



TERRORISM AND HUMAN RIGHTS

THE PERSPECTIVE OF INTERNATIONAL LAW

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ABBREVIATIONS

EU - European Union

ICC - International Criminal Court

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

ICTY - International Criminal Tribunal for the former Yugoslavia

IHL - International humanitarian law

OAS - Organization of American States

OSCE - Organization for Security and Co-operation in Europe

UDHR - Universal Declaration of Human Rights

UN - United Nations

UNGA - United Nations General Assembly

STL - Special Tribunal for Lebanon



Photo credit: MOADH AL-DULAIMI/AFP/Getty Images

SUMMARY

This paper explores the relationship between terrorism and human rights from the international legal perspective. It first reviews the definitional content of "terrorism" and "human rights" and then discusses their doctrinal interactions—considering terrorism as both a cause and a product of human rights violations and addressing counter-terrorism efforts as a source of human rights violations that can themselves generate support for terrorism. It concludes with some observations about issues of international terrorism in the context of refugee law, criminal law and humanitarian law as well as some recommendations for future action.



KEY POINTS

- The international human rights “revolution” has transformed the landscape of the international community, with an increasing number of bodies empowered to issue binding decisions.
- International terrorism has also become a dominant factor in international relations but no agreed definition of terrorism exists, much less effective international mechanisms for punishing terrorists.
- As a result, the international legal “system” remains incomplete, sometimes inconsistent.
- We must acknowledge that human rights violations can be a main generator of terrorist violence and that repressive counter-terrorism practices are demonstrably counter-productive.
- A comprehensive, binding convention is needed to criminalize terrorism and establish effective mechanisms requiring terrorists (and their “aiders and abettors”) to compensate their victims.

INTRODUCTION

Law (including international law) necessarily reflects the community it serves. It mirrors the community's values and structure and should serve the interests of the community in resolving disputes among its members in accordance with their expressed values. Law provides only one way of defining and dealing with communal problems, but without clear legal principles and effective legal processes, the community lacks a critical stabilizing force.

Human rights and terrorism are broad phenomena, not just legal problems, and the legal perspective is surely not the only one relevant to an analysis of their role in contemporary international relations. But law can contribute to viable solutions, and an awareness of the legal perspective is just as important for policy makers as other perspectives are for international lawyers.

PART I. WHAT ARE "HUMAN RIGHTS"?

Internationally-recognized human rights are commonly understood to encompass those rights to which all persons are entitled without discrimination by the mere fact of being human—that is, rights that cannot be denied or restricted on the basis of

culture, tradition, nationality, political orientation, social standing or other factors, but must be protected in fact and given effect by law.

Broadly speaking, these rights include the most fundamental preconditions for a dignified human existence. They are primarily asserted against government authorities (i.e., must be respected, protected and given effect by the government) but in some instances are also capable of assertion against other individuals in their private capacities (e.g. discrimination).

1. INTERNATIONAL HUMAN RIGHTS LAW

The main articulation of international human rights law is found in various human rights treaties and other international instruments.¹ The core documents are the 1948 Universal Declaration of Human Rights (UDHR) and two multilateral treaties, the 1966 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (sometimes referred to collectively as the "International Bill of Rights"). As a General Assembly resolution, the UDHR is technically non-binding under international law but is generally accepted as articulating the obligations undertaken by UN Member States under the UN Charter. The two Covenants are legally binding on States

that have ratified them, and they are in fact widely ratified (if not equally widely respected in practice).²

Other core universal human rights treaties include the 1965 International Convention on the Elimination of All Forms of Racial Discrimination,³ the 1980 Convention on the Elimination of All Forms of Discrimination against Women,⁴ the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,⁵ the 1989 Convention on the Rights of the Child,⁶ the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,⁷ the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, and the 2006 Convention on the Rights of Persons with Disabilities.

In addition to these “universal” conventions, several regional human rights systems are founded on their own treaties and feature regional enforcement mechanisms (e.g., commissions and courts), specifically in Europe (under the Council of Europe), Africa (within the African Union) and the Americas (OAS). No such agreements or mechanisms exist for the Middle East (or Asia).

2. CATEGORIES OF RIGHTS

With the proliferation of international human rights instruments, it has become common to differentiate between

- a. civil and political rights, sometimes called “first generation” rights,
- b. economic, social and cultural rights (“second generation” rights), and
- c. group or collective rights, often denominated “third generation” rights.

These are not precise categorizations but nonetheless serve to highlight some helpful distinctions.

By way of example, “first generation” rights relate primarily to personal freedom and liberty from governmental interference. They encompass many of the basic individual rights protected by the U.S. Constitution and related legislation, including (i) such “physical integrity rights” as the rights to life, liberty and security of the person, protection from physical violence including torture and inhuman treatment, exile, slavery and servitude; (ii) “due process” rights such as protection against arbitrary arrest and detention, the right to a public hearing by an independent and impartial tribunal, the presumption of innocence, freedom from double jeopardy, the right to equal treatment and protection in law; and (iii) “personal freedom” rights such as protection

of one's privacy and rights of ownership, freedom of expression, thought, conscience and religion, association, assembly, movement, etc. They also include "political participation rights" common to democratic governance, including the right to take part in the government of one's country, to vote, to stand for election at genuine periodic elections held by secret ballot, etc.

