

A Lawful Fight Against Terrorism?

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Revenge is a kind of wild justice; which the more man's nature runs to, the more ought law to weed it out. For as for the first wrong, it doth but offend the law; but the revenge of that wrong putteth the law out of office.

—Francis Bacon, *Essays: Of Revenge* (1597)

Combatants or Criminals?

In the fight against terrorism, states exercise their monopoly of force. The challenge since 11 September 2001 has been to follow the fundamental democratic principle that "public power shall be exercised under the law." Below, we describe some of the problems in international law that the current fight against terrorism has created, and we also reflect on some of its causes and effects. If not otherwise specified in the essay, we refer to international terrorism.

The UN Charter contains a general but very clear ban on the use of force. Article 2(3) says that states shall "settle their international disputes by peaceful means" and Article 2(4) prohibits states from using "threat or use of force against another state." Only if a state is subject to an "armed attack" may it, according to Article 51, use force in self-defence, but even then it must follow the decisions of the Security Council regarding further measures. Retaliation as a matter of revenge for terror attacks is furthermore considered prohibited according to international law. Even when a state retaliates to redress an injury suffered in peacetime and calls this "public reprisal," its retaliation considered prohibited according to the general ban on the use of force as stated in the UN Charter.

In 1986, American military personnel visiting a discotheque in Germany were the subject of a terrorist attack, after which the United States responded by bombing various targets in Libya. President Reagan remarked that "Operation El Dorado Canyon," as the military operation was called, was conducted in self-defence against the terrorism financed by the Libyan state. He argued that the operation was in com-

plete accordance with Article 51 of the UN Charter. However this view was not shared by the world community, which expressed strong criticism of the United States' expansive interpretation of Article 51. Criticism was also forthcoming when the United States, in "Operation Infinite Reach," retaliated for the August 1998 terrorist attacks against the American embassies in Kenya and Tanzania. On this occasion, some eighty cruise missiles were used against various alleged terrorist training camps in Afghanistan and against a suspected chemical weapons factory in Sudan. It is clear that the world community did not consider terror attacks of that kind as an armed attack on a state. However the Security Council believed that the situation in Afghanistan constituted a "threat to peace and security," and demands were made whereby the de facto Taliban regime in Afghanistan was to extradite leading members of the Al Qaeda terrorist organisation for trial. Despite repeated appeals and the later introduction of sanctions, Afghanistan did not obey the Security Council resolutions. If force has to be used in the fight against international terrorism, it is the obligation of each state to act on its own territory and under the rule of law. Only if a state neglects its obligations does it become an issue for the Security Council to handle.

The massive terrorist attacks of 11 September 2001, directed against targets in the United States of America, prepared the world community to rank the act as an armed attack in the sense expressed by the UN Charter. The use of force as self-defence against large-scale terrorism seemed now acceptable. The Security Council's view was confirmed immediately by NATO, which for the first time in its history stated that force originating from outside had been used on one of its member states. The European Union stated that the terrorist attacks were not only an attack against the United States but also against humanity itself, but avoided to use the language "armed attack" as laid down in article 51 of the UN Charter. They also announced that "it would make every possible effort to ensure that those responsible for these acts of savagery are brought to justice and punished." The forty-five-member Parliamentary Assembly of the Council of Europe called for the backing of the United Nations Security Council and described the attacks as "crimes, rather than acts of war." It continued by saying that any action taken by the United States or others should aim at bringing the organisers and sponsors to justice, instead of inflicting "a hasty revenge." And it finished by saying that "long-term prevention of terrorism must include a proper understanding of its social, economic, political, and religious roots." The fifty-seven-member Islamic Conference Organisation, in a statement on 10 October 2001, expressed neither support nor condemnation of the air strikes in Afghanistan in response to the 9/11 attacks. In the conference's final statement, it stressed "the necessity of tracking down the perpetrators of these acts in light of the results of investigations and bringing them to justice." Amre Moussa, the Secretary

General of the League of Arab States, made clear at the conference that he would prefer a global antiterrorism campaign to be placed under the authority of the United Nations.

