

Legal, Moral Context for Combating Terrorism

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Introduction

The topic of my presentation, “Legal, Moral Context for Combating Terrorism” presumes at the very outset, at least from my point of view, that there is convergence between the legal and moral imperative to combat terrorism. The legal and moral imperatives are mutually reinforcing. One will not succeed without the other. Some may argue the opposite. They are, no doubt, in the minority.

No event or series of events, in recent years had evoked such unified response from the international community as was evident in the immediate aftermath of the events of 11 September 2001.

It should be noted, however, that terrorism did not begin on September 11. The terrorism phenomenon is not new. Terrorism has existed in different forms for centuries.

Response to terrorism also is not new. Sparked by a number of terrorist acts, the United Nations began to grapple with the problem of international terrorism in 1972. On 11 September 2001, there were 12 international and a number of regional anti-terrorism conventions and protocols, none of which had achieved universal implementation.¹ Prior to 9/11 only two countries had become parties to all 12 international conventions.²

At the same time, regional organizations, taking into account the special characteristics of their respective regions, also adopted anti-terrorism conventions to provide additional legal tools in combating terrorism. These regional anti-terrorism instruments fared no better than the international instruments in terms of ratification and implementation. Hence there were wide gaps in the international legal regime to combat terrorism. At the same time, negotiations on a comprehensive anti-terrorism convention were making limited progress in the United Nations, primarily due to the inability to agree on a universally accepted definition of terrorism.

¹ The 1st of the international antiterrorism conventions is the Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963, and the 12th is the International Convention for the Suppression of the Financing of Terrorism. For a full listing of the international and regional anti-terrorism conventions, see Ward, *supra*, footnotes 4 and 6, pp. 290 and 291; also, for full description of these conventions, see M. Cherif Bassiouni, *International Terrorism: Multilateral Conventions (1937-2001)* (Ardsley, NY: Transnational Publishers, 2001).

² The two countries were Botswana and the United Kingdom.

We have no problem recognizing terrorism when we see it. At a minimum, the criminal conduct underlying the prohibited acts enumerated in the existing international anti-terrorism instruments form the basis for a common acceptance of what constitutes terrorist acts.

I understand fully that arriving at an acceptable definition of terrorism has been a complex issue. And, there are terrorist acts that are not covered adequately by the international instruments. Suffice it to say, there is broad agreement that international criminal acts aimed primarily at innocent civilian targets, with wanton disregard for human life and with the objective of achieving a political end, fall squarely within the category of acts described as terrorism.

I wish to emphasize that as the events of 11 September unfolded, not only was there no comprehensive international legal instrument in place to combat terrorism, no country in the world had appropriate legal tools to deal with and suppress terrorist acts. Faced with this gap in the legal and institutional capacities of states, and of the international community as a whole, to adequately deal with the complex issues surrounding international terrorism, the United Nations Security Council took a series of unprecedented actions.

A new wave of terrorism emerged during the final decade of the 20th Century. Not only Al-Qaeda-sponsored terrorism, but terrorism carried out by home-grown movements comprised of non-state actors, generally viewed as domestic terrorism, which have morphed into a coalescing global network of terrorists in the post 9/11 period. Aided by globalization, what was conceived as domestic terrorism now has widespread implications beyond the home state border.

Needless to say, terrorism has benefited from globalization – facilitated by the ease of global communication, travel, banking, and use of the internet – and can only be dealt with effectively through global measures, including cooperation and collaboration among states within a multilateral legal framework.

The moderate successes of the UN Security Council in responding to terrorism may offer some guidance.

The Legal Context for Combating Terrorism

The United Nations Security Council, emerging from decades of Cold War malaise, began in earnest to deal seriously with internal and international threats to peace, including terrorism. Prior to 11 September, the Council had already significantly expanded its role in the maintenance of international peace and security generally. The Council charted a new course in its legislative and enforcement authority. The Council's new legislative activism was aimed at state and non-state actors alike, including measures

taken under Chapter VII of the UN Charter imposing targeted sanctions on parties to intra-state conflicts and measures against terrorists and terrorist groups.³

The Council began to engage with the issue of terrorism seriously in 1999, primarily as a response to Osama bin Laden and Al-Qaeda, and the attacks on U.S. embassies in Dar-es-Salaam, Tanzania and in Nairobi, Kenya in August 1998, which were ascribed to him. The Security Council adopted two anti-terrorism resolutions in quick succession – resolution 1267 on 15 October 1999⁴ and resolution 1269 on 19 October 1999.⁵ Resolution 1267 imposed a mandatory asset freeze on the Taliban for harboring bin Laden. Because resolution 1267 was adopted by the Council under Chapter VII of the UN Charter, it created mandatory legal obligations on states to enforce it.⁶ A number of other resolutions were adopted under Chapter VII, pre- and post-9/11, imposing additional sanctions, such as travel bans and arms embargo, against the Taliban, Osama bin Laden and individuals and groups associated with them.⁷ Monitoring mechanisms were also established to ensure that these sanctions measures were implemented by states.⁸

