

International Terrorism: What role should the law play?

The war-drum throb'd no longer, and the battleflags were furl'd
In the Parliament of man, the Federation of the world.
There the common sense of most shall hold a fretful realm in awe,
And the kindly earth shall slumber, lapt in universal law.

Tennyson's poem Locksley Hall describes a Utopian world in which universal law dispenses justice rendering war between peoples unnecessary. Is this idealistic vision a practical impossibility?

There seems no theoretical barrier to creating a global criminal code covering acts of international terrorism. The principles by which human behaviour is judged are distilled from morality, and municipal criminal law provides a means of censure for morally wrongful acts. International 'terrorism' is a sphere of human conduct and so it ought to be possible by identifying the moral rules by which such acts can be assessed to encapsulate them in criminal laws.

The 'morality of terrorism' appears to be an oxymoron. Surely terrorism in all its forms is inherently evil. Well this depends on how one defines a 'terrorist' – according to that well used adage; 'one nation's terrorist is another nation's freedom fighter'. The fledgling International Criminal Court has no jurisdiction over terrorist offences precisely because a generally acceptable definition of these offences could not be reached. However, almost universal condemnation of the acts carried out on the 11th September indicates that widespread agreement among nation-states on the moral status of certain forms of terrorist acts can be reached.

The freedom-fighter/terrorist distinction does not constitute an impasse. Municipal criminal law recognises circumstances in which conduct that would otherwise attract punishment is excused, or justified, absolving the 'offender' of any blame or limiting blameworthiness. It permits individuals to defend themselves, also allowing pre-emptive defensive action. It permits third parties to defend others from physical attack and attacks on their property. It is the adaptation and application of these principles that will enable us to formulate a rational legal framework capable of administering justice in cases of conflict among nation-states, or nation-states and violent terrorist/resistance organisations.

A carefully developed concept of self-defence could provide a test against which the boundaries of legitimate pre-emptive action in self-defence, such as that undertaken by the United States against the Taliban could be determined. It might have much to say on the degree and magnitude of any perceived risk of terrorist attack and level of suspicion that must be held by a nation-state before it engages in an extensive bombing campaign. More clarity in distinguishing the freedom-fighter from the terrorist might lie in a similar development of the principles on which liability and exculpation rest in respect of those who go to the defence of third parties who are under attack. Violent acts committed against a tyrannical regime that subjugates the population by means of systematic murder may well be justified. Of course the justification for any particular act might also depend upon the relationship between the target and the regime. For instance although violence against a regime might be justified in general terms, the murder of a police officer whose sole task is to direct traffic or a builder who enters into a construction contract with the regime would not.

A fully developed international criminal code ought to provide a means by which states and organisations involved in armed struggles can both judge, and be judged on, the propriety of their actions. The effectiveness of the law as a means of deterrence and bringing justice to wrongdoers lies equally in its content and application.

International law in its present form suffers from a fundamental and inherent weakness. Its provisions are largely to be found in treaties that bind only signatories. Those who would breach the provisions of a treaty on terrorist offences would seek haven in states not party to the convention and thus put themselves beyond the reach of 'international law'. International criminal law ought to be of general application.

At national level the state acts to protect the rights of its citizens. It marks out certain conduct as morally wrong and passes criminal laws accordingly. Where the rights of a citizen have been infringed by the criminal acts of another the state takes the matter out of the hands of the parties and dispenses justice. This helps to maintain order more generally. Strict adherence to the rule of law makes it less likely that aggrieved victims will misdirect their own retribution or exceed the limits of reasonable response in the course of exacting revenge. It also discourages third parties from expressing sympathy or outrage through unrestrained vigilantism with all of its attendant dangers. These are precisely the types of concern raised in various quarters before the Anglo-American response to the events of September 11th. Such concerns are perhaps inevitable. When a nation state becomes a victim of the type of acts inflicted on the United States there is no higher global authority acting to ensure that justice is dispensed impartially.

It is doubtful whether a democratic global legislature passing international law of general application over a global population that recognises its legitimacy and which is armed with the necessary coercive powers of enforcement, will ever come into existence. Only the supreme optimist could foresee a time when national, cultural and religious self-interest is put aside and all nation-states surrender the sovereignty necessary to allow the creation of an effective international criminal justice system capable of dealing with international terrorism. It is a truism that revolutionary change in the sphere of politics requires revolution and history has shown that radical reform often occurs only in the wake of war. The likelihood of a large-scale global war would be too great a price to pay for the ensuing peace.

At present, the law and machinery for enforcing it must be developed as far as is possible within the existing political framework, building on and refining those treaty provisions that already exist to create a model international criminal code. The next objective ought to be a codified international criminal procedure that would prove acceptable to those whose national legal systems are diverse. The principal stumbling block in this respect is the insularity of those working within these various legal systems.

The role of the law in relation to international terrorism might be limited to the development of treaty provisions and, to use topical jargon, 'preparing the ground' for an international law of general application passed in a system of legitimate global governance. The remainder lies in the hands of politicians.