

INTERNATIONAL TERRORISM: WHAT ROLE SHOULD THE LAW PLAY?

It is the relative smallness of a globalised world that allowed a group of terrorists in a far-eastern desert to strike at the heart and soul of the world's sole superpower with devastating effect. And it is this relative smallness, this jostling of peoples and nations, that makes the need for agreed sets of rules—for consensus and legitimacy--all the more urgent. International law has a central role--arguably *the* central role--to play in fighting terrorism.

Any means of fighting terrorism may be judged using two criteria: legitimacy and effectiveness. In obtaining UN backing for its military action in Afghanistan, the U.S. sought to achieve both. In fact, in approving such action the U.N. specifically called for multi-lateral agreements to prevent and suppress terrorism. Such consensus is the very basis of legitimacy. When a country appears to fly in the face of international law, however, suggesting the use of other means in the war against terrorism such as assassination and torture, legitimacy is called into question. Effectiveness does not equal legitimacy; the ends do not justify the means.

The U.S. government has also adopted its own approach to the detention and trial of suspected (non-U.S. citizen) terrorists. A recent U.S. Presidential Order declares that military tribunals, not U.S. district courts, are to have exclusive jurisdiction. Individuals subject to such proceedings are 'not privileged to seek any remedy or bring proceedings in any U.S., foreign, or international court.' Such trials might be quick and expeditious, but will they be legitimate and just?

Legitimacy is not mere conformity to rules. Legitimacy also involves shared beliefs that the rules are justifiable. Further, it involves the expressed consent of those who are subject to the rules.¹ The distinction between the latter two dimensions of legitimacy, between shared beliefs and expressed consent, can perhaps be seen in the position of the U.S. in relation to the Rome Statute of the International Criminal Court. While the U.S. has signed the Statute creating such a court (expressing a shared belief), it has refused to ratify it. It will not, so to speak, consent to be governed by it.

One of the charges levelled against an International Criminal Court is that it would be slow and ineffective. But the International Criminal Tribunal for the former Yugoslavia (ICTY), created by the UN, has shown that independent courts can be effective. Moreover, the trial and conviction of a Libyan agent of the Lockerbie bombing demonstrates that even ordinary national courts, with the highest standards and safeguards, can in the end be effective against terrorism.

It might be objected that consensus for an International Criminal Court will be least forthcoming from certain types of nations, for instance those with Islamic governments. The so-called clash between East and West highlights differences in approach to basic questions such as justice and legitimacy. In Islam, these derive from divine authority, from the law of Allah. The atrocities of September 11 were inspired by and justified with reference to militant Islamic fundamentalism. Thus, the nations and peoples whose consent to international law would be most important in the fight against terrorism seem least likely to give that consent.

¹ Beetham, J. (1991) *The Legitimation of Power* London: MacMillan Press Ltd.

But here we must distinguish carefully between Islam and Islamic fundamentalism. The latter is characterised by rigid dogmatism and black and white absolutes. But as one scholar of Islamic law has put it, The Islamic religion does not, I would submit, encourage or create and nourish fundamentalism. It is the economic, social and political environment that encourages the forces for change, sometimes minor and other times radical.² Legitimacy, in any case, does not require the expressed consent of the rogue states, the outlaws and the terrorists. It is a broad coalition of nations that will lend both legitimacy and effectiveness to an International Criminal Court.

And yet, international criminal law is not enough. Such measures will not directly impact the forces for change in the developing world; they will not alter the milieu from which the current terrorist threat springs. We must look further. We must also look beyond efforts to choke off funding for terrorism through tighter international financial regulation, important though these may be. We must instead look to an area of law capable of shifting power relationships, altering social networks and transforming economic systems: international trade.

The static gap between rich and poor countries, the inherently unequal bargaining power between them, the opening up of markets in a way that benefits rich nations and the ruling elites of developing countries but leaves the vast majority of the latter's populace worse off, are all part of the background to terrorism. The legitimacy of the World Trade Organisation, in terms of shared belief in the justifiability of trade rules and the expressed consent of those subject to them, is currently under intense strain. The

² Reisman, M. (1991) 'Islamic Fundamentalism and Its Impact on International Law and Politics' in Janis, M. (ed) *The Influence of Religion on the Development of International Law* London: Martinus Nijhoff Publishers.

events of September 11 argue forcefully that the West's approach to international trade and the legal framework which is its basis must change.

If we are serious about fighting terrorism in the long term, then military intervention, even when legitimated by the UN and a broad coalition of nations, will never be enough. The smallness of our globalised world means that conflict elsewhere will eventually spill over into our own streets and cities. In the interests of both effectiveness and legitimacy, the fight against terrorism requires that international law move forward on *all* fronts. Peace and prosperity, legitimacy and justice: these sum up the role the law should play.