While many resolutions were designed to respond to a specific incident or to target particular individuals and groups, resolution 1269 dealt with international terrorism in general by emphasizing the need of member states and the international community as a whole to intensify the fight against terrorism at the national and international levels. It called on all states to take appropriate steps, set out in the resolution, including for states to become parties to and implement the then 12 outstanding international conventions dealing with terrorism. However because resolution 1269 was not adopted under Chapter VII it did not have the force of a legally binding obligation on states, and therefore was unenforceable. It was treated as a political act by most states, while others implemented token anti-terrorism measures in their domestic laws.

³ Action by the Council under Chapter VII of the UN Charter creates mandatory obligations on states to implement measures taken pursuant to Articles 39, 41, and 42 to address any threat to peace and to maintain international peace and security.

⁴ U.N. Doc. S/RES/1267 (1999), 15 October 1999. (All Security Council resolutions are available on the web site: <http://www.un.org/documents/scres.htm>).

⁵ U.N. Doc. S/RES/1269 (1999), 19 October 1999.

⁶ Under Art. 25, ‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter;’ and, Art. 49, ‘The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.’ Also, Art. 48(1) of the UN Charter states: ‘The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.’

⁷ Res. 1333 (2000), U.N. Doc. S/RES/1333 (2000), 19 December 2000; Res. 1363 (2001), U.N. Doc. S/RES/1363 (2001), 30 July 2001; Res. 1390 (2002), U.N. Doc. S/RES/1390 (2002), 16 January 2002; Res. 1526 (2004), U.N. Doc. S/RES/1526 (2004), 30 January 2004; and Res. 1617 (2005), S/RES/1617 (2005), 29 July 2005.

⁸ Currently the *Analytic Support and Sanctions Monitoring Team* established pursuant to resolution 1526 (2004), UN Doc. S/RES/1526 (2004), 20 January 2004, tasked with reporting at certain intervals on the implementation of the sanctions and making recommendations to the 1267 Sanctions Committee (Al Qaeda-Taliban) for improving the effectiveness of the measures.

The Council and Responses to Terrorism after 11 September 2001

The events of 11 September 2001 set in motion a new paradigm for the international community to combat international terrorism.⁹ The world was largely unprepared; no state had sufficient legal and administrative capacity to deal with the terrorist phenomenon, although many acts had been designated as “terrorist”.

The response of the Security Council to the events of 9/11 was unprecedented. A new dynamic emerged in the Security Council. The level of cooperation among the members of the Council to deal with terrorism reached new and unprecedented levels.¹⁰ This new level of cooperation led to a series of actions.

On 12 September 2001, just a day after the attacks, the Security Council unanimously adopted resolution 1368 (2001),¹¹ in which the Council recognized the inherent right of states to act in individual or collective self-defense in accordance with Article 51 of the UN Charter, implicitly acknowledging that the terrorist acts of 11 September constituted an attack on the United States for the purposes of the Charter. The resolution also denoted any act of international terrorism as a threat to international peace and security – a determination required for the Council to act under Chapter VII of the Charter.¹²

Resolution 1368 provided an international legal context for potential military action against the perpetrators (and their supporters) of the 9/11 attacks. In deference to the requirement of Article 51, the governments of the United States¹³ and the United Kingdom,¹⁴ as well as other coalition partners, provided the necessary notification to the President of the Security Council regarding intended responses to the threats, and the military response taken by the United States and the supporting international coalition against the Taliban and Al-Qaeda in Afghanistan would be authorized under international law by the Security Council.

Having expressed ‘its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism,’¹⁵ the Security Council, acting under Chapter VII of the Charter, proceeded to adopt resolution 1373 (2001) on 28 September 2001.¹⁶

⁹ Curtis A. Ward, “Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council”, *Journal of Conflict & Security Law*, Vol. 8 No. 2, (Oct. 2003) 289-305

¹⁰ The 15 members of the Council at the time were: Bangladesh, China, Colombia, France, Ireland, Jamaica, Mali, Mauritius, Norway, Russian Federation, Singapore, Tunisia, Ukraine, United Kingdom, and the United States of America.

¹¹ UN Doc. S/RES/1368 (2001), 12 September 2001.

¹² Art. 39 of the UN Charter.

¹³ Letter from the Permanent Representative of the United States of America to the President of the Security Council, UN Doc. S/2001/946, dated 7 October 2001.

¹⁴ Letter from the Charge d’Affaires of the United Kingdom to the President of the Security Council, UN Doc. S/2001/947, dated 7 October 2001.

