objective,¹²⁵ although evidence of this connection might be necessary where such a link is not plainly evident.¹²⁶ This first requirement links with the necessity elements of paragraphs 4(b) and (d) of the *Commissioner's Guidelines*.¹²⁷

Council Told" *UN Wire* (20 July 2004), online: <<http://www.unwire.org/UNWire>>.

125 See *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 at 219, where the Supreme Court said that "[t]he *Oakes* inquiry into 'rational connection' between objectives and means to attain them requires nothing more than a showing that the legitimate and important goals of the legislature are logically furthered by the means the government has chosen to adopt." The Court's directions on the *Charter of Rights* notes that the Court has seldom found that legislation fails this part of the test, although there are instances where this has occurred. Stratas, *supra* note 115 at 6:06. In *Oakes*, for example, s. 8 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, was found to lack rational connection. Section 8 (which had certain criminal process implications and thereby impacted upon criminal process rights) contained a statutory presumption that possession of even small amounts of narcotics meant that the offender was deemed to be trafficking in narcotics. There was no rational connection, said the Court, between the possession of small amounts of narcotics and the countering of trafficking. *Supra* note 83 at para. 78.

126 *Figueroa v. Canada (A.G.)*, [2003] 1 S.C.R. 912. The Court was critical of aspects of the *Canada Elections Act*, R.S.C. 1985, c. E-2, concerning the registration of political parties and the tax benefits that flow from such registration. The *Act* required that a political party nominate candidates in at least fifty electoral districts to qualify for registration. While the Court held that it was a pressing objective to ensure that the tax credit scheme was cost-efficient, it found that there was no rational connection between that objective and the fifty-candidate threshold requirement. For the majority, Iacobucci J. (at para. 68) was particularly critical of the fact that the government had provided no evidence that the threshold actually improved the cost-efficiency of the tax credit scheme.

127 Requiring limitations to be necessary for public safety and public order, and necessary in a

The author again proposes that further reflection be undertaken at this point. While it is acknowledged that the Supreme Court does not appear to have adopted a stringent approach to this feature of the *Oakes* test, it will be helpful to identify not only whether the counter-terrorist measure rationally furthers its objective, but also the extent to which this is effective. Having regard to the repeated reference to necessity, proportionality, and appropriateness within the *Commissioner's* (and others') *Guidelines*, a counter-terrorist measure must not only be rationally connected to its legitimate objective, but must also be effective in its pursuit of that objective. Imposing a limitation on rights for the purpose of countering terrorism, but doing so through ineffective means, is unlikely to be justifiable. Such means would, in all probability, be neither necessary, proportional, nor even appropriate.

Minimal Impairment

The second proportionality requirement is that the limiting measures being examined must impair the right or freedom as little as reasonably possible.¹²⁸ The Supreme Court initially displayed a degree of deference here, reluctant to consider the availability of alternative means of achieving an objective where the impairment upon the right was not serious.¹²⁹ This approach has been subsequently rejected on the basis that it would preempt the third stage of the proportionality analysis.¹³⁰ This proportionality requirement fits with paragraphs 4(d) (interpreting limiting measures in favor of rights) and 4(g) of the *Commissioner's Guidelines* (being the least intrusive means of achieving the protective function of the limitation). In doing so, this would also appear to fit with the reasonably broad requirement in paragraph 4(h) that any limitation must be compatible with the objects and purposes of human rights treaties (assuming that Canada's national instruments have properly incorporated the relevant treaties).

democratic society.

128 See *Oakes*, *supra* note 83 at 106; and *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 772-73.

129 In *R. v. Schwartz*, [1988] 2 S.C.R. 443, for example, it was suggested that the statutory provision (which provided for a presumption that a person did not have a firearms licence if s/he failed to produce one upon request) unnecessarily infringed the presumption of innocence. Counsel for Schwartz argued that police could simply check their computerized records to ascertain whether a licence had indeed been obtained. Justice McIntyre stated: "Even if there is merit in the suggestion . . . Parliament has made a reasonable choice in the matter and, in my view, it is not for the Court, in circumstances where the impugned provision clearly involves, at most, minimal - or even trivial - interference with the right guaranteed in the Charter, to postulate some alternative which in its view would offer a better solution to the problem." *Ibid.* at 492-93.