The persistent non-compliance of Afghanistan with earlier Security Council resolutions and the fact that they had supported and harboured Al Qaeda now offered the United States a territory to direct its military resources at in order to counter the existing threat. Not only members of the Al Qaeda terrorist network but also members of the Afghani Armed Forces became legitimate military targets according to the “Laws of Armed Conflict.” According to international law, every captured person on the battlefield should be viewed as a combatant until a competent court of law had decided on his or her status. Nor could anyone be subject to torture or humiliating treatment, and people suspected of committing criminal acts had to be assured of a fair trial in a court of law. Protected persons must not be subject to the effects of war unnecessarily, and in this regard the customary law principles of distinction and proportionality had to be observed. We now know that very little of this was respected. Persons suspected of being members of Al Qaeda or Taliban forces were subjected to torture or humiliating treatment in the hunt for intelligence. In opposition to the Geneva Conventions, several hundred people were also transported to the American base in Guantánamo Bay in Cuba—a vacuum of international law. In numerous instances, supposedly legitimate targets were bombed indiscriminately, resulting in unacceptable injury to civilians and damage to civilian property. For a long time the United States had sought legalisation – a *jus ad bellum* – of its actions against international terrorism, but when it finally received international support, it ignored its duty during the armed conflict in Afghanistan to observe *jus in bello* – that is, the “Laws of Armed Conflict.”

On 12 September 2001, the day after the attacks, the UN Security Council, in Resolution 1368, implored the UN member states to accelerate their work to combat terrorism. On 28 September 2001, it went a step further, passing a binding resolution (1373) making it the duty of the member states to join forces to arrest and bring to justice the people suspected of collaborating with terrorism. The UN Security Council had now opened two “tracks” with quite different mandates to use force: “military” and “law enforcement.” The crucial difference between the two is that when force is used on a military mandate, the opponent is perceived as a legitimate target to eliminate, whereas force based on a law enforcement mandate is only excusable when a person suspected of a crime refuses arrest or when there is a clear danger to somebody’s life or property. In addition, no one, not even a suspect, shall arbitrarily be deprived of his life. Everyone shall also have the right to challenge any accusation in a fair trial.

Since December 2001, the particularly weak Afghan interim regime has “governed” the country with the support of the previous occupying power at the same time as a security force with a UN mandate, the ISAF (International Security Assistance Force), has been operating in the capital of Kabul. American forces operating outside Kabul are not formally responsible for the maintenance of law and order. Nor are they, in terms of international law, at war with the state of Afghanistan. However, the new regime is still not able to provide the required security, which is why the American forces can be seen as having been “invited” to work in close relation with Afghan security forces. The legal mandate on which they operate originates from the legitimate regime in Afghanistan and the force they use must therefore occur under national Afghan law and international law. World society, through the UN, expects no less than Afghanistan developing into a state under the rule of law. Therefore, after the extended mandate, the legal basis for the use of force outside Kabul can only be based on the requirements of law enforcement measures – that is, that in the first place, suspected terrorists should be arrested and then be brought before a competent court of law. However, the United States has previously stated that as long as the threat to American interests remains, it will continue to view terrorists as enemies that can be fought with deadly force. Therefore it is a great concern that the military “track” was not clearly terminated in conjunction with the extended mandate given to the ISAF in October 2003. The current situation creates highly uncertain situations regarding how suspected terrorists in Afghanistan should be dealt with. On numerous occasions, there have been reports that personnel from “Operation Enduring Freedom” have bombed civilian residences, resulting in many civilian deaths and injuries. The ISAF, whose duties include supporting the Afghan interim government in the maintenance of law and order, is also expected to follow the “Code of Conduct for Law Enforcement Officials,” which has been adopted by the UN. The hunt for remaining members of the Taliban and Al Qaeda appears to continue with the same methods as during the armed conflict. The interim president Hamid Karzai has appealed to the United States to increase their efforts to avoid civilian casualties as a result of their operations. The relevant question is obvious: Why do the remaining forces of “Operation Enduring Freedom” feel that they are not required to follow international law, particularly in the area of law enforcement? The principle that “public power shall be exercised under the law” is part of every democratic society. The observance of that principle is a prerequisite if we want to hold people accountable for violating law enforcement regulations. It shouldn’t matter if the rules are related to an agreement between the former occupying powers and the new state, a Security Council resolution, or national law; divergences are simply not acceptable, as they encourage impunity and corruption. Unfortunately the trend ap-

appears to be moving in the wrong direction, since the aforementioned behaviour is clearly evident in Iraq. The weak new interim government lacks control of the security situation and so is forced, in conflict with its formal responsibility, to accept clear breaches of the principles of law enforcement and international law.

