A window on International Law

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International Law and Counter-Terrorism

Note by the author: *I have been a new member of an ANU-based Research Project on "Terrorism and the non-State actor after September 11: the role of law in the search for security" since March 2005. The Research is financed by an Australian Research Council "Discovery Grant" until the end of 2007. The Research Team includes: Prof. Andrew Byrnes (UNSW), Prof. Simon Bronitt, Ms Miriam Gani, Mr Russell Hogg (UNE), Dr. Mark Nolan, Dr. Penelope Mathew and Mr Gregor Urbas. Combining perspectives from international law and criminal law, criminology and social psychology, the Research aims to examine the challenges that recent developments in anti-terrorism Australian legislation pose to accepted legal categories. The views presented below are not the results, not even in progress, of my personal or the Team's research, but only a summary presentation of some of the most relevant international law issues to be analysed within the framework of the Project. Also, I wish to advise that I am solely responsible for the content of this article.*

The chain of large scale terrorist attacks on civilian targets since 2001 shows that the threat of international terrorism will continue to be a sinister presence in our future. Terrorism is certainly not a new threat to human security. However, the attacks on New York and Washington DC of 11 September 2001 are almost unanimously seen as a definitive turning point in the strategy and methods of action of some international terrorist groups. The response of States, both individually and collectively, to the renewed threat of globalised terrorism lends itself to an examination through the lens of international law, most notably under the following angles of analysis: (1) the qualification of the States' response as "War on Terror"; (2) the potential of international criminal law in the struggle against terrorism; (3) the protection of human rights and fundamental freedoms within the framework of the policies and legislation on counter-terrorism.

1 The use of the expression "War on Terror" by many States to label counter-terrorism efforts, both at the national and international level, *is highly problematic under international law*. First of all, with the adoption of the United Nations Charter in 1945, the ban put on the resort to "war" coincided with the abolition of this term itself from the legal vocabulary. Today international lawyers would rather use the expression "use of armed force" in international relations, in accordance with the UN Charter terminology, or "armed conflict", in accordance with the Geneva Conventions of 1949 and other related international treaties. But apart from what may be seen as no more than a terminological dispute among specialists, the point is that an attack carried out by Al-Qaida or another international terrorist organisation against a State could hardly qualify as a "war" or "international armed conflict", i.e. an armed confrontation between two or more States. Indeed, the perpetrators of the attacks are non-State actors that cannot qualify as belligerent factions according to the law of armed conflict. Unlike lawful combatants (e.g. insurgents), terrorists can hardly be identified on a battlefield. Terrorist cells normally proliferate in disguise among the civilian population, and can stay dormant for years before they attack. Therefore, not even the conditions to speak of an "internal armed conflict" (i.e. a conflict occurring on the territory of a State) seem to be met.

On the other hand, the term "war" has undoubtedly a *major psychological impact on public opinion* and was therefore successfully used to rally political consensus for international armed operations against Afghanistan after September 2001, when the UN Security Council concluded that the Taliban government had allowed the Afghan territory to be used for terrorist purposes by the Al-Qaida network and others associated with them.
As to the military operations launched against Iraq in 2003, a coalition of forces from thirty States (so-called "coalition of the willing") not only invoked previous resolutions adopted by the Security Council in the 1990s as legal justification for the use of force, but also portrayed its action as an element of the broader strategy of the war on terror. On the contrary, the great majority of international law scholars think that intervention in Iraq was never properly authorised by the Security Council and is therefore most probably illegal under international law. Such tolerance of illegal use of force is one reason why many scholars have raised publicly their concerns about the "war on terror" discourse and its potentially disruptive effect on some areas of international law that codify fundamental values of today's international community.

2 In order to deal with the threat of international terrorism, *international criminal law* provides a more appropriate legal framework than the military response. Numerous international conventions have been concluded by States since the 1960s, for the *prevention and prosecution of international acts of terrorism* – for example the taking of hostages and other acts against the security of civil aviation and maritime navigation, or the financing of terrorism. These agreements constitute a formidable basis for inter-State cooperation and mutual assistance in criminal matters. Indeed, they aim to eliminate loopholes among the spheres of jurisdiction of different States, which are typical grey areas where terrorists can hide and escape criminal prosecution and punishment.
Today, acts of terrorism can most probably also be prosecuted as "crimes against humanity", even if this idea does not currently meet with unanimity among States. One major advantage of qualifying terrorist acts as crimes against humanity is the possibility to prosecute the suspects not only before national courts, but also – under certain conditions – before the recently-created International Criminal Court. This would eventually diminish the possibility of impunity for terrorists.