130 See e.g. *RJR-MacDonald*, *supra* note 81 at 200.

Proportionality

The final proportionality requirement demands that the effects of any limitation must be proportionate to the importance of the objective. This is one of the most difficult issues involved in applying the *Oakes* test in general, let alone in the thorny context of assessing the validity of counter-terrorist measures that limit human rights.¹³¹ “Objective” versus “means and effect” are, in a figurative sense, different sides of the same coin. The larger the head of the coin (the objective), the more room there is on the tail of the coin (the means and effect). Thus, a more severe threat will, by logical implication, justify the implementation of a more severe level of limitation of rights and freedoms.

An examination of the relevant Supreme Court judgments reveals that the Court’s approach has been to consider the particular legislative provision in its context and on the facts, and such a line is a proper one to take. Much will depend on the specific limitation in question and how it impacts upon rights and freedoms. The Court in *Oakes* spoke of the need to ensure that the law restricting the right is not so severe and so broad in its application so as to outweigh the objective, adding in *Lucas* that this requires consideration of the importance and degree of protection offered by the human right being limited.¹³² In the same year, Lamer C.J. rephrased this part of the test, stating that “there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, *and there must be a proportionality between the deleterious and the salutary effects of the measures.*”¹³³

Thus, the final proportionality step requires careful consideration of the effects of the limitation, the importance of the objective, and the importance of the right being affected. It will ensure that the limitation conforms to the *Commissioner’s Guidelines’* adherence to the principle of proportionality¹³⁴ and the appropriateness of the measures to achieve their protective function.¹³⁵ In an attempt to formulate a process by which this complex issue might be considered when examining counter-terrorist measures and provisions, and against the background of the discussion to this point, the following set of questions is offered:

131 See *Oakes*, *supra* note 83 at 106, and *R. v. Lucas*, [1998] 1 S.C.R. 439 at para. 118 [*Lucas*].

132 *Lucas*, *ibid.* See also *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 [*Dagenais*].

133 *Dagenais*, *ibid.* at 889 [emphasis in original].

134 See the *Commissioner’s Guidelines*, *supra* note 63 at para. 4(f).

135 *Ibid.* at para. 4(g).

- a) What are the effects of the limiting provision (or measure) upon the right or freedom being invoked?
- b) What is the importance of, or the degree of protection provided by, the right or freedom?
- c) How effective is the counter-terrorist policy (or the regime or power established under the legislative provision), and what is the importance of its objective? On the latter subject, the factors identified earlier will come into play: how does it add to the countering of actual threats of terrorism against the state; how does it further the countering of potential threats of terrorism; what is its contribution to the international framework on counter-terrorism; and does it advance any other national interests of the state?
- d) Is the effect of the measure or provision (factor (a) just identified), having regard to the importance of the right or freedom (factor (b) just identified), proportional to the effectiveness and importance of the objective (factor (c) just identified)?

IV. THE *COMMISSIONER'S GUIDELINES* AND SECTION 7 OF *THE CHARTER OF RIGHTS*

As illustrated in *Re Application under s. 83.28 of the Criminal Code*,¹³⁶ consideration of the justified limitations provision may not occur where a legislative limitation upon rights is capable of justification on a definitional basis.¹³⁷ In that case, the Supreme Court of Canada concluded that section 83.28 of the *Criminal Code* did not infringe section 7 of the *Charter* because it was in accordance with the principles of fundamental justice. Section 1 of the *Charter* was therefore not considered. Since this is the usual approach in cases concerning section 7, and given that this was the most recent instance in which Canada's new anti-terrorism legislation was tested by the Supreme Court,¹³⁸ the question is this: did the Court's analysis of section 83.28 of the *Criminal Code* and section 7 of the *Charter* require it to reach a threshold equivalent to that within the *Commissioner's Guidelines*?

136 *Supra* note 74.

137 Discussed in Part III above.

138 See also *Re Vancouver Sun*, [2004] 2 S.C.R. 332 (concerning s. 7 principles of fundamental justice in the context of the open court principle in terrorist investigative hearings); *Suresh*, *supra* note 73 (concerning s. 7 principles of fundamental justice in the context of refugee deportation and the definition of "terrorism," and ss. 2(b) and 2(d) freedoms of association and expression); and *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 72 (concerning s. 7 principles of fundamental justice in the context of refugee deportation and the definition of "terrorism," and ss. 2(b) and 2(d) freedoms of association and expression).

The Court in *Re Application under s. 83.28 of the Criminal Code* was considering the ability of a provincial court judge (or a judge of a superior court of criminal jurisdiction) to issue an order for the purposes of an investigation of a terrorism offence *requiring* a person to attend (on oath or not) an examination before that (or an alternatively designated) judge. Such an order may be made on the application of a peace officer, with the consent of the Attorney General on grounds set out within section 83.28(4).¹³⁹ Under section 83.29, such individuals may be imprisoned for evasion of service or failure to attend or remain at the examination. Section 83.28 therefore establishes a regime, the application of which may result in the deprivation of liberty.