Just as in Afghanistan, a method currently used in Iraq is to shoot missiles at buildings presumably containing wanted enemies of the interim regime and the American security forces. The result is, as has been frequently reported, that innocent civilians are also injured or killed. Not even during armed conflicts can these methods generally be viewed as being in accordance with the principles of distinction and proportionality, and even less so in the case of a state no longer engaged in an armed conflict. It is worth reflecting that in developed countries like the United States or Great Britain, these methods of hunting down terrorists would hardly be used and would certainly not be accepted by the people. If the rules of international law are indeed universal, do they not also apply for the populations of countries with security problems? Without making a distinction between national and international terrorism, a similar kind of behaviour is also evident in the conflict in Chechnya. The best way to avoid being labelled a rogue nation is to make sure that the “rule of law principle” is followed.

Reclaiming the Rule of Law

If there is a collapse of the rule of law in the struggle against terrorism, have not the terrorists succeeded in their work, regardless of their aims? If the state, by way of its actions, aids in erasing the distinction between legitimate and illegitimate targets, does it not become difficult to criticise the terrorists’ choice of targets from a moral point of view?

The fear of fresh attacks in new countries have gradually led to measures where human rights have been sacrificed in the war on terrorism. National security has been made a priority over individual human security. A utilitarian approach has been taken, where efficiency has gained the upper hand at the expense of human rights. The openness and protection of the democratic society have been reduced. Critics have gone so far that in some cases they speak of a disassembly of the state governed by the rule of law. Professor Ian Cameron at Uppsala University maintains that the primary objective of the rule of law is not to be efficient but to find a satisfactory level of efficiency – if total efficiency is reached, there is no longer rule of law. In the long term, the struggle against terrorism must be based on a cooperation that maintains the principle of rule of law with regard to law and order. One problem in this struggle is that there is still no universally accepted definition of ter-

rorism, even if work is underway to develop an overarching convention. One of the difficulties has been to formulate a definition that includes international terrorists but excludes freedom fighters, but “one person’s terrorist is another person’s freedom fighter.” The conflicts in Chechnya and the Middle East are two examples where opinions vary greatly.

For several decades, international law has included various conventions and binding Security Council resolutions for combating terrorism. Twelve international conventions treat several different forms of terrorism, such as hijacking, bombing, hostage taking, and the financing of terrorism. One principle shared by all these conventions is that people suspected of terrorist crimes must either be extradited for trial in another country or be tried in one of the country’s own courts of law. There is also the possibility of trying suspected terrorists in the International Criminal Court in The Hague, if the act of terrorism can be seen as constituting a crime against humanity, genocide, or a war crime. To constitute a crime against humanity, the attack must be considered extensive or systematic and directed at civilians.

International cooperation in the fight against terrorism took on a new expression in January 2002, when the UNSC approved a binding resolution (1390) regarding so-called smart or directed sanctions against terrorists. All states were urged to freeze the funds belonging to Usama bin Laden, other members of Al Qaeda, and the people or groups who cooperate with them, in accordance with a particular sanctions list. In response to the UN resolution, the European Union decided to impose these and other measures on the persons and organisations in the list. In practice, the list constitutes a blacklisting of people and consequently this amounts to punishment without any previous legal decision and without the opportunity to actually scrutinise the decision. The accusations of terrorism against individuals cannot be assessed, since the charges and the proof are confidential. The entire procedure is contrary to the rule of law principle that people are assumed innocent until a competent court of law in a final decision has decided otherwise. It has proven very difficult and complicated to appeal the decision by the UN Security Council Sanctions Committee, even though in 2002 the committee approved guidelines detailing how people could be removed from the list. The method of freezing funds does not only affect the individual whose funds are frozen, but also his or her family and other associates; nor can the state help the accused, for example, by way of social assistance, without breaching the sanction. Through this procedure, three Swedish nationals of Somali background had their funds frozen by the EU. The legality of the decision has been questioned, and the cases have been brought before the First Instance of the EU Court of Justice, but have not yet been resolved.