¹⁵ Res. 1368, para.5

¹⁶ UN Doc. S/RES/1373 (2001), 28 September 2001.

Resolution 1373 was unprecedented in the history of the Security Council. It set out *mandatory* legal obligations on all states to create a legal framework in their national laws and institutions to combat terrorism, and established modalities for cooperation between states, including through mutual legal assistance, intelligence sharing, and tracing and freezing assets related to terrorists and terrorism. States were required to implement border control measures to prevent the movement of terrorists, to deny access to weapons by terrorists, and to deny safe haven to terrorists.

Also, very importantly, resolution 1373 called on all States to become parties to the 12 international anti-terrorism conventions and protocols and to implement them fully.

The resolution also established the Counter-Terrorism Committee (CTC)¹⁷ to monitor implementation¹⁸ and in subsequent resolutions tasked the CTC to facilitate assistance¹⁹ to states to build their counter-terrorism capacity pursuant to the requirements of the resolution. States were required to report to the CTC on the actions taken by them to implement the resolution.²⁰

The response of states to the requirements of resolution 1373 has, like the resolution, been unprecedented. A majority of the member states of the United Nations have now become parties to most of the 12 international anti-terrorism conventions and protocols and have implemented their provisions in their domestic laws. The result is that a body of international legal instruments to facilitate interstate cooperation in combating terrorism has been established. While these legal instruments require states to adopt and enforce laws prohibiting certain acts, the international community as a whole through this process has strengthened significantly its capacity to suppress and prevent acts of terrorism by non-state actors and state support – active and passive – for terrorists and terrorist groups.

The Council has also taken measures to prevent weapons of mass destruction and their pre-cursors from reaching terrorists.²¹ And the Council is not the only intergovernmental body developing multilateral instruments to contain terrorist threats. The United Nations General Assembly on 15 April 2005 adopted the *International Convention for the Suppression of Acts of Nuclear Terrorism*.²²

¹⁷ For a discussion on the role of the CTC, see Ward, *supra* pp. 297-305; and E. Rosand, “Security Council Resolution 1373 and the Counter-Terrorism Committee: the Cornerstone of the United Nations Contribution to the Fight against Terrorism”, in *Legal Instruments in the Fight Against International Terrorism: Transatlantic Dialogue*, C. Fijnaut, J. Wouters & F. Naert (Eds.), at 603-631, Brill Publishing (2004).

¹⁸ The CTC is organized pursuant to paragraph 6 of resolution 1373.

¹⁹ UN Doc. S/RES/1377 (2001), 12 November 2001 and subsequent resolutions and statements of the President of the Security Council

²⁰ Res. 1373, para.6

²¹ Resolution 1540, UN Doc. S/RES/1540 (2004), 18 April 2004.

²² General Assembly resolution A/RES/59/290, 15 April 2005, adopting the International Convention for the Suppression of Acts of Nuclear Terrorism

Collective efforts – cooperation and collaboration through the framework of an international legal regime – grounded in multilateralism is our best hope for defeating terrorism. The United Nations is leading the way in establishing an international legal framework to facilitate this process. These efforts have been spearheaded by the Security Council through the resolutions I have discussed, and the efforts at compliance by states.²³ The Security Council is resolute in its determination to use all available measures to combat terrorism, and despite the widely publicized fallout from the invasion of Iraq by the United States and its coalition states without Security Council authorization, the level of cooperation on terrorism in the Council remains high.

The Moral Context for Combating Terrorism

In discussing the moral context for combating terrorism, one must start from the premise that it is a human rights obligation for States to take strong and effective action against terrorism. In keeping with one of its primary obligations under human rights law, a state must defend its population's rights to life and to physical integrity. This link between human rights and counter-terrorism has been underscored by the UN Secretary-General and the High Commissioner for Human Rights, among many others.

At the same time, counter-terrorism measures must comply with international human rights obligations. This is, first of all, the legal consequence of the ratification by States of international human rights treaties, as well as other provisions of international law.

Some of the key rights said to be placed in jeopardy by certain counter-terrorism measures include the rights to life, to freedom from torture and other ill-treatment, to freedom from discrimination, and to fair trial and other aspects of due process. States which have been said to have violated human rights in their counter-terrorism programs range from established, highly-developed democracies to countries still on the road to development.

The moral context for combating terrorism is indeed a cross-cutting issue. It remains to be seen how States will respond to the calls that have been made by different bodies to ensure respect for human rights in their efforts to combat terrorism, and what kind of impact terrorism will have on free, democratic and law-abiding societies around the world in the years to come.