By contrast, the "second generation" of human rights addresses the broader societal conditions necessary for well-being and prosperity, including, for example, the rights to property, work (which one freely chooses or accepts), a fair wage, a reasonable limitation of working hours, safe working conditions, and trade union rights. Notably this category extends to elements considered necessary for an adequate standard of living, including inter alia rights to health, shelter, food, water, social care, education, to participate freely in the cultural life of the community, to share in scientific advancement and to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author.

"Third generation" rights include both "solidarity rights" deemed necessary to protect specific groups in need of particular protection (women, children, migrants, the disabled, the indigenous, etc.) and rights owing to the "global community" in general, for example the rights to development, peace or a clean global environment. Perhaps the most fundamental "collective" human right is the right to self-determination, which is textually vested in "peoples" rather than in individuals. (A vibrant debate has emerged over whether this right applies outside the context of a struggle for post-colonial independence, e.g., to the "people" in Quebec, Catalonia, California or Corsica). It is generally accepted that collective rights may not infringe on universally-accepted individual rights, such as the right to life and freedom from torture.

These categories reflect different concepts of the nature of "rights" and the role of government in their protection and promotion. Broadly speaking, "first generation" rights can be thought of as limitations on governmental action (freedoms) while "second generation" rights function as demands on government (entitlements). To illustrate, freedom



of speech, press, assembly and religion are largely respected when the government does not interfere, while rights to work, education and health care likely require affirmative governmental action. The distinction is not perfect, but in its origins it reflected the differing approaches of the liberal/western democracies on the one hand and the socialist/communist approach on the other (thus, the decision taken in the United Nations during the Cold War to separate the rights described in the Universal Declaration into two separate “human right covenants”).

In their legal formulations, civil and political rights are sometimes said to reflect “negative obligations” capable of immediate implementation and are therefore expressed in precise language, while economic, social and cultural rights are viewed as imposing “positive obligations” which are often conditional on the existence of available resources and therefore require “progressive realization” and can consequently expressed in less precise terms.

In consequence, civil and political rights are often said to be “justiciable,” i.e., legal rights capable of being asserted against governmental authority in court, while economic, social and cultural rights are by nature “non-justiciable” and instead matters for governmental decision (such as legislative enactment) since they involve commitment of resources and funding.

Photo credit: AHMAD AL-RUBAYE/AFP/Getty Images

While that may reflect the situation in many traditional democratic systems, it is not true of many countries today (such as South Africa, which specifically vests its courts with powers to instruct the government on the necessary allocation of funds to satisfy legally-recognized economic and social rights).

The “human rights revolution” has also opened up new opportunities for international examination of how governments give effect to their human rights obligations at the domestic level. Once considered an intrusion into “domestic affairs” to criticize how a government dealt with its own citizens, that discussion has now been legitimized for example through the “universal periodic review” of every State’s human rights performance by the UN Human Rights Council, as well as the examinations undertaken by other human rights entities such as the “treaty bodies” established by the various human rights conventions (e.g., the Human Rights Committee under the ICCPR and the Committee on Economic, Social and Cultural Rights under the ICESCR), both of which can receive and consider individual and collective complaints alleging violations of rights protected under their respective treaties.



Photo credit: FADEL SENNA/AFP/Getty Images

PART II: WHAT IS “TERRORISM”?

At its most general level, the term “terrorism” denotes the (generally criminal) use of politically-motivated violence. It is typically used to refer to “a special form or tactic of fear-generating, coercive political violence” as well as “a conspiratorial practice of calculated, demonstrative, direct violent action without legal or moral restraints, targeting mainly civilians and non-combatants, performed for its propagandistic and psychological effects on various audiences and conflict parties.”⁸

However, no single or agreed legal definition exists at the international level. The term is frequently employed to describe a wide range of acts committed in response to varying circumstances and phenomena at both the domestic and international levels. Its use is often politically-charged.

1. DOMESTIC U.S. DEFINITIONS

Most acts of terrorism violate “ordinary” domestic criminal law (assault, malicious wounding,

manslaughter, murder, property destruction, etc.). The “terrorist” distinction arises from the purpose or intent behind the acts.

As a matter of U.S. law, the U.S. Department of Defense defines terrorism as “[t]he unlawful use of violence or threat of violence, often motivated by religious, political, or other ideological beliefs, to instill fear and coerce governments or societies in pursuit of goals that are usually political.”⁹

The Department of State’s definition is broader. As applied to the preparation of the annual country reports on terrorism, the term “terrorism” means “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”¹⁰

For the specific purposes of U.S. federal criminal law, the term “international terrorism” means activities that—

- a. involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

- b. appear to be intended— (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- c. occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.¹¹

2. INTERNATIONAL APPROACHES

Despite repeated condemnation of “terrorism” in the United Nations,¹² it has to date proven impossible for the international community to agree on a single definition of terrorism. In consequence, no international criminal tribunal currently has jurisdiction over a distinct crime of terrorism.