These and a number of other examples have led to a questioning of the forms under which the “war on terrorism” is being conducted. In

response to the increasingly tough measures, the Council of Europe approved in July 2002 guidelines on "human rights and the war on terrorism." These lay down, for example, that the member states may not decide to introduce illegal measures and that they must, under all circumstances, observe the ban on torture. Furthermore, they demand that a person accused of terrorist activities must not receive the death penalty, and, if a death penalty has been issued it should not be carried out.

So how has the protection of the individual been affected since 11 September 2001? In many places, police and security services have been given an increased authority in the fight on terrorism. In some instances this has resulted in an increased risk of discrimination, injustice, and abuse of power. This can take many forms: arbitrary arrests, the legal detention period being exceeded, interrogation methods that include abuse, the lack of a right to due process, extradition without the chance of appeal, stricter rules and discrimination based on race and ethnicity for immigrants and asylum seekers, unlawful surveillance and bugging, as well as other attacks on personal liberties. There have been reports from the United States that immigrants have disappeared, that people have been imprisoned without trial and without any time limit, that torture has been used against purported terrorists, and of cases of death in custody. The UNHCR has expressed concern about the restrictive laws and the administrative routines that were introduced after 11 September 2001 and it warns that rules protecting refugees might be eroded. According to the UNHCR, it must be possible to appeal a decision to extradite and the individual must be afforded the right to present evidence that refutes claims of terrorism. Sweden has been criticised by the UN Committee Against Torture and by Human Rights Watch for having extradited two Egyptians accused of terrorism, who probably were subject to torture following their transportation to Egypt by an American force.

Human rights are not simply a matter of the state avoiding violations. There is also a duty to take positive measures to fulfil them. The principle of the rule of law requires that it should be possible to try terrorists for their crimes without contravening other rights such as the right to due process, an independent and impartial court of law, the right to life, freedom and personal security, and the right to property. There are also accepted minimum rules that apply during arrests, and the state does not have the right to subject individuals to arbitrary or unlawful encroachments into their private or their family life, homeland, or correspondence. Even states that have not ratified the United Nations' Conventions on Human Rights have this responsibility, because the rules are considered to have gained status of international customary law.

Causes and Effects

Terrorism must be condemned unequivocally, and no underlying reasons can legitimise it. Colonialism, racism, and the occupation of another state's territory have previously been cited as such reasons. In 1985, the UN General Assembly approved a resolution that condemns all acts, methods, and forms of terrorism, wherever they are executed and whoever executes them, and urges the states to help eliminate the causes of terrorism. In 1994, the General Assembly approved a declaration on the elimination of international terrorism, where it was stated even more clearly that there are no circumstances whatsoever that justify terrorism.

The large-scale international terrorism we now witness is, according to many, the result of accelerating globalisation. It forces us to find new forms of legitimate political power capable of controlling global developments, within reasonable limits. One side of the fight against terrorism, which has not received as much attention, is the long-term measures aimed at the underlying causes. Military measures are short-term and only affect the symptoms. Nor can humanitarian work alone bring about the long-term, stable societies that are necessary for achieving global human security. The structures of international justice and the struggle against poverty need to be strengthened as well. Increased international financial, political, and social cooperation which, similar to the Marshall Plan after World War II, promote democracy, economic development, good governance, human rights, and a strong civil society – all these things can lead to a social transformation that reduces marginalisation and the exclusion of groups and peoples. At the same time, one must not neglect the importance of the role of ideology and religion in what has come to be called “The Clash of Civilizations.”

In a seminar on human security and terrorism held in Japan in December 2001, it was argued that military security is a costly illusion, which is why more resources must be directed to finding a peaceful solution to the underlying causes of human insecurity, fundamentalism, and terrorism. By the adoption of a Human Security Agenda, and through so-called “soft power,” terrorism can be countered “not by force but by the force of ideas.” Is this a realistic, possible path? How does one achieve long-term peace with terrorists? The prohibition of force and the principle of peaceful solution of conflicts in the UN Charter urge states to solve their international conflicts through negotiation, mediation, conciliation, and arbitration. Are these the paths that should also be followed in the fight against terrorism? Is it possible to negotiate peace with terrorists and is it possible to reach consensus on a political agenda? Does terrorism have legitimate political aims? Over the years, terrorism has been used by various actors – including states – as an effective tool to affect or alter the course of events when there have been

no political tools to achieve this or because they did not want to use them. But terrorism lacks all forms of constructive and acceptable political aims, and that for that reason there is no actual policy to negotiate. Terror and destruction do not open the door to solutions. Those responsible must be put to trial, regardless of the underlying reason for the crime. However, there are those who advocate a political communication when it comes to the West's approach to other cultures, in order to put an end to the global structural violence. It is argued that through multicultural and interreligious dialogue it is possible to pave the way for measures that create trust. Jürgen Habermas explains in the book *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* that conflicts arise out of distortions in communication, through misperceptions, misunderstandings, dishonesty, and deception:

The spiral of violence begins as a spiral of distorted communication that leads through the spiral of uncontrolled reciprocal mistrust to the breakdown of communication.

