

## **Defining terrorism and its implications on human rights**

(New rules of engagement for a new form of warfare)

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In trying to deal with the problem of defining terrorism and the possible consequence for human rights, it will be useful if this survey begins by underlining that to some parties in this discussion there are no major difficulties of definition and to others there exist the seeds of systemic upheaval.

Let me just first attempt to dispense with the usual bromides and clichés about terrorism and whether your definition depends on whether you are a victim, oppressor or a freedom fighter. And although we will discuss various elements of international law, we will not attempt to deal here with other closely-related issues, such as the right of intervention, pre-emptive strikes and the International Criminal Court.

That terrorism has been a steady companion of history and especially recent periods has also been repeated ad nauseum and needs almost no repetition, except to remind of the obvious.

Among the first of the attacks of more recent decades were the hijackings of international airliners at the beginning of the 1970s, the assault on the Olympic Games in Munich in 1972, the kidnapping of OPEC Ministers and the continuing struggles in Europe with the Red Army Brigades in Germany and Italy, the IRA in Northern Ireland, the ETA in Spain, the Corsican and other groups in France. Recent Asian history has also been punctuated by similar forms of terrorism that continue to this day.

In dealing with both the possible problems of definition, the struggle against terrorism and its legal ramifications, it is therefore worth reminding that this issue arose before September 11 and that there are 12 existing UN conventions on terrorism. Several of these deal specifically with acts of terrorism on aircraft, airports, on the seas and others deal specifically with hostage-taking, nuclear terrorism, marking of explosive material and other areas.

Unfortunately, implementation of these international conventions has been uneven and no systematic monitoring has been done. No implementation machinery has been established to evaluate national measures that would turn the conventions into effective laws in each contracting party.

### **Comprehensive Convention on Terrorism**

In addition, in 1996, the General Assembly also established an Ad Hoc Committee with a mandate to draft a comprehensive international convention on terrorism and a convention on the suppression of acts of nuclear terrorism. Since its establishment, the Ad Hoc Committee has successfully negotiated two Conventions: the International Convention for the Suppression of Terrorist Bombings, adopted by the Assembly in 1997, with 58 signatures; and the International Convention for the Suppression of the Financing of Terrorism, adopted in 1999 and signed by 119

nations - the highest number of actions so far. Both of these have since entered into force.

In 2000, the UN General Assembly began considering an Indian draft of a comprehensive convention on terrorism, which received considerable support in Europe and North America.

In January 2001, General Assembly Resolution 55/158 reminded member states to remain committed to drafting the convention, work on which is continuing. This work has agreed on much of the content of this new convention. The comprehensive convention being drafted contains specific reference and provisions to the rights of persons detained, accused or implicated on terrorist acts. 2002 had reached a broad agreement on 27 articles. But articles dealing with the definition of terrorism, its relation to liberation movements and the possible exemptions to the scope of the treaty, in particular the activities of armed forces, are yet to be completed. Its Article 18 lists the acts that should not be considered as exceptions to terrorism.

The question of a definition of terrorism has haunted the debate among states for decades. A first attempt to arrive at an internationally acceptable definition was made under the League of Nations, but such a convention drafted in 1937 never came into existence.

More recent attempts to come to grips with this problem of definition have suggest that only attacks on non-military targets be considered as terrorism or that the existing definition of war-crimes, such as hostage-taking or the killing of prisoners be used to define terrorism as the "peacetime equivalent of war crimes."

### **Beyond the definition dilemma**

But this inability to find a consensus on the precise wording of what constitutes terrorism did not deter most of the international community in the real world.

The UN Security Council in a resolution 1368 on September 12, recognised the inherent right of individual or collective self-defence in accordance with the UN Charter, Chapter VII, Article 51, and unequivocally condemned the attacks as "a threat to international peace and security." It expressed a readiness to take all necessary steps to respond to the attacks.

On 28 September 2001, Security Council resolution 1373 also repeated the "threat to international security" designation and imposed a requirement on all states to take measures against the perpetrators and states suspected of assisting them. It also urged states to prevent and suppress the financing of terrorist acts, prohibit their national from assisting terrorists, and should ensure terrorist acts are established as criminal offences in domestic law with adequate penalties. Increased bilateral and multilateral cooperation should be developed on information and assistance in investigations and states should become parties to and fully implement the relevant international protocols and conventions to combat terrorism. It also invoked the close connection between terrorism and organised crime, including drug and arms trafficking and money laundering and established a counter terrorism committee to monitor and implement the resolution.