Perhaps the most debated definition of terrorism, as an international crime, was adopted by the Appeals Chamber of the Special Tribunal for Lebanon (STL), which stated that:

the international crime of terrorism ... requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public

danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.¹³

Numerous efforts have been made since the 1920s to achieve an international agreement on the definition of the crime of “terrorism” as such, but without success. For instance, a concerted effort has been since 2000 in the UN General Assembly to draft a comprehensive convention on international terrorism but remains frustrated by sharp disagreement over the definition, in particular the insistence by some delegations on drawing a clear distinction between illegal “terrorism” and the use of force and violence in the exercise of the legitimate right of peoples to seek self-determination and resist foreign occupation.

The 1998 Arab Convention on the Suppression of Terrorism, adopted by the League of Arab States, defined the term “terrorism” to include “[a]ny act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resources [sic].” Art. 1(2). However, Article 2(a) then narrowed that definition by providing that “[a]ll cases of struggle by whatever means, including armed

struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence."

To much the same effect, the 1999 Convention of the Organization of the Islamic Conference on Combating International Terrorism defined "terrorism" to include "any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperiling their lives, honor, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States."¹⁴

But the Convention then excluded a series of acts (including "aggression" against heads of state, ambassadors, acts of sabotage, etc.) even when "politically motivated."¹⁵

The most productive approach at the international level has therefore been to condemn specific terrorist acts in focused multilateral "counter-terrorism" conventions addressing particular, narrowly defined acts deemed criminal (typically in response to international incidents). For instance, Article 2(1) of the 1999 International Convention for the

Suppression of the Financing of Terrorism (the most widely ratified anti-terrorism convention)¹⁶, provides that:

(1) Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; (emphasis added) or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

This same "list" approach was followed in the 2002 Inter-American Convention against Terrorism¹⁷ as well as the 2005 Council of Europe Convention on the Prevention of Terrorism.¹⁸

Under this approach, the specific crimes defined in the following "counter-terrorism" conventions are generally considered terrorist crimes, at least with respect to the States that have ratified or acceded to these conventions:

1. 1963 Tokyo Convention on Offences and Other Acts Committed on Board of Aircrafts

2. 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, of 16 December 1970;
3. 1971 Montreal Convention on Suppression of Unlawful Acts Against the Safety of Civil Aviation, its 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports, and its 2010
4. 1973 New York Convention on the "Prevention and Punishment of Crimes Against Persons Enjoying International Immunity, Including Diplomatic Agents
5. 1979 International Convention against the Taking of Hostages (New York, 1979).
6. 1979 Convention on the Physical Protection of Nuclear Material and its 2005 amendment.
7. 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, its 1988 protocol relating to unlawful acts against the Safety of fixed platforms located on the continental shelf, and the 2005 Protocol thereto
8. 1991 Montreal Convention on the Marking of Plastic Explosives for the Purposes of Detection
9. 1997 International Convention for the Suppression of Terrorist Bombings
10. 1999 International Convention for the Suppression of the Financing of Terrorism
11. 2005 International Convention for the Suppression of Acts of Nuclear Terrorism
12. 1982 United Nations Convention on the Law of the Sea (provisions relating to piracy on the high seas)

While adherence to these counter-terrorism conventions varies among "Middle Eastern" States (as does compliance with their treaty obligations), the overall regional record of ratification is quite respectable.¹⁹

PART III. TERRORISM AND HUMAN RIGHTS

How do these separate but related bodies of international law interact with each other?²⁰

1. TERRORISM AS A VIOLATION OF HUMAN RIGHTS

If one accepts that terrorism involves the use of politically-motivated, fear-generating violence to commit criminal acts aimed at harming innocent individuals for the purpose of coercing governments or societies to take or refrain from action, then it clearly violates —indeed, is precisely intended to violate —fundamental human rights (and, more generally, the very concept of rule of law).

By committing acts of terror, terrorists by definition attack the values at the heart of the Universal Declaration of Human Rights, the two Covenants, and other international instruments, in particular many “first generation” rights (such as the rights

to life, liberty and physical integrity) but also second and third generation rights.

Moreover, terrorist acts can be distinguished from “ordinary” crimes precisely because they are aimed at destabilizing Governments, undermining civil society, jeopardizing peace and security, and threatening social and economic development, all outside “normal” political and legal channels and in defiance of the law.

The destructive impact of terrorism on human rights and security has repeatedly been recognized by the United Nations. Consider, for instance, the preamble to UN Security Council Resolution 2396 (adopted Dec. 21, 2017):

Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever, wherever and by whomsoever committed, and remaining determined to contribute further to enhancing the effectiveness of the overall effort to fight this scourge on a global level,

Reaffirming that terrorism poses a threat to international peace and security and that countering this threat requires

collective efforts on national, regional and international levels on the basis of respect for international law and the Charter of the United Nations,

Emphasizing that terrorism and violent extremism conducive to terrorism cannot and should not be associated with any religion, nationality, or civilization...²¹

As a matter of contemporary international law, States have an affirmative duty to protect individuals under their jurisdiction against interference in the enjoyment of their human rights, in particular the right to life and the right to security. These rights have been described as “preeminent” rights because without them all the other rights would effectively be meaningless. In many respects, terrorism aims to undermine the ability of governments and governmental entities —and perhaps more importantly, the *confidence* of the population in that ability —to safeguard society in precisely this fundamental respect. Perhaps more directly, acts of terrorism violate the rights of individual victims, who suffer an attack on their most basic right to live in peace and security.