The majority of the Court concluded that such orders and subsequent hearings did not infringe, under section 7 of the *Charter*, the right to silence and the privilege against self-incrimination, or the principles of judicial independence and impartiality guaranteed by section 11(d).¹⁴⁰ Section 7 operates to protect the rights to life, liberty, and security of the person, and it operates to demand that these rights may only be deprived if this is in accordance with the principles of fundamental justice. The Court reaffirmed its earlier jurisprudence that a "principle of fundamental justice" must fulfill three criteria: first, the principle must be a basic tenet of the legal system, and not just a matter of policy; second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice"; and, third, the principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results.¹⁴¹ The Court accepted that right against self-incrimination was a principle of fundamental justice.¹⁴² It concluded, however, that section 83.28(10) provides both use immunity and an absolute derivative use immunity to the individual named in an order for the gathering of information, since they demand that no answer given or thing produced at a hearing can be used or

139 Those grounds are: (a) that there are reasonable grounds to believe that (i) a terrorism offence has been committed, and (ii) information concerning the offence, or information that may reveal the whereabouts of a person suspected by the peace officer of having committed the offence, is likely to be obtained as a result of the order; or (b) that (i) there are reasonable grounds to believe that a terrorism offence will be committed, (ii) there are reasonable grounds to believe that a person has direct and material information that relates to a terrorism offence referred to in subparagraph (i), or that may reveal the whereabouts of an individual who the peace officer suspects may commit a terrorism offence referred to in that subparagraph, and (iii) reasonable attempts have been made to obtain the information referred to in subparagraph (ii) from the person referred to in that subparagraph.

140 *Supra* note 77 at para. 106.

141 *Ibid.* at para. 68. The Court affirmed that approach, as stated in *R. v. Malmö-Levine*, [2003] 3 S.C.R. 571; and *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*, [2004] 1 S.C.R. 76 at para. 8. See also *R. v. Malmö-Levine*, *ibid.* at para. 113; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 503; and *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519 at 590.

142 *Supra* note 77 at paras. 70-71.

received against any criminal proceedings against that person, save prosecution for perjury or giving contradictory evidence.¹⁴³ In essence, the Court took the view that although section 83.28 of the *Criminal Code* engaged section 7 of the *Charter*, it did not limit the privilege against self-incrimination; therefore, section 83.28 established a regime through which a person could consequently be detained in accordance with the principles of fundamental justice.

Focusing on the inter-relationship between section 7 of the *Charter* and the *Commissioner's Guidelines*, it strikes the author that the application of section 7 not only satisfies the *Commissioner's Guidelines*, but probably places a higher threshold on the limitation of life, liberty, and security rights, since it will only allow such limitation in accordance with the principles of fundamental justice. As seen, such principles must be legal, vital and fundamental to democratic notions of justice, and sufficiently precise. These three criteria engage the factors identified within the *Commissioner's Guidelines*. There are, in addition, a good number of similarities between the application of section 1 of the *Charter* and the manner in which section 7 analyses are conducted.¹⁴⁴ The only conceivable problem is that these factors do not expressly form part of the section 7 test, compared with the reasonably mechanical, step-by-step approach mandated by section 1.

V. LIKELY TREATY-BODY RESPONSES?

One final issue requires brief consideration before leaving the subject of compliance with international human rights. The matter concerns consistency between particular international human rights documents and the outcome of applying sections 1 or 7 of the *Charter* to justify limitations upon rights under Canada's counter-terrorist legislation. What if, for example, the decision in *Re Application under s. 83.28 of the Criminal Code*¹⁴⁵ concerning the privilege against self-incrimination was inconsistent with a provision of the *International Covenant on Civil and Political Rights (ICCPR)*?¹⁴⁶ It is likely that the decision is in harmony with the *ICCPR*, but the question posed remains of interest.

143 *Ibid.* at para. 72. In the context of other, non-criminal proceedings, see the Court's discussion at paras. 73-79.

144 See in particular *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at paras. 77-92.

145 *Supra* note 77.