In the wake of the terrorist action, NATO also invoked for the first time in its 52-year history its Article 5 on collective security and proclaimed the attack as one on all the Alliance. And the European Union also announced an Action Plan which has been set motion on a somewhat piecemeal basis. Some of these steps originally foreseen

included a common arrest warrant, central identification and banning of terrorist organisation and closer cooperation between Europol and other law enforcement authorities on a number of sectors such as money-laundering and information exchanges, many of which remain also in the formative stage and many of which have been criticised from different fronts.

Subsequent meetings, declarations and accords on a bilateral, regional and multilateral basis established the objective and contours of the international coalition against terrorism, which by most reckoning involves more than 100 countries to a larger or lesser degree. This number includes the members of the EU, ASEAN, APEC and ASEM, as well as others from other regional and international groupings.

On the ground more has taken place than in the palaces of international discussion, which nevertheless serve as clearinghouses of information and provide another frame of reference to other activities conducted on a bilateral or national basis.

### **The coalition for a new form of conflict**

Ever since those early days in which the 90-100-nation coalition was formed, initial rules of engagement in this new form of warfare have evolved. US Defense Secretary Donald H. Rumsfeld said the coalition "we have put together is broad, it's deep, it's impressive, and it is in fact what is helping the forward progress that we're achieving,"

This coalition was first directed at Afghanistan and enlisted virtually all of the states in Central Asia and neighbours of the Taliban regime. It also immediately involved Europe, Russia and other major partners such as Pakistan, India and China.

The first rules of engagement, which involved waves of air and cruise missile attacks on Afghanistan, were largely dictated by the United States. But since then, each member of the coalition has been preparing its own battle plan and the American leadership in the subsequent phases has been called into question in some circles and erstwhile coalition allies.

Some of these battle plans have involved massive allocations of funds and other resources to confronting terrorism through military, intelligence and other means in the case of the US. More than 10,000 troops are still involved in the military phase of the operation in Afghanistan, months after the opening of fire. There are some 4500 troops from 20 countries involved in the ISAF contingent in Kabul and the US deployment is said to number about 8000. Individually rather than in the context of the EU, nearly all European Union members have engaged in the international military security force in Kabul and the EU mechanisms have been actively involved in the reconstruction of Afghanistan and in other post-conflict or capacity-building measures in the entire region.

Nearly 600 al-Qaeda and Taliban suspects, from 38 countries, are being held by the US military at Guantanamo Bay and several hundred more fighters are being held in Afghanistan.

Others have, without completing ignoring such confrontational means, put much of the emphasis on the desire to attack the root causes of terrorism. The latter involve primarily civilian means upstream in anticipation of potential socio-economic or political tensions, crises, and conflicts.

Authorities in more than 90 countries have joined the fight against Osama bin Laden's terrorist network, scouring for clues in the Sept. 11 investigation and achieving an unprecedented level of cooperation and intelligence sharing. Some, such as Britain, introduced special anti-terrorism laws broadening police powers to detain foreign nationals suspected of involvement in terrorism almost indefinitely.

US authorities and officials overseas say they have thwarted plans to strike at American targets or US citizens in Lebanon, Turkey, Greece, Malaysia, Indonesia, France, Bosnia, Belgium, the Czech Republic, India and Australia. Those also included a plot in Strasbourg against the European Parliament -- in December 2000.

However, most terror suspects were reported to have picked up as part of investigations initiated before Sept. 11 and were connected to attacks that were thwarted in the past two years and the overwhelming majority of those arrested overseas in the first days after the attacks have been reported to have been released.

Progress has been made on cutting al-Qaeda off from its assets. Roughly \$112 million in funds allegedly tied to terrorist-related groups and individuals have been blocked worldwide, including \$34 million frozen by the United States. But according to a UN draft report released in late August, Al-Qaeda established cells in at least 40 countries, developed operational links with other militant Islamic groups, gained new recruits, and found new ways to channel millions of dollars and a variety of weapons to its supporters.