Increasingly, support for the victims of terrorism has become an important aspect of international focus. In the 2005 World Summit Outcome (General Assembly Resolution 60/1), for example, Member States stressed “the importance of assisting victims of terrorism and of providing them and their families with support to cope with their loss and their grief.” Similarly, the United Nations Global Counter-Terrorism Strategy reflects the pledge by Member States to “promote

international solidarity in support of victims and foster the involvement of civil society in a global campaign against terrorism and for its condemnation.” In one sense, the failure of governments to provide assistance and relief to victims of terrorism may well be described as a human rights violation itself.

2. TERRORISM AS A CONSEQUENCE OF HUMAN RIGHTS VIOLATIONS

Terrorism is not a single phenomenon. It comes in many varieties. Nor is it generated by a single “cause” but can arise from a variety of circumstances and motivations which differ (in nature, impact, and extent) from situation to situation. In many instances, those circumstances and motivations involve real or perceived human rights violations.

Among the commonly-cited conditions that make terrorism possible or likely (“precursors”) are extreme poverty, social exclusion, and economic privation; religious and ethnic prejudice and discrimination; political repression and denials of due process; communal alienation; and lack of education, employment opportunities and social services. Without question, political objectives and ideological orientation have frequently played important roles (i.e., desire to end foreign occupation or outside interference, to overthrow or promote a particular form of governance) as have

religious factors (belief in the superiority of one's faith or in commandments from the Deity).

Yet it seems clear that in many if not most circumstances the conditions that create susceptibility to radicalization, that make terrorist violence against innocent civilians appear to be a reasonable, justifiable and even necessary option, themselves reflect human rights violations. It is not simply that people choose terrorism when they are just trying to correct what they perceive to be social, political or historical injustices, but perhaps more likely when they have (or perceive they have) no other options, when they feel excluded from other ways of achieving their desired changes. Terrorism appeals to individuals and groups denied fundamental human rights (for example, those subjected to oppressive and authoritarian regimes) *because* they have no alternatives. Deprivation of human rights unquestionably fuels that sense of alienation and exclusion that is often used to justify terrorist acts.

Of course, more personal factors - marital difficulties, broken relationships, recent loss of employment, mental health problems, etc. - can all be "triggers" in specific instances. It is also surely the case that some individuals who become terrorists have certain predispositions or psychological traits conducive to violent or anti-social behavior. Many are drawn to emulate what they see as the heroic feats of others. It may also be true that a "tyrannical mindset" does exist in some segment of every population, and perhaps it does take "monstrous people

to produce atrocious deeds."²² Without question, violent crime occurs even in the most human-rights compliant societies. Compliance with international human rights obligations cannot prevent all acts of violence or terrorism.

Yet it also seems true that recruitment by international terrorist groups is aided by deeply-felt grievances nurtured by poverty, foreign occupation, and the absence of human rights and fundamental freedoms, as well as the lack of means of redress "within the system." Democracy may be neither a necessary nor sufficient bulwark against terrorism (even from within) but it certainly seems that the social and political communities that are most compliant with human rights norms tend to suffer the least from domestic ("home grown") terrorism. It also appears that improvements in domestic human rights conditions tends to reduce the level of terrorist violence.

3. HUMAN RIGHTS IMPLICATIONS OF COUNTER-TERRORISM

At the same time, some measures to counter or prevent terrorist acts can themselves pose serious challenges to the protection and promotion of human rights —both for the perpetrators and for the population at large. The declaration of the "Global War on Terror" in the wake of the 9/11 attacks, which led to the use of torture and other "enhanced interrogation techniques" and to such practices as "irregular rendition" and prolonged



incommunicado detention at Guantanamo, put this aspect of the relationship between human rights and terrorism squarely before the international community. It has since become a dominant theme in the international consideration of terrorism.

The UN General Assembly has repeatedly emphasized that the rights of the alleged perpetrators of terrorist attacks must be respected in the course of their apprehension and prosecution, including their rights to public trial, to be presumed innocent until proven guilty, and not to be subject to torture or other degrading treatment. For example, in adopting its fundamental “Global Counter-Terrorism Strategy” in 2006, the UNGA reaffirmed that “the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the protection of

human rights are not conflicting goals, but complementary and mutually reinforcing, and stressing the need to promote and protect the rights of victims of terrorism.”²³

To the same effect, the 2009 UNGA resolution on the “protection of human rights and fundamental freedoms while countering terrorism” stressed “the fundamental importance, including in response to terrorism and the fear of terrorism, of respecting all human rights and fundamental freedoms and the rule of law.” It emphasized that “Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law” and underscored that “respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing

with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort and notes the importance of respect for the rule of law so as to effectively prevent and combat terrorism." Finally, it noted that "failure to comply with these and other international obligations, including under the Charter of the United Nations, is one of the factors contributing to increased radicalization to violence and fosters a sense of impunity."²⁴