146 *Supra* note 44. The *ICCPR* does not expressly include the right to silence or privilege against self-incrimination. Article 14(2) includes the presumption of innocence. It is, however, limited to circumstances where a person has already been charged with an offence and, more importantly, it is doubtful that the provision impliedly includes any right to silence or privilege against self-incrimination. The Human Rights Committee has not given consideration to that issue, nor has it given any indication that the presumption of innocence is any broader than its plain word meaning.

To the author's mind, one of the problems with the *ICCPR* is that it does not include a general limitations clause, other than allowing the temporary derogation of certain rights in times of emergency.¹⁴⁷ Instead, it adopts a definitional approach to the limitation of rights, expressing any potential limitations within the text of the enunciated rights. As a consequence, the *ICCPR* has the potential of being more absolute in its expression of rights than the approach envisaged by the former High Commissioner of Human Rights in her *Guidelines*. Given the parallels between the *Commissioner's Guidelines* and sections 1 and 7 of the *Charter*, the *ICCPR* can therefore also be more absolute than the limitations framework permitted under the *Charter*. Such conflicts have not yet been tested, although it is notable that the Human Rights Committee has expressly directed a number of states (including New Zealand, which borrowed its general limitations clause from section 1 of the *Charter*)¹⁴⁸ to ensure that measures taken to implement Security Council Resolution 1373 are in full conformity with the *ICCPR*.¹⁴⁹ How, then, would the Committee react to an argument that a breach of an *ICCPR* right was nevertheless consistent with the justified limitations test in the *Charter* and with the *Commissioner's Guidelines*?

This is a difficult question to answer in unqualified terms. The Human Rights Committee has refrained from adopting the "margin of appreciation" doctrine,¹⁵⁰ a doctrine that is utilized by the European Court of Human Rights and defined as each society's entitlement to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions.¹⁵¹ However, despite the formal rejection of this doctrine by the Human Rights Committee, commentators have identified "incipient elements of the doctrine in some of the [Human Rights Committee's] jurisprudence."¹⁵² The Human Rights Committee may

147 *Ibid.* at art. 4. See also Human Rights Committee, *General Comment 29, States of Emergency (article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001).

148 *New Zealand Bill of Rights Act 1990*, s. 5. Note, however, that s. 5 is subject to s. 4 of the *Act*, which renders the *Bill of Rights* of a quasi-subordinate nature to other New Zealand legislation. See e.g. Alex Conte, "From Treaty to Translation: The Use of International Human Rights Instruments in the Application and Enforcement of Civil and Political Rights in New Zealand" (2001) 8 *Canterbury Law Rev.* 54.

149 Human Rights Committee, *Concluding Observations of the Human Rights Committee: New Zealand*, 17 July 2002, UN Doc. CCPR/CO/75/NZL at para. 11.

150 Former Judge Rosalyn Higgins, for example: see P.R. Ghandhi, *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (Brookfield, VT: Ashgate/Dartmouth Publishing Ltd, 1998) at 14.

151 Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards" (1999) 31 *International Law & Politics* 843 at 843-44. For a comprehensive discussion of the doctrine, see Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (New York: Intersentia, 2002).

152 Professor Scott Davidson in Alex Conte, Scott Davidson & Richard Burchill, *Defining Civil and*

therefore be reminded to find ways of validating limitations upon rights that can be justified by application of sections 1 and 7 of the *Charter*. In light of the fact that this would be consistent with guidelines advocated by a former UN High Commissioner for Human Rights on the precise subject of counter-terrorism, it is anticipated that the Human Rights Committee would be loath to do otherwise.

VI. CONCLUSION

A number of encouraging parallels exist between emerging international guidelines and rules on the interface between counter-terrorism and human rights, and the manner in which Canada is equipped to consider such matters within its municipal legal framework (through the *Charter of Rights*). There is a clear international consensus that counter-terrorist measures must be effected in a manner consistent with human rights, although a qualified approach to this has developed – permitting the limitation of non-derogable rights where this is necessary and to the extent that such limits are proportional. Likewise, the *Charter* has the power to strike down legislation that is inconsistent with the rights and freedoms set out within it, unless the inconsistency is a justified limitation under section 1 of the *Charter* or, in the case of section 7 litigation, forms part of a fundamental principle of justice. The application of these qualifications bear a noticeable likeness to factors identified within the various international and regional guidelines on counter-terrorism and human rights and, in particular, to the very useful *Commissioner's Guidelines*.

Political Rights: The Jurisprudence of the United Nations Human Rights Committee (Burlington, VT: Ashgate Publishing, 2004) at 11. See also David Harris & Sarah Joseph, eds., *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: Clarendon Press, 1995) at 629.

