PRINCIPLES OF THE ANTI-TERRORISM ACT REVIEW

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Since 9/11, we have often asked ourselves as a society, "How much of our freedoms should we give up?" The problem, if I may suggest, is that such questions may, however inadvertently, invite an inquiry into the freedoms to be surrendered, as distinct from the rights to be secured; a discourse on the dangers to our democratic way of life from counter-terrorism law rather than on the safeguarding of democracy itself from the terrorist threat; a characterization of the *Anti-terrorism Act* in terms of national security versus civil liberties. This is a zero-sum analysis, when what is actually involved is "human security" legislation that purports to protect both national security and civil liberties.

The foundational principles that underpin our anti-terrorism law are as follows:

Principle 1: The Relationship Between "Security" and "Rights"

The underlying principle is that there is no contradiction in the protection of security and the protection of human rights. Counter-terrorism, itself, is anchored in a twofold human rights perspective.

First, that transnational terrorism – the slaughter of the innocents – constitutes an assault on the security of a democracy and the most fundamental rights of its inhabitants: the right to life, liberty, and security of the person. Accordingly, counter-terrorism is the promotion and protection of the security of a democracy and fundamental human rights in the face of this injustice. This is protection, indeed, of human security in the most profound sense.

Second, the enforcement and application of counter-terrorism law and policy must always comport with the Rule of Law. Minorities must never be singled out for differential and discriminatory treatment. Torture must always and everywhere be prohibited. Counter-terrorism must not undermine the very human security we seek to promote and protect by that counter-terrorism.

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* Revised and compiled from a speech given by the Honourable Irwin Cotler, Minister of Justice and Attorney General of Canada, when he appeared on February 21, 2005 before the Special Committee of the Senate on the *Anti-terrorism Act*.

Principle 2: Jettisoning "False Moral Equivalencies": Towards a "Zero Tolerance" Principle Regarding Transnational Terrorism

One of the more important – yet oft ignored – dynamics inhibiting the development of principled counter-terrorism law and policy has been the blurring of the moral and juridical divides occasioned by the mantra that "one person's terrorist is another person's freedom fighter". Indeed, the repeated invocation of this moral and legal shibboleth has not only undermined intellectual inquiry, but its moral relativism. Its false moral equivalency has blunted the justificatory basis for a clear and principled counter-terrorism law.

Simply put, the idea that one person's terrorist is another person's 'freedom fighter' cannot underpin any principled approach to anti-terrorism law. Freedom fighters don't set out to capture and slaughter schoolchildren; terrorist murderers do. Freedom fighters don't blow up trains or busses containing noncombatants; terrorist murderers do. Democracies cannot allow the word 'freedom' to be associated with acts of terrorism.

Accordingly, U.N. Security Council Resolution 1377 reaffirmed "its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed."

In a word, the underlying principle here for the Canadian government or the United Nations, must be that terrorism from whatever quarter, for whatever purpose, is unacceptable. There must be a Zero Tolerance Principle for transnational terrorism, just as there is a Zero Tolerance Principle for racism.

Principle 3: The Contextual Principle

The third principle is what might be called the "contextual principle". I refer to the approach taken by the Supreme Court of Canada, where it noted that Charter rights, and any limits imposed on them must be analysed not in the abstract, but in the factual context that gives rise to them.

Accordingly, any anti-terrorism law must factor into it an appreciation of the contextual principle - the nature and dimensions of this transnational terrorist threat. This includes:

- the increasingly lethal face of terrorism as in the deliberate mass murder of civilians in public places;
- the growth and threat of destructive economic and cyber terrorism, which seeks to paralyse civilian infrastructure;
- the sophistication of transnational communications, transportation and financial networks;

- the increasing incidence of "suicide bomber" terrorism underpinned by radical extremism or fanaticism;
- the potential access to, if not prospective use of, weapons of mass destruction; and
- the increased vulnerability of open and technologically advanced democratic societies like Canada to this genre of terror.

Principle 4: The International Criminal Justice Model

In brief, we are not dealing with an ordinary domestic criminal, but with the transnational super-terrorist; not with ordinary criminality, but with crimes against humanity; not with your conventional threat of criminal violence, but with a potential existential threat to the whole human family.

In a word, we are dealing with Nuremberg crimes and Nuremberg criminals, with *hostis humanis generis* – the enemies of humankind. In that sense, the domestic criminal law due process model, standing alone, is insufficient. For the juridical war on terrorism cannot be fought – or won – by one country alone.

Accordingly, the international criminal justice model finds expression in the *Anti-terrorism Act*, in the domestic implementation by Canada of the twelve international anti-terrorism conventions, as well as those undertakings mandated by the United Nations Security Council Resolutions.

In sum: the *Anti-terrorism Act* is intended not only to mobilize the domestic legal arsenal against international terrorism, but to help build and strengthen the international mechanisms to confront the new supernational terrorism.

Principle 5: The Prevention Principle

A core concept of our anti-terrorism law – and of United Nations Security Council Resolutions 1373 and 1377 – proceeds from a culture of prevention and pre-emption, as distinct from reactive, after the fact, law enforcement. This includes the range of international terrorist offences that seek to disable and dismantle the terrorist network itself. This range also includes investigative and procedural mechanisms, such as preventive arrest and investigative inquiry, that seek to detect and deter rather than just prosecute and punish.

Principle 6: The Proportionality Principle

As the Supreme Court of Canada instructed in *R v. Oakes*, "there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right and the objective which has been identified as of sufficient importance."