The UN Security Council echoed these principles in a recent anti-terrorism resolution, reaffirming that "Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law." It also stressed that "[r]espect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort," noted "the importance of respect for the rule of law so as to effectively prevent and combat terrorism." and said that "failure to comply with these and other international obligations, including under the Charter of the United Nations, is one of the factors contributing to increased radicalization to violence and fosters a sense of impunity."²⁵

These principles have become embedded in the expanding UN structures for dealing with terrorism and counter-terrorism. The Security Council's Counter-Terrorism Committee, established in 2001,

emphasizes that States must ensure that any measures 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, including coordination with the Office of the UN High Commissioner for Human Rights.²⁶

Within the UN Secretariat, an Office of Counter-Terrorism headed by an Under-Secretary General was recently established²⁷ to assist Member States in implementing the UN Global Counter-Terrorism Strategy. It will evidently combine the functions of the pre-existing UN Counter-Terrorism Implementation Task Force and the UN Counter-Terrorism Centre. Among its mandates is preventing violent extremism in accordance with the 2006 Global Counter-Terrorism Strategy (thus ensuring emphasis on compliance with human rights norms).

The newly-appointed Special Rapporteur of the UN Human Rights Council on "the promotion and protection of human rights and fundamental freedoms while countering terrorism," Fionnuala Ní Aoláin, indicated in her recent report to the UN General Assembly that she will focus on four substantive areas: (1) the proliferation of permanent states of emergency and the normalization of exceptional national security powers within ordinary legal systems; (2) the need for greater clarity in respect to the legal relationships between national security regimes and international legal regimes (human rights, international humanitarian law, and international

criminal law) as well as the relationship of human rights to the emergence of stand-alone international security regimes regulating terrorism and counter-terrorism; (3) the advancement of greater normative attention to the gendered dimensions of terrorism and counterterrorism; and (4) advancing the rights and protection of civil society in the fight against terrorism.²⁸

The same themes are being given attention in other international bodies. On July 6, 2017, the European Parliament set up a special 12-month committee on the impact of EU anti-terror laws on fundamental rights.²⁹ Within the OSCE's "human dimension" component, attention has long been paid to the relationship between the need for security in response to terrorism and the risks that counter-measures can pose for fundamental rights and freedoms, including the rights to a fair trial, to privacy, and the freedoms of association and of religion or belief. Participating States have pledged under a "Plan of Action" to fully respect international law, including the international law of human rights, in the development and implementation of their counter-terrorism initiatives. A very useful discussion of the issues can be found in the OSCE's Manual on Countering Terrorism, Protecting Human Rights.³⁰

PART IV: TERRORISM AND OTHER ASPECTS OF INTERNATIONAL LAW

1. TERRORISM AND INTERNATIONAL REFUGEE LAW

Alongside the specific obligations of human rights law, international refugee law provides a set of principles that have increasingly become relevant to the effort to combat international terrorism, particularly with respect to crimes committed in European and other states of refuge for persons fleeing the conflicts in the Middle East.

The basic international instruments are the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, which taken together define the term refugee to denote an individual who is outside his or her country of nationality or habitual residence and is unable or unwilling to return due to a "well-founded fear of persecution based on his or her race, religion, nationality, political opinion, or membership in a particular social group." As a technical legal matter, the definition excludes those who are economic migrants or victims of natural disasters or violent

conflict (but not personally subject to discrimination amounting to persecution) as well as the “internally displaced.”³¹

The definition also excludes persons who would otherwise meet the refugee definition when there are “serious reasons” for considering that he or she (a) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes, (b) has committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee, or (c) has been guilty of acts contrary to the purposes and principles of the United Nations.³² Acts which bear the characteristics of terrorism will almost invariably amount to serious non-political crimes.³³

The basic principle of refugee law is the obligation of States not to return (*refouler*) a refugee to “the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”³⁴ This “non-refoulement” obligation is generally acknowledged as a human right and has been expressly incorporated into a number of human rights treaties (including the UN Convention against Torture, the American Convention on Human Rights, and the African [Banjul] Charter on Human and Peoples’ Rights).

As a strictly legal matter, however, the obligation only precludes the “return” of individuals who have been “admitted”

into a State’s territory; it does not obligate States to grant admission to individuals seeking entry as refugees. In other words, it does not mandate automatic acceptance or “open borders” even for those who might eventually be adjudicated to have the necessary “well-founded fear.” Nor does it prohibit requiring an individual to leave for a third country where he or she would not face persecution on one of the prohibited bases.

Immediately following the 9/11 attacks, the UN Security Council called upon Member States *inter alia* to “take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for 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.”³⁵

2. TERRORISM AND INTERNATIONAL CRIMINAL LAW

As indicated above (Part I), the main emphasis in the international community’s legally-oriented counter-terrorism efforts over the past several decades has been to develop a body of binding international conventions aimed at coordinating and

strengthening domestic criminal law responses to specific terrorist acts that span different national jurisdictions or otherwise have an international element. These treaties have typically been negotiated in reaction to egregious terrorist events (such as the hijacking of aircraft, the killing of diplomats, the taking of hostages, the use of plastic explosives, the hijacking of the Italian cruise ship *Achille Lauro*, acts of terrorist financing, etc.) to provide a consensual framework for international cooperation.