He argues further that the West must change its policy if it wishes to be perceived as “a shaping power with a civilizing impact,” which in practice means taming global capitalism and creating a more just world order. In this long-term project, people must increase their understanding of one another and expand their horizons through a dialogue where different perspectives merge.

In the course of mutual perspective-taking there can develop a common horizon of background assumptions in which both sides accomplish an interpretation that is not ethnocentrically adopted or concerted but rather intersubjectively shared.

But should and can terrorists be tolerated and treated as equal partners in a discussion? What is the point of creating communication if it is still not possible to reach consensus? Is this even possible, and is it desirable? Habermas' ideas concern “communication without consensus,” which can according to him lead to a fusion of horizons, mutual perspective-taking, and intersubjective understanding. It might seem particularly farfetched and absurd to adopt such a position in relation to international terrorism. At the very least, one can say that there is very little political will to move in that direction.

The final report of the 9/11 Commission in the United States presents a broad, integrated plan to prevent the continued growth of Islamic terrorism. The suggested strategy for countering terrorism is aimed at attacking terrorists and their organisations, preventing the continued development of Islamic terrorism and protecting the homeland from and being prepared for further attacks. The Commission maintains that military action must be complemented by long-term measures if the war on

terrorism, in particular Islamic terrorism, is to be won. They refer to measures such as diplomacy, intelligence services, secret actions, legal action, economic policy, foreign aid, and homeland defence. The United States should in this project adopt a moral leadership in the world, offering a vision of a better future than that of death and violence. As a stage in this work, the American ideal and values are to be communicated and defended in the Muslim world. Can this plan be seen as expressing Habermas' ideas of communication? A global PR campaign where American values are communicated to the rest of the world seems more based on demands for assimilation to one's own way of reasoning and of interpreting the world than on an open approach and an understanding of new perspectives. Perhaps it is correct to say there is nothing to be understood in terrorism, that there is no deeper message but only a perverted belief in death, violence, and destruction. But the question is whether or not the American model can form the basis of a global moral leadership. International terrorism does actually make it quite clear that the world is not confident that the Pax Americana will succeed, especially in the Muslim world. This is a signal that should probably be considered more, and instead of rearming the defence forces on every level – including the moral level – perhaps one needs to be open to the possibility of changing or developing one's own ideals. At the same time, it is equally important that the Muslim world also opens up to modernity, human rights, and democracy.

Conclusions

Is there a way to fight terrorism by the letter of a paragraph? The answer is no, and all too well we instead see the means and methods of terror, reflected in relevant covenants on international terrorism. But where are the means and methods available for the state in fulfilment of its responsibility to protect its people against unlawful acts? The terrorist attacks of 9/11 were directed against the territory of a state and were of great magnitude. That seems to have given acceptance for a new interpretation of Article 51 of the UN Charter. This, however, did not change the applicability of international humanitarian law and human rights. The legal status of a person engaged in unlawful acts is either as a combatant committing crimes or as a civilian committing crimes. It is the international legal obligation of every state to ensure the rights of both. No order or decree can change that. The rule of law is the watermark for a democratic regime and consequently those without a rule of law are considered false and not trustworthy. A lawful fight against terrorism is therefore the real challenge for the international community after 9/11. It might help in trying to understand diverging opinions

among nations and peoples in their struggle for democracy. In the advertisement for a system believed to be superior, a humble attitude usually prevails. After all, setting good examples are often more powerful than persuasion by brutal force.

Look at that destruction, that massive, senseless, cruel loss of human life, then I ask you to look in your hearts and see there is no room for neutrality on the issue of terrorism. You're either with civilisation or with the terrorists.

—Rudolph Giuliani, Mayor of New York, addressing the United Nations General Assembly, 1 October 2001

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