The juridical response to terrorism must be proportional to the threat. The proportionality principle requires that we factor into our assessment the dangers of the contemporary transnational terrorist threat. We can thereby appreciate whether our response meets the rights-based proportionality test.

The terrorist threat has crossed a strategic and juridical watershed, so as to comport with the first requirement of the proportionality test that there be a substantial and pressing objective for the limitation of any *Charter* right. However, it must still pass constitutional and policy muster in respect of the three prongs of the "remedial means" part of the proportionality test: there must be a rational basis for the remedy that is tailored specifically to the objective; the remedy must intrude upon *Charter* rights as little as possible; and the effect or cost of the legislation – particularly in its impact on our civil liberties – must not outweigh its purposive and remedial character.

Thus, while we are dealing with special legislation that responds to an extraordinary threat, that legislation must still comport with the principle of proportionality. Just remedies must serve just objectives.

Principle 7: The Comparativist Principle

In determining the justificatory basis for the *Anti-terrorism Act,* Parliament had recourse to comparative anti-terrorist legislation in other free and democratic societies, such as the UK, the US, Australia, France, Germany, and the like.

The importance of comparing the legislation and experiences of other jurisdictions was not only to appreciate what other free and democratic societies were doing, but to understand that all other free and democratic societies had enacted or were enacting anti-terrorist legislation. Judging by their travaux préparatoires, the purpose of these enactments in each jurisdiction was to protect those societies and allow them to remain free and democratic.

This does not mean, nor should it to be inferred, that just because we look at other free and democratic societies and find our legislation preferable, that we have thereby satisfied the threshold requirements of our *Charter* and our Canadian principles and values.

Principle 8: Due Process Safeguards

While analysis of our anti-terrorism law should proceed from a more inclusive, international criminal justice model, this does not mean that the domestic due process model is unimportant or irrelevant. On the contrary, the domestic due process model is a necessary model and safeguard, and one that has to be included in our appreciation of the foundational underpinnings of the legislation.

Principle 9: The Minority Rights Principle

A particular concern is protecting visible minorities from being singled out for differential and discriminatory treatment in the enforcement and application of anti-terrorism law. This was also a central issue in the submissions of civil libertarian and Muslim groups before the Standing Committee on Justice and Human Rights, which considered the anti-terrorism legislation at the time. In their brief to the Justice Committee, the Coalition of Muslim Organizations argued that the fallout from the government's anti-terrorism law and policy would be differentially and discriminatorily borne by Muslim Canadians. That submission has continued to find expression in concerns respecting racial profiling.

I reiterate my longstanding principle and policy in this matter: discriminatory practices, including the targeting of minorities, have no place in law enforcement and security and intelligence work. We are committed to ensure that the operation of the *Anti-terrorism Act* does not have a discriminatory impact on members of ethno-cultural and religious minorities, because racial profiling is itself a form of racial discrimination and undermines the constitutional right to equality.

Principle 10: The Anti-Hate Principle

This principle seeks to protect visible minorities from any hate on the Internet or in the public communications sphere. Hate can have the effect of singling minorities out as targets of hatred, but also as targets of terrorist acts.

Thus, our anti-terrorism law includes important provisions that allow the courts to order the deletion of publicly-available hate propaganda from computer systems like Internet sites. As well, *Criminal Code* amendments create a new offence of mischief motivated by bias, prejudice or hate based on religion, race, colour or national or ethic origin, committed against a place of religious worship or associated religious property.

In addition, amendments to the *Canadian Human Rights Act* make it clear that using telephone, Internet, or other communication tools for purposes of hate or discrimination is prohibited. This is particularly important in light of the Internet's ability to "extend the potential reach of hate messages to millions."

Principle 11: The Oversight Principle

This is a particularly important principle which finds expression in oversight mechanisms in the anti-terrorism law to ensure both parliamentary and public accountability. I refer to:

- the application of the *Canadian Charter of Rights and Freedoms*;
- the application of International Human Rights norms;
- the annual reports of the Minister of Justice and Solicitor General to Parliament and the counterpart reports to the provincial legislatures;
- the importance of the Information and Privacy Commissioners' oversight;
- the requisite authorization or consent by the Minister of Justice for prosecutorial purposes of terrorist offences;
- the enhanced judicial capacity regarding certain offences and investigative mechanisms under the Act;
- the mandatory three year parliamentary review; and
- a sunset clause for the provisions respecting preventative detention and investigatory hearings, and the like.

In addition to judicial and Parliamentary oversight, the media, NGOs, and an engaged civil society also oversee the operation of the Act and, therefore, promote the Act's overall integrity and efficacy.

Conclusion

The Senate Committee conducting a review of the Act has the advantage of the perspective that comes only with time. They have the benefit of three years experience with the legislation in force, with the expertise and experience of those domestic and international officials and academics.

The importance of this legislation cannot be understated. Canadians need to be reassured that their government has done all we can to protect them against terrorist acts without unnecessarily infringing on their individual rights and freedoms. In developing a comprehensive anti-terrorism law, the challenge is not one of balancing the protection of national security with the protection of human rights, but one of re-conceptualizing human rights as including national security and vice-versa. The inquiry is not one of the freedoms that should be surrendered, but of the rights that should be secured. The two are inextricably linked.

Accordingly, the Government of Canada must have a principled approach to the protection of security and human rights. We have sought to build on this approach in our relationships with our international partners and our work with our provincial counterparts. To this end, I am pleased that an FPT Working Group on Terrorism is being established to ensure a comprehensive, integrated and coordinated strategy to address terrorism.