In general, they follow a common approach: they define the particular "terrorist" acts in question and require States Party to criminalize those acts under their respective domestic laws, to prosecute the perpetrators in certain situations (for instance, when the offense is committed in their territory or by their nationals), and to cooperate with other States Party in preventing such acts.

Importantly, most of the treaties also obligate States Party to extradite an accused individual to other States Party if they find that person in their territory but lack one of the required jurisdictional elements to prosecute - for example, because the crime was not committed in their territory or the accused is not their national. But if for some reason they cannot accomplish the requested extradition, the treaties require them to proceed with a domestic prosecution. In other words, the treaty provides an internationally-agreed jurisdictional basis for prosecution.

This *aut dedere aut judicare* ("extradite or prosecute") principle was intended to eliminate safe havens for terrorists.

Deterrence is obviously among the broader policy objectives of this approach, by eliminating terrorists' refuges and fostering a coordinated international approach to criminal prosecution of specific types of terrorism. Encouraging States to pursue terrorists through criminal prosecution also serves, to some extent, to prevent summary or extra-legal punishment and to protect the "first generation" due process rights of the defendants.

Domestic legal systems vary, of course, in their effectiveness and consistency. To date, no international criminal tribunal has been given jurisdiction over the specific crime of international terrorism (or most of the treaty-based counter-terrorism crimes). One decision of an international tribunal specifically involving terrorism came in the case against General Stanislav Galić before the International Criminal Tribunal for the Former Yugoslavia (ICTY). In 2003, the Tribunal convicted General Galić of terrorism as a war crime and a crime against humanity for directing acts

of violence "with the primary aim to spread terror among the civilian population of Sarajevo" between 1992 and 1994. While convicting him for those crimes, the ICTY trial chamber considered the campaign of shelling and sniping of civilians in Sarajevo (for which it found Galić responsible) to be "an act of terrorizing the civilian population."³⁶

An effort was made to include “terrorism” as a distinct crime during the negotiation of the Rome Statute creating the International Criminal Court but failed because of disagreement over the definition. Conceivably, following the Galić precedent, certain types of terrorist conduct might be encompassed by various other offences within the ICC’s mandate, depending on the facts —as a war crime, for example, or a crime against humanity if the acts included certain acts committed as “part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” or even as an act of genocide if the requisite “specific intent” could be proven.

Additionally, proposals have occasionally been made for the creation of a specialized stand-alone court for the prosecution of acts of international terrorism.³⁷ For self-

evident reasons, such proposals seem unlikely (in the foreseeable future) to garner the necessary international support for adoption.

3. TERRORISM AND INTERNATIONAL HUMANITARIAN LAW

International humanitarian law (“IHL” for short), often considered part of the law of armed conflict, sets forth rules on the protection of persons in “armed conflict” and more generally for the conduct of “hostilities.” These rules are reflected in a number of treaties, including the four Geneva Conventions and their two Additional Protocols, as well as other international instruments aimed at reducing human suffering in armed conflict. Generally, they apply to armed conflict between States and are



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designed to prevent the unnecessary or disproportionate use of force during military operations as well as the infliction of unnecessary suffering and to protect certain categories of non-combatants (including for example civilians, the wounded, the shipwrecked, prisoners of war).

In recent years considerable debate has arisen about whether these IHL rules do or should apply to “terrorist” situations, specifically with respect to acts by or against terrorists that are significant enough to amount to the use of “armed conflict” (consider, for example, the 9/11 attacks). The latter view draws some support from such actions by the UN Security Council as the adoption of a resolution shortly after the 9/11 attacks, under Chapter VII of the Charter of the United Nations, stating explicitly that every act of terrorism constitutes a “threat to international peace and security” (thus permitting invocation of the right of self-defense) and that the “acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations” (potentially justifying collective action by States against the terrorists and their supporters).³⁸

The question is whether (or when) the acts in question are more properly considered crimes committed by private individuals (non-state actors), to be dealt with judicially, or amount to the conduct of armed hostilities justifying military responses to which IHL rules (permissive as well as restrictive) apply. IHL contains no explicit definition of “terrorism” as such,

much less general rules regarding actions by or against terrorists. It does permit the use of armed force that would not be legitimate in a “civilian” criminal context not involving “hostilities,” while at the same time prohibiting many acts during armed conflict that would be considered terrorist if committed in times of peace (such as deliberate acts of violence against civilians and civilian objects constitute war crimes under international law, for which individuals may be prosecuted).

By way of example, the proportionate use of lethal force is lawful during armed conflict, without regard to normal “civil and political rights,” while disproportionate or indiscriminate attacks are strictly prohibited as are “measures” or “acts of terrorism” or “acts or threats of violence the primary purpose of which is to spread terror among the civilian population.” The International Court of Justice has affirmed the applicability of fundamental human rights during armed conflicts, stating that “[in] principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities.”³⁹

This debate (about the rules governing use of armed force in the terrorism context) becomes particularly intense in relation to the terrorist activities of organized groups capable of operating across national boundaries and those claiming to have governmental or proto-governmental status. It is even sharper when the focus shifts to “state sponsored terrorism” and allegations that the actions of the terrorists have been supported, facilitated or financed by foreign governments.