"Al Qaeda, despite the successful inroads made against it over recent months is, by all accounts 'alive and well' and poised to strike again how, when and where it chooses," said the report, prepared by an expert group authorised by the UN Security Council.

### **A second front**

A so-called "second-front" was rhetorically and militarily launched in Southeast Asia, accompanied by the dispatching of several hundred US military advisers to the Philippines. A significant US presence has also been established in Singapore, US military links have also been re-established with the Indonesian military and a highly visible new relationship has been initiated with Malaysia.

In January 2002 Singapore said it had arrested members of a militant regional Muslim group suspected of links to al Qaeda which was planning to blow up U.S. targets in the city state.

Soon after, Washington opened up what some called a "second front" in the terror fight by sending US troops to the southern Philippines for six months to train government soldiers battling the Abu Sayef rebel group, which has been linked to al Qaeda.

US officials have claimed some of the planning for Sept. 11 may have taken place in Malaysia, where at least two of the hijackers visited a year earlier. Plots against US interests in Indonesia and Singapore have also been exposed and thwarted in the past year.

Malaysia, the Philippines and Singapore have arrested a number of members of Jemaah Islamiah, the militant group accused of plotting the attacks in Singapore. Indonesia has not arrested any Jemaah Islamiah members.

## **Cracks in the coalition**

But that support has also had limits, as some of Washington' s closest allies have questioned treatment of their nationals being held at Guantanamo Bay, Cuba, and balked at some US requests to act against individuals without sufficient evidence.

In its August 31 issue, the Economist magazine conducted an international survey of civil liberties in the context of the war on terrorism and remarked, "Even for those not directly affected by al Qaeda' s attacks, the war in Afghanistan or the anti-terrorist measures taken almost everywhere, the past 12 months may yet come to be seen as an *annus miserabilis* as far as freedom is concerned. The reason is that, from motives good and bad, governments everywhere have been restricting rights or enforcing existing laws more harshly, and thus reducing the freedoms people used to enjoy."

In related leader commentaries in the same magazine concludes that despite the trade-off that must take place between freedom and security "it is in America that the damage has been particularly dismaying. America, is after all, the land of the free, and the land to which increasing numbers of people elsewhere look to safeguard their freedoms." It also remarks that "It is far from clear, though, that many of the Bush administration' s actions over the past year will be effective or that they would be justified even if they were...Mr. Bush may have made a mistake when he chose to call his response to September 11 a ' war.' Talk of war conjures up the need for suspension of normal political life and even of civil liberties."

The same issue of magazine also spotlights the Spanish government' s banning of the political wing of the the Basque separatist guerrilla, Batasuna, noting that "Its views may be odious, but free speech should be valued to protect not anodyne views, but offensive ones."

And Washington has lost at least three extradition requests for individuals wanted for terrorist-related activities. In April, a British judge threw out the extradition case against Lotfi Raissi, an Algerian pilot whom Washington had at first accused of training several Sept. 11 hijackers. Citing lack of evidence, Canada freed Liban Hussein, a Somali-born man wanted by the United States on suspicion of money laundering for terrorists..

Despite the arrest of Moroccan Mounir El Motassadeq, on some 3000 counts of accessory to the Sept. 11 attack, German authorities have refused to detain another man, Mamoun Darkazanli, that the FBI has described as a well-connected bin Laden agent. Germany says Washington had not provided sufficient evidence.

In London, several clerics connected in indictments to al-Qaeda or Sept. 11 either remain free or have gone underground.

Malaysia is holding Yazid Sufaat, a former army captain accused of hosting two of the hijackers in Kuala Lumpur in January 2000. Although he also hosted Sept. 11 suspect Zacarias Moussaoui and Sufaat' s wife signed an employment letter for him, Sufaat has not been charged.

In Spain, authorities are trying to determine whether Sept. 11 ringleader Atta met with Imad Yarkas. Yarkas was arrested in November along with nine other suspects.

Spanish police say he knew that the World Trade Centre and the Pentagon would be targeted by al-Qaeda.

In addition to the outright concern for the possible violation of human rights in handling of the detainees in the US and elsewhere, there are also concerns expressed regarding the political repercussions that would come from the legitimisation of anything labelled as counter-terrorism and the governments or other instruments of this policy. In general terms, the virtually blanket endorsement by the US of all such crackdowns have been decried as setting back both human rights and democracy.

