

Annex III

Counter-terrorism strategies, human rights and international law: meeting the challenges

Expert Seminar Working Paper

Panel I: Assessing and situating various forms of international terrorism

Chair: Dr. Hossain (Bangladesh)
Speakers: Professor Scheinin (Finland)
Judge Maged (Egypt)

The aim of the first panel is to set the stage and to identify common grounds in our definition and perception of terrorism. The leading questions, which may not be directly legal, can be phrased as follows: in what is "modern terrorism" different from the forms of terrorism that we know of the direct post WW II era and the Cold War era, and do we need new international law to address these new forms of terrorism? Are there differences in the forms of terrorism as regards the transnationality and its ability to cross borders, the nature of the violence and the actors/perpetrators committing the terrorist acts? How relevant is the distinction between domestic terrorism and international terrorism still today? And what are the consequences of labeling a certain act as an "act of terrorism".

Furthermore, some strategic (and legal) approaches are discussed on the basis of national experiences in the fight against terrorism. In this context, different perceptions of the crime of terrorism in various religions/civilizations/ideologies are also discussed.

Paving the way for the subsequent panels, this panel opens the discussion on how the "war on terror" should be conceptualized from an international law perspective. The panel will conclude with a provisional stocktaking of the most pertinent challenges posed to the current international legal framework by "new terrorism".

Panel II: Counter-terrorism, international humanitarian law and human rights law

Chair: Ms. Pejic (ICRC)
Speakers: Professor Fischer (Germany)
Professor McNeal (US)
Ms. Duffy (Interights)

The aim of this panel is to identify the main controversies as regards the applicability of international humanitarian law (IHL) and human rights law (HRL) to counter-terrorism strategies and the precise scope of the rules emanating from these fields of public international law.

Since not every situation of violence may amount to an armed conflict per se, the applicability of IHL needs to be assessed on a case-by-case basis. In this context, relevant questions are: can there be an armed conflict - international or non-international - between a State and a terrorist organization? If so, then does IHL apply as it does to regular international or non-international armed conflicts, or are modifications of the rules necessary? Specific questions in this respect are: when do hostilities end in case of a conflict between a State and a terrorist organization? And when are civilians actively participating in hostilities, so that they become a legitimate

target? Does the expectation that the terrorist organization will not adhere to the rules affect the analysis on the applicability of IHL rules?

Subsequently, an important question to be addressed concerns the status and rights of detained individuals under IHL. In particular, the issue of the extent of protection granted to detained "unlawful combatants" and spies needs reflection.

As regards the applicability of HRL, a pertinent question concerns the possible extraterritorial effect of human rights, especially in cases where a specific State enjoys clear jurisdiction/power over the individuals whose human rights are allegedly violated. Moreover, the relationship between IHL and HRL will be examined and specifically the question to what extent HRL is applicable in situations of armed conflict. The question of the interrelationship between IHL and HRL may be especially challenging when analyzing the legality of targeted killings.

In the context of HRL, a further issue to be discussed concerns the non-derogability of certain rights, such as the prohibition of torture. In particular, the direct implications of accepting the absolute nature of the prohibition of torture should be discussed, such as the prohibition of admitting evidence obtained through torture, the non-refoulement prohibition and positive obligations for States to prevent torture.

Panel III: Counter-terrorism and national criminal law approaches

Chair: Dr. Van Sliedregt (The Netherlands)
Speakers: Professor Newton (US)
Professor Kress (Germany)

The aim of this panel is to analyse various national criminal law approaches and to identify common problems and solutions. This panel focuses primarily on terrorist acts outside the scope of armed conflict.

First, a comparative overview will be given of important recent legislation in different countries in the field of combating terrorism. This legislation may concern criminalizing preparatory acts, increased investigative powers for intelligence services, criminalizing incitement to commit terrorism, and enlarging the possibilities for pre-trial detention of terrorist suspects. Subsequent to this overview, it is analysed to what extent these new domestic laws comport with human rights requirements and fundamental criminal law guarantees.

The discussion may be based on the following four propositions:

- 1) The catalogue of human rights encapsulated in the various conventions and treaties was drawn up in the aftermath of WW II with its traditional liberal perspective on justice. We now live in a different world; referred to some as a 'risk society'. This different social context and the reality of terrorism should prompt us to re-evaluate these rights.
- 2) The due process concept that can be found in various constitutions and human rights conventions is premised on the notion of the 'punishing state'. This no longer reflects the general trend towards criminalising the prevention of crime. Principles of due process should be redefined to 'fit' the model of a 'preventive state'.
- 3) Terrorism as a crime can be sufficiently dealt with by the ordinary criminal justice system. It should not be treated differently from other serious crimes. That is the only way one can safeguard the respect and application of fundamental values, such as the presumption of innocence and the culpability principle.

- 4) Mutual legal assistance and extradition agreements must be improved to facilitate a more expedient international co-operation in criminal matters. Enhancing the classical international criminal law framework can mitigate the perceived need to use extraordinary measures, such as rendition and abduction.

Panel IV: Counter-terrorism, failing States and the international law of peace and security

Chair: Judge Kooijmans (The Netherlands)
Speakers: Professor Bianchi (Italy)
Professor Voorhoeve (The Netherlands)

The aim of this panel is to determine what limits the international law of peace and security poses to counter-terrorism strategies and whether the existing rules are adequate or whether they should rather be adapted in order to be better tuned to dealing with the specific challenges posed by the threat of terrorism.

More specifically, the rules of self-defense are explored. In this context, it is discussed whether and to what extent it is or should be allowed to act pre-emptively or preventively to a threat of international terrorism, and what kind of actions are allowed and most effective (are targeted killings allowed?). In case of large scale operations that are primarily targeted against non-State actors one of the key questions regards attribution to a sponsoring State.

Operations of a smaller scale concern the question as to what to do if classical extradition requests fail. Is the use of force allowed to arrest terrorist suspects? This question is particularly pertinent in case of failing and rogue states.

Panel V: The legal framework for terrorism in the twenty-first century: place and role of counter-terrorism treaty regimes, the interaction between international and national law and the Agenda for Prevention

Chair: Professor Schrijver (The Netherlands)
Speakers: Professor Van Boven (The Netherlands)
Professor Garraway (UK)

Effectively combating international terrorism demands a multilevel, multifaceted and coherent strategy rather than fragmented and isolated/scattered approaches. This implies that various branches of international law are relevant and both during times of armed conflict and in times of peace. The need for a coherent multilateral approach and for unity of international law poses the enormous challenge to the various branches of international law to effectively converge in order to ensure that public international law with respect to the use of force, collective security, State responsibility and conflict management is well coordinated with human rights law, international humanitarian law, supranational/international and national criminal law.