3 At the national level, the misleading label of war on terror can have devastating effects upon the *protection of human rights and fundamental freedoms.* The use of "war" rhetoric lays the ground/foundation for the "exceptionalist" arguments. It creates the idea that enhanced police powers and new criminal offences are necessary. The emphasis on the *internal security* aspects and the *perception of the terrorist threat* is designed to lead the public opinion to acquiesce to more use of State power and draconian security measures. As a consequence, people will correlatively attach less importance to the respect of human rights. In other words, the "siege" mentality can lead us to sacrifice the protection of human rights to the imperatives of the war on terror. Human rights will end up been regarded by many as a partial or total impediment to the extraordinary means which are needed in order to face the (alleged) extraordinary emergency times in which we live. A few examples can better illustrate this point.
Both Australia and Italy are currently concerned with the adoption of new anti-terrorism laws in the areas of criminal law and national security powers. In *Australia,* debate has begun anew on the occasion of renewal by Parliament of the ASIO (Australian Security Intelligence Organisation) Bill. This Act was initially adopted in June 2003 as a temporary response to the threat of terrorism – an extraordinary law

for an extraordinary time. It gives ASIO the power to detain and question people for up to seven days, not because they are charged with any terrorism offence, but simply because they are thought to have information about terrorism. The Bill clearly sets aside all of the fundamental guarantees applying to detention and police powers. Similarly, the *Italian Government* approved last July new measures to face the international terrorism "emergency". Under the governmental decree, persons can be now kept in detention for up to 24 hours without any form of judicial control. By the same token, police forces can now enforce compulsory collection of DNA samples from the saliva of foreigners who are found without identification documents.
These are patent examples of anti-terrorist laws targeting particular groups or individuals, including political activists, ethnic and religious minorities and asylum-seekers. Such laws, or at least parts of them, are clearly in breach of fundamental international human rights norms.
International law, and most notably international conventions for the protection of human rights, provides the yardstick for the legality of those laws. It is true that some rights can be limited in times of public emergency which threaten the life of the nation. This rule is today codified, *inter alia*, in The UN *International Covenant on Civil and Political Rights* and in the *European Convention on Human Rights* and Fundamental Freedoms. However, there are particular rights from which derogation is never permitted under these treaties: the right to life, to be free from torture and enslavement, to freedom of thought, conscience and religion, as well as certain elements of the right to a fair trial. Furthermore, permitted derogations from rights in time of emergency cannot involve discrimination solely on the ground of race, colour, sex and language, religion or social origin.
Where States show themselves reluctant to comply with their international human rights obligations, international bodies and courts for the protection of human rights – e.g. the UN Human Rights Committee and the European Court of Human Rights – can play a fundamental role in the reassertion of legality. Reasserting legality is not denying States the power to take special measures against terrorism; it means, rather, assuring that those measures be taken within the respect of fundamental human rights and freedoms.

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The complexity of the threat posed by international terrorism shows the inadequacy of a military counter-terrorism strategy alone. International criminal law and, more generally, human rights law definitely provide a more appropriate legal framework for States' action. It is clear that the international community has a duty to elaborate broader and long-term strategies for the struggle against international terrorism. At the Summit on Democracy, Terrorism and Security, held in Madrid last 10 March, the UN Secretary General Kofi Annan illustrated in a keynote address to the delegates the UN anti-terrorism strategy for the future. This comprehensive strategy is based on five main elements: 1. to dissuade disaffected groups from choosing terrorism as a tactic to achieve their goals; 2. to deny terrorists the means to carry out their attacks; 3. to deter States from supporting territories; 4. to develop State capacity to prevent terrorism; 5. to defend human rights in the struggle against terrorism. According to Kofi Annan, the UN has an essential role to play in every single aspect. Significantly, as to point 5, he stated that "Human rights law makes ample provision for counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism (…). Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element". Thanks to the Secretary General's initiative, today we can celebrate the creation by the

Commission on Human Rights of a Special Rapporteur who would report to the Commission on the compatibility of counter-terrorism measures with international human rights laws.

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