RECOMMENDATIONS

Several important steps could be taken by the international community to address some of the issues identified above.

- Perhaps most important is the recognition that human rights violations are themselves among the main generators of terrorist violence. Consequently, respecting the rights of marginalized groups, strengthening the protections available to minorities and the disadvantaged, ensuring equal participation in political, economic and social life —these can be the most effective counter-terrorism (or terrorism-preventive) strategies.
- Equally important is acknowledging that repressive counter-terrorism policies and practices are demonstrably counter-productive. This point has been made repeatedly, and forcibly, by the current U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Fionnuala Ní Aoláin.
- Agreement on a global or comprehensive Convention on International Terrorism could be a significant step forward legally. This effort, centered in a UN Committee, remains deadlocked over how to define the term. Of course, by itself, agreement on the text of such a treaty would not be sufficient; it would need to be coupled with a broad commitment by States Parties to implement it effectively.
- Regarding deterrence, effective action is needed to hold terrorists accountable both for their own acts and for providing compensation for victims of terrorism. A proper regime would cover state sponsors as well as others who “aid and abet” or provide material support to the terrorists.
- Eventually one might contemplate a global human rights court (as an extension of the existing regional mechanisms) as well as a global terrorism court (perhaps as an outgrowth of the International Criminal Court), but those developments are highly unlikely to gain support for many years into the future.

ENDNOTES

1. One useful reference is Buergentahl, Shelton, Stewart and Vazquez, *International Human Rights in a Nutshell* (West, 5th ed. 2018).
2. Currently, 169 States are party to the ICCPR (six others have signed but not yet ratified, but not Oman, Qatar, Saudi Arabia or the UAE); 166 States are party to the ICESCR and four others (including the United States) have signed but not yet ratified (not Oman, Qatar, Saudi Arabia or the UAE).
3. In the region, only Iran has not ratified the Racial Discrimination Convention.
4. CEDAW has 189 States Party, not including Somalia.
5. The Torture Convention has 162 States Parties, not including Iran or Oman.
6. The United States is the only State not to have ratified the Rights of the Child Convention.
7. Algeria, Egypt, Libya, Morocco, and Syria are among the 51 States Parties to the Migrant Workers Convention.
8. "At the origin of terrorism stands terror – instilled fear, dread, panic or mere anxiety – spread among those identifying, or sharing similarities, with the direct victims, generated by some of the modalities of the terrorist act – its shocking brutality, lack of discrimination, dramatic or symbolic quality and disregard of the rules of warfare and the rules of punishment.... [T]errorist violence is predominantly political – usually in its motivation but nearly always in its societal repercussions [and] [t]he immediate intent of acts of terrorism is to terrorize, intimidate, antagonize, disorientate, destabilize, coerce, compel, demoralize or provoke a target population or conflict partly in the hope of achieving from the resulting insecurity a favourable power outcome, e.g. obtaining publicity, extorting ransom money, submission to terrorist demands and/or mobilizing or immobilizing sectors of the public." A.P. Schmid (ed.), *Handbook of Terrorism Research* (Routledge 2011) at 86-87.
9. Joint Publication 1-02: Department of Defense Dictionary of Military and Associated Terms (amended through 15 June 2015), available at <https://www.hsdl.org/?view&did=750658>. See also NATO defines terrorism in the AAP-06 NATO Glossary of Terms and Definitions, Edition 2014 as "The unlawful use or threatened use of force or violence against individuals or property in an attempt to coerce or intimidate governments or societies to achieve political, religious or ideological objectives."
10. 22 U.S.C. § 2656f(d).
11. 18 U.S.C. § 1331(1).
12. See, e.g., para. 3, UNGA Res. 49/60 (Measures to eliminate international terrorism), Dec. 8, 1994), which referred to "[c]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them"; see also para. 3 of UNSC Res 1566 (2004), recalling that "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature."
13. Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I (Feb. 16, 2011), para. 85, available at <https://>

www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/appeals-chamber/534-f0936.