Recognizing that states could possibly use the combating of terrorism as a pretext to deny their citizens and others of fundamental human rights, UN Secretary-General

²³ Res. 1390, UN Doc. S/RES/1390 (2002), 16 January 2002; Res. 1455, UN Doc. S/RES/1455 (2003), 17 January 2003; Res. 1526, UN Doc. S/RES/2004 (2004), 30 January 2004; Res. 1617, UN Doc. S/RES/1617 (2005), 29 July 2005. Also, for a discussion of Security Council efforts to monitor implementation of the Al Qaeda/Taliban sanctions, see Eric Rosand, "Current Developments: The Security Council's Efforts to Monitor the Implementation of Al Qaeda / Taliban Sanctions," *American Journal of International Law*, 745-63 (2004).

Kofi Annan has spoken forthrightly on the issue of preserving human rights while combating terrorism. In a statement to the Security Council on 18 January 2002, the Secretary-General reminded member states that: “There is no trade-off between effective action against terrorism and the protection of human rights.”

Also, in an address to the Commission on Human Rights on 12 April 2002, the Secretary-General warned, “We cannot achieve security by sacrificing human rights. To try and do so would hand the terrorists a victory beyond their dreams. On the contrary, I am convinced that greater respect for human rights, along with democracy and social justice, will in the long term prove the only effective prophylactic against terror.”

And, he stated further that, “We must not allow the struggle against terrorism to become a pretext for the oppression of legitimate opposition or dissent.”

The Secretary-General has stressed also that, “States must also take the greatest care to ensure that counter-terrorism does not, any more than sovereignty, become an all embracing concept that is used to cloak, or justify, violations of human rights.”

The Security Council addressing its own concern that some states may abuse human rights in combating terrorism beginning with resolution 1456 (2003) declared that, “States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular, international human rights, refugee, and humanitarian law.”

The UN Counter-Terrorism Committee has reiterated this in letters from the Chairman to all states. And, the UN Counter-Terrorism Executive Directorate now has a senior human rights officer, reporting directly the Executive Director. At this time, the role of the human rights expert with regard to the work of the CTC/CTED remained unresolved. It is hoped that the role of the expert will be proactive in providing guidance to the CTC/CTED, and guidance to states in ensuring international standards for the protection of human rights are integral to counter-terrorism efforts. In a report submitted to the Security Council on 16 December 2005, the CTC itself concluded that CTED should take human rights into account in the course of its activities. This position was endorsed by the Security Council in a presidential statement on 21 December 2005.

Most recently, in Resolution 1624 (2005), the Security Council stressed, that States must ensure that any measures taken to implement (relevant paragraphs of the) resolution comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law.

As a conceptual matter, it is clear that respect for human rights is essential to a successful counter-terrorism strategy, and will ensure that States maintain the clear distinction between their own respect for the rule of law and the contemptuous attitude toward law shown by terrorists. In fact, counter-terrorism measures that are based on

respect for human rights, rule of law and good governance strengthen the democratic foundations of the States that adopt them. This in turn strengthens those States' capacity to counter terrorism through transparent policies and practices, and with the active support of their populations.

Similarly, Counter-terrorism measures which stigmatize sectors of the population and threaten innocent parties are in fact harmful to a successful counter-terrorism program. This is why respect for human rights is such an integral element of an overall, comprehensive counter-terrorism strategy, as was declared by the UN Secretary-General in Madrid on the first anniversary of the March 2004 bombings.

The powerful should not seek security above all else, through armed force where necessary, including through preemptive use of force if necessary. Such action taken unilaterally by any country to protect its interests must not see the rule of law as an impediment, but rather as an instrument of facilitation. Multilateral cooperation is not only necessary, but it helps states to take appropriate actions to protect their vital interests.

The problems associated with terrorism cannot be resolved by any one state, no matter how powerful and fully resourced. In particular, a potential terrorist attack against any given country cannot be prevented by simply securing its border, if that was at all possible, or by sustained military response, whether in the form of pre-emptive strikes or otherwise – a militarized approach – as a last resort.

For example, the fact that there has not been a successful terrorist attack on US soil since 9/11 is by no means an indication that the US has successfully secured its borders or has successfully “taken the fight to the terrorists” wherever they may be found. It is due primarily to the increased level of international cooperation brought about by the increased capacity of states around the world to share intelligence and to take preventive action.

Because violent non-state actors may be located almost anywhere, and responses cannot simply be military ones that single out an individual state or a group of states as “the enemy”, multilateral responses are needed.

Conclusion

The emphasis on international organizations to which the member states have a legal obligation, in particular the United Nations²⁴, is far more desirable than resort to unilateral action. International terrorism, like other transnational problems, requires transnational solutions and modalities for cooperation – legal and operational measures which, prior to 9/11, were lacking in all states. In this regard, the response of the UN Security Council has been exceptional.

²⁴ See Art. 2(5), reads in part: ‘All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter’

Success in defeating terrorism will only be possible if all countries demonstrate the political will to commit to the legal and operational measures necessary to achieve the objective, and enforce these measures in the context of full adherence to international human rights and humanitarian law.

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