For example, while there have attempts by the US to reassure such concerns, Washington' s new \$50 million aid to the Indonesian security force in the struggle against terrorism, comes at a crucial time when the country and the military were grappling with the difficult question of reform of the armed forces and their status in Indonesian politics, which many feel have been directly implicated to the repression and regional unrest which threatens the country.

There have been critics of such questionable US practices or strategies in dealing with political opponents or even conflict management in an otherwise democratic system such as the Philippines in suppressing groups such as Abu Sayuf, may also get a positive stimulus from the campaign. There was even some surprise when the US decided to officially declare a Uighur organisation in China' s Xinjiang province as a terrorist organisation, leading to possible identification with the China government overall tactics in that region.

Numerous warnings have also been addressed in the US and around the world against the widespread inclination of governments to look for suspects in immigrant communities and to resort to massive expulsions, in many cases with methods involving secret hearings in which the deportees have not been represented or confronted with proper charges, according to court rulings in the US and some European countries.

"There is no doubt that after September 11 security concerns have become paramount," Reed Brody, director of special prosecution for Human Rights Watch was quoted as noting. "In country after country we have seen a tightening in security and immigration laws and we have seen the banner of anti-terrorism raised as a pretext for cracking down on domestic opposition," he added. On a website "Opportunism in the Face of Tragedy," Human Rights Watch carries a tally of states - - countries such as Australia, Malaysia, Zimbabwe -- it accuses of using the shield of September 11 to intensify attacks on political opponents or stiffen measures against immigrants.

Declaring itself in a state of war, the administration of President Bush also proposed special military tribunals to try suspected "terrorists." Washington has also run into protests over its refusal to grant full prisoner of war status to captured Taliban fighters, some held at the US naval base at Guantanamo Bay. No one has yet been brought before a military tribunal and the only person currently on trial in the United States for his alleged involvement in September 11 -- French national Zacarias Moussaoui -- is being tried in an ordinary court.

But in some countries, an independent judiciary, authorities and parliamentarian, non-governmental organisations and other watchdog including the press where possible, have begun expressing their concern about whether the hunt for suspects has been in full compliance with domestic or international rules.

Many of these have suggested that respect for the rule of law and fundamental human rights may become part of the collateral damage in the war on terrorism. Hundred or perhaps even thousands of secret detentions or expulsions without customary judicial process are facing increasing attention and scrutiny. In the US, the Government, which has in effect suspended the customary civilian legal procedures in its search for suspects and "enemy combatants" using an ad hoc system of military justice, has been challenged by the courts and in fact has chosen to either ignore or challenge the legal opinions.

And within the coalition, there are signals of dissent regarding both the conduct of all operations in the first phase and whether the heavy military hand should also be used in subsequent phases. Although dismissed in some quarters both the country itself and in some US circles as essentially political campaign rhetoric, the German leadership has been among the most vocal in distancing itself from some of the past coalition campaign, even as it maintains its own efforts to track down suspects.

Germany, which has not only been at the heart of the investigation of suspected plotters of the September 11 residing in that country as well as a victim of terrorism itself in April when 14 German tourists, along with four French visitors, were blown up in the Tunisian island of Djerba in a plot linked to Al Qaeda, has voiced its concern about so-called pre-emptive US military strikes against Iraq and about the potential infractions of human rights during investigations.

But in March German Foreign Minister Joschka Fischer told the session of the UN Human Rights Commission in Geneva that "We are all called upon to fight terrorists who put their goals ahead of the lives of innocent people with the utmost determination and rigour - where necessary, as in Afghanistan, also with military means. Tough action and repression alone do not however constitute a satisfactory response to the threat posed by modern terrorism. We will only be able to curb it through a policy of prevention, if we manage to take a new joint approach to effectively fighting its many different causes. This includes new strategies against hunger, poverty and the lack of opportunities as well as a socially just management of economic globalisation. But this includes above all protection of human rights, civil, political as well as socio-economic and cultural rights. Human rights are not a luxury, not an exotic issue that can be pushed to the side when security policy is back at the top of the agenda. The very opposite is true. Promoting human rights, democracy and the rule of law is in the long term the most solid foundation for stability and peace - this central lesson from the Cold War has been given a new, global relevance in the light of 11 September.