14. Article 2(c).
15. Organization of the Islamic Conference, Convention of the Organization of the Islamic Conference on Combating International Terrorism, 1 July 1999, Annex to Resolution No: 59/26-PI, art. 3: "In the implementation of the provisions of this Convention the following crimes shall not be considered political crimes even when politically motivated: (1) Aggression against kings and heads of state of Contracting States or against their spouses, their ascendants or descendants. (2). Aggression against crown princes or vice-presidents or deputy heads of government or ministers in any of the Contracting States. (3). Aggression against persons enjoying international immunity including Ambassadors and diplomats in Contracting States or in countries of accreditation (4). Murder or robbery by force against individuals or authorities or means of transport and communications. (5). Acts of sabotage and destruction of public properties and properties geared for public services, even if belonging to another Contracting State. (6). Crimes of manufacturing, smuggling or possessing arms and ammunition or explosives or other materials prepared for committing terrorist crimes.
16. Among "Middle Eastern" States, only three have not ratified this treaty: Lebanon, Iran and Somalia (although Somalia has signed it).
17. AG/RES. 1840 (XXXII-O/02).
18. ETS 196, Warsaw, May 16, 2005.
19. Consider, for example, the Tokyo Aircraft Convention (186 States Party but not Somalia); the 1989 Hostages Convention (176 States Parties but not Somalia or Syria); the 1991 Plastic Explosives Convention (155 States Party, but not Comoros, Iran or Syria); the 1997 Terrorist Bombing Convention (170 States Party, but not Iran, Jordan, Lebanon, Oman, Somalia or Syria); the 2005 Nuclear Terrorism Convention (112 States Parties but not Iran, Oman or Syria – Egypt, Mauritius and Syria have signed but not ratified).
20. A thorough and thoughtful examination of these issues can be found in Manfred Nowak and Anne Crawford, *Using Human Rights to Counter Terrorism* (Elgar April 2018); see also Human Rights, Terrorism and Counter-Terrorism: Fact Sheet No. 32, Office of the UN High Commissioner for Human Rights (July 2008).
21. UNSC Res. 2396, preamb. paras 2-4 (Dec. 21, 2017).
22. Albert Bandura, Selective Moral Disengagement In the Exercise of Moral Agency, *Journal of Moral Education*, Vol. 31, No. 2, 2002, cited in Coffee, "What Motivates Terrorists," *The Atlantic*, June 9, 2015, available at <https://www.theatlantic.com/international/archive/2015/06/terrorism-isis-motive/395351>.
23. Annexed Plan of Action, Part IV, UNGA Res 60/288 (Sept. 20, 2006) ("The United Nations Global Counter-Terrorism Strategy).
24. UNGA Res 63/185, preamb. paras. 2 and 7 (March 3, 2009) ("Protection of human rights and fundamental freedoms while countering terrorism")
25. UNSC Res. 2396, preamb. paras. 7 and 8 (Dec. 21, 2017).
26. See <http://www.un.org/en/sc/ctc/rights.html>.
27. UNGA Res. 71/291 (June 15, 2017) ("Strengthening the capability of the United Nations system").
28. See Promotion and protection of human rights and fundamental freedoms while countering terrorism, UN General Assembly Seventy-second session Item 73 (b) of the provisional agenda, September 27, 2017, A/72/43280.
29. European Parliament decision of July 6, 2017, on setting up a special committee on terrorism, its responsibilities, numerical strength and term of office. 2017/2758(RSO), P8_TA-PROV-(2017)0307.
30. Available at www.osce.org/odihr/29103?download=true.
31. Technically, a refugee is not the same as an "asylum-seeker," i.e., someone whose claim has not yet been definitively evaluated. In the case of mass refugee movements (usually a result of conflict), the reasons for fleeing are evident

and there is no capacity to conduct individual interviews, such groups are often declared *prima facie* refugees. In U.S. law, the same legal standard is applied to those outside the country who seek admission to the U.S. as "refugees" and those in the country who seek to remain under the "asylum" provisions of our immigration law.

32. Art. 1F, 1951 Convention.

33. If a person has already been granted refugee status under the 1951 Convention, such status may be cancelled if there are grounds for considering that the person should not have been recognized as a refugee in the first place. This is the case where there are indications that, at the time of the initial decision, the applicant did not meet the inclusion criteria of the 1951 Convention, or that an exclusion clause of that Convention should have been applied to him or her (i.e., if the individual committed terrorist acts).

34. Art. 33(1). The Convention does, however, contemplate the possibility of expulsion to a third country on national security grounds under article 32.

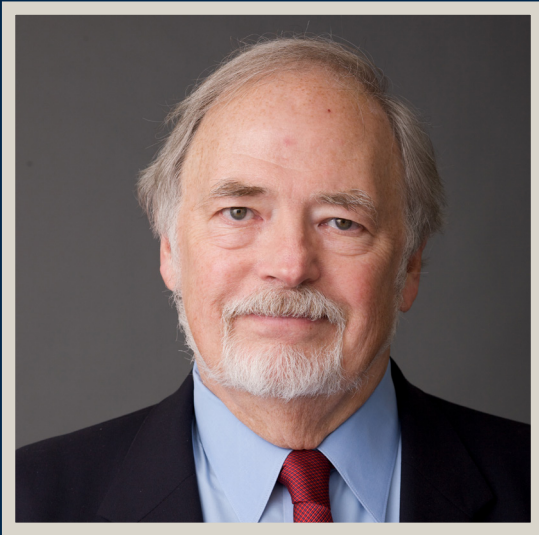
35. UNSC Res. 1373 (Sept. 28, 2001), paras 3(f) and (g).

36. See Summary of Judgment, Prosecutor v. General Stanislav Galić. Dec. 5, 2003, available at http://www.icty.org/x/cases/galic/tjug/en/031205_Gali_summary_en.pdf, and the Judgement of the ICTY Trial Chamber, at <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>.

37. See, e.g., the report of a Spanish proposal, Apr. 14, 2015, at <https://www.thelocal.es/20150414/spain-to-propose-that-un-set-up-terrorism-court>, and a related Romanian initiative, Apr. 16, 2015, at <http://www.mae.ro/en/node/31628>.

38. UNSC Res. 1373 (Sept. 28 2001).

39. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, July 8, 1996, ICJ Rep. 1996, para. 40.



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