Although British leadership is generally believed to be aligned with the US on a push into Iraq, UK Foreign Secretary Jack Straw also told the same UN Human Rights Commission meeting a few months ago that "Combating terrorism, however, must not become a pretext for setting aside the human rights norms so painstakingly established over the last 50 years." He added that "Upholding human rights and international law are a matter not merely of justice, but of international security...There have never been any excuses for disregarding universal human rights. There are no cultural, religious or political reasons which explain why arbitrary arrest, torture or other ill-treatment might be more acceptable to some populations than others."

Europeans are not the only parties to this issue concerned about the possible abuse of the war on terrorism. Numerous NGOs, some political personalities, editorials and others have also expressed their anxiety. For example, Prof Simon Tay the

chairman of Singapore' s Institution of International Affairs, has issued a statement saying the war on terror poses a challenge to governments. "I hope it never becomes the excuse to repress their own people. We must be watchful for that. But if we allow people to be terrorised, that' s another form of repression. So the state is in a difficult position."

While Simon Tay was referring to national governments, regional entities, including the EU and Asia also have roles and responsibilities in this new generation of conflict, sometimes in concert.

Again Human Rights Watch and the Executive Director of its Europe and Central Asia division, Elizabeth Andersen, cautioned in late 2001 that "The challenge for policymakers is to make sure their response to the September 11 attacks does not violate fundamental rights. What' s at stake are the basic rights of asylum seekers and migrants to avoid discrimination and abuse, and to find refuge from persecution." The group also expressed concern over a broad definition of terrorism that threatens freedom of speech, assembly and association; the lack of fair trial guarantees in the proposal for a European arrest warrant; and threats to the international refugee protection system.

In Asia, internal and external groups have expressed their concern about not only the EU actions, but also the actions individual European or Asia countries have taken in the wake of the September 11 events. Arousing particular attention have been the lack of transparency in the EU anti-terror plans, including its banning of certain terrorist organisation without its own clear joint definition of terrorism. In Asia, there has been specific concern about the India Prevention of Terrorism Act (POTO) and the Malaysian Internal Security Act.

This is not to infer that the EU or Asian countries are not conscious of this responsibility. Some delegates at the recent ASEAN Regional Forum meeting in Brunei, which included the EU, US and other dialogue partners in extensive discussion about counter-terrorism action and the signing of a joint ASEAN-US accord on the subject. The subject will also be the main point at a special ARF intersessional meeting next month in Malaysia.

It is instructive and perhaps even useful to note that some of the new international accords relating to collaboration in the combat against terrorism make specific and sometimes detailed reference to the related concern for the rule of law and human rights and other either do not directly or do so only obliquely, indicating varying degrees of importance or relevance attached to the subject. For example, the EU-Japan Summit declaration on terrorism of December 8, 2001, expresses the determination to protect citizens "while safeguarding the rule of law, human rights and the right to equitable justice." In some contrast, the more recent US-ASEAN joint declaration of Brunei of August, make no direct reference to human rights except for a commitment to counter, prevent and suppress all forms of terrorist acts in accordance with the UN Charter, international law and the other UN declarations and resolutions.

Incidentally, both these bilateral accords and numerous other make specific reference to the importance attached to United Nations involvement in such processes, a point not to be ignored in pursuing extensions of this combat.

### **Proportionality as a strategy**

In summation, it could be perhaps useful to stress the belief that a policy of zero tolerance for terrorism is not contradictory and is instead compatible with full compliance with the rule of law and individual rights.

There is evidence to indicate that repressive use of force should be proportional to the perception of threat. It is appropriate to take additional measures to counter and prosecute terrorism in a higher-risk environment such as the US or other states on the front lines and to conduct lower-intensity operations in a lower threat environment.

But it is up to each society to determine the direct threat it faces in deciding what instruments and means to use for homeland security and what it can gain and contribute in a global coalition against a global problem.

The balance and proportionality of means should be determined with some transparency and also be weighed against the not insignificant risk of playing into the hands of the adversary. Again there is some evidence that vigilance and diligence may be capable of denying the adversary the capacity to recruit and sustain a capacity for terror and some evidence to indicate that over-reaction can be counter-productive and risk an escalatory spiral into loss of control and a self-perpetuating conflict, such as in the Middle East or Chechnya where a terrorist problem has escalated into permanent conflict.