

Essay 1. Terrorism and the law: past and present international approaches

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The problem of definition

While the use of terror to secure political objectives has a long history, international efforts to define and repress terrorism date back to the relatively recent past. Two problems have arisen in relation to the phenomenon of terrorism: first, there has been a failure to settle on a coherent, usable definition of terrorism; and second, there are deep-seated disagreements about the most appropriate methods of dealing with the threat of terrorist attack. These two problems have tended to stymie international and national efforts to eliminate terrorism and are likely to be a continuing feature of discussions and debates on the question for some time to come.

This essay focuses on new international (or multilateral) initiatives in response to terrorism. It raises the question whether these initiatives will lead to a satisfactory definition of terrorism and whether they point in the direction of a common approach to the problem of terrorism. It concludes that responses to and understandings of terrorism must be viewed in the light of a series of profound choices to be made about the nature of terrorism and the future of international society.

Before briefly tracing the history of international responses to terrorism, this essay presents observations on the question of definition or nomenclature. The first quality worth remarking on is the sheer diversity and range of activities encompassed by even restrictive notions of terrorism. In international law, for example, terrorism is understood to include attacks on diplomatic staff, hostage taking, hijacking, some forms of money laundering, and violations committed against maritime vessels and civil aviation. There are also much broader current national policy definitions, which complicates efforts to arrive at a satisfactory common definition. For example, US President George W. Bush's 'war on terrorism' has been expanded to include the possibility of a war against a sovereign state thought to pose a threat to the international order by virtue of the weapons allegedly in its possession. Moreover, terrorism is the word used to describe many human rights violations committed by both state and non-state actors in the post-cold war world, and it has also been applied to specific forms of warfare directed at civilian populations. This profusion of meanings clearly creates problems for any rational discussion of the issue of terrorism.

Instead of artificially engineering a working definition, this essay points out that the two most common ways of defining terrorism are both rather unsatisfactory. In one case, terrorist is the label attached to a particular, usually non-state, enemy. In this instance, terrorists are most often groups that act to upset the status quo and are prepared to use armed force to do so. This usage does not require that the terrorist employ force against civilian targets; for example, attacks by the Irish Republican Army (IRA) in Northern Ireland against British military installations were routinely described as terrorist attacks. The problem with this approach is obvious: it is highly ideological and largely depends on a characterization of the goals rather than the

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methods of terrorists or rebels (although the perfidious methods employed can be relevant). The alternative approach, one that makes method central, seems more auspicious, until one tries to apply it in practice. If terrorism really is only the indiscriminate or disproportionate use of violence against civilian targets, then much of what has been tolerated and sometimes celebrated in international society, such as the bombing of Dresden or the use of violence by the French resistance in World War II or of terrorism by the African National Congress in the 1980s, falls rather too readily into the category.

Ultimately, these general definitions of terrorism tend to be either under-inclusive or over-inclusive. It is little wonder then that the UN's Policy Working Group on the United Nations and Terrorism decided not to devise a definition of terrorism before embarking on its detailed discussion of the practice.¹

Pre-2002 approaches

In lieu of a definition of terrorism, five general approaches that were developed in the pre-2002 legal environment and were still highly relevant in 2002 might usefully be identified: (a) the establishment of *international conventions* designed to enhance international cooperation with a view to the suppression or elimination of terrorism; (b) the creation and enforcement of *human rights standards* designed to protect civilian populations from mass atrocity and the elaboration of a body of laws to be applied in times of armed conflict, some of which are designed to protect civilian populations from the worst effects of warfare; (c) the development of *domestic laws* and policing in relation to crimes of mass violence; (d) the emergence in customary international law of categories of offence over which all states shall have jurisdiction, that is, *universal jurisdiction*; and (e) self-defence, or *the use of military force by states* against terrorist organizations. Plainly, it is impossible to be comprehensive in describing or explaining these efforts, but at least one example from each category is provided below.

International conventions. The first international convention explicitly concerned with the suppression of terrorism was drafted by the League of Nations in 1937. Twenty-four states signed the 1937 Convention for the Prevention and Punishment of Terrorism,² but an absence of ratifications meant that it did not enter into force and the international criminal court proposed in an annex to the convention was not created. The classic anti-terrorism conventions of the post-World War II era were more successful. These conventions were designed to promote cooperation between states and to ensure that criminal jurisdiction could be readily exercised over suspected terrorist acts. Most of them contain an *aut dedere aut judicare* clause requiring custodial states to either extradite or prosecute suspects.

Typical examples of such conventions are the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft,³ the 1971 Convention for the

¹ United Nations, Report of the Policy Working Group on the United Nations and Terrorism, UN document A/57/273-S/2002/875, 6 Aug. 2002, para. 9, available at URL <<http://www.un.org/terrorism/>>.

² *League of Nations Official Journal*, vol. 19 (1938), p. 23. India was the only state that ratified this convention.

³ The convention was signed at Tokyo on 14 Sep. 1963. *United Nations Treaty Series*, vol. 704 (1963), p. 219, available at URL <<http://untreaty.un.org/English/Terrorism.asp>>.

Suppression of the Unlawful Seizure of Aircraft,⁴ the 1970 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation⁵ and its 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Montreal Protocol),⁶ the 1979 International Convention against the Taking of Hostages,⁷ the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation,⁸ and the 1997 International Convention for the Suppression of Terrorist Bombings.⁹ These conventions were successful because they defined specific types of offences (e.g., hostage taking) rather than general categories of criminal behaviour (e.g., terrorism).

Supplementing these general conventions were two other models. The first was the regional convention. In this regard, a number of European states or organizations have been in the vanguard of attempts to build regional structures aimed at preventing and punishing terrorism (e.g., the 1977 European Convention on the Suppression of Terrorism¹⁰ and the 1978 Bonn Declaration on International Terrorism¹¹). These instruments have been relatively effective tools in combating terrorism and, in the latter case, illustrate how administrative measures can be introduced to encourage further cooperation in the repression of terror. The second development arose in relation to the funding of terrorist organizations. This has, of course, become a major focus of attention since 2001, but the United Nations has long identified this as a problem for international order. The 1999 International Convention for the Suppression of the Financing of Terrorism¹² was the product of work in this field.

Human rights law and international humanitarian law. In a sense, the whole human rights system is a part of counter-terrorism. The rights enumerated and elaborated in the 1966 International Covenant on Civil and Political Rights¹³ seek to protect human beings from violations of their basic rights to life, dignity and liberty. Campaigns of terror—whether instigated by states (as in Guatemala in the 1980s) or by non-state groups (as in Angola in the past three decades)—are often simply mass violations of fundamental human rights such as the right to life and to security.

⁴ The convention was signed at The Hague on 16 Dec. 1970. *International Legal Materials*, vol. 10 (1971), Article 4.2, p. 1151, also available at URL <<http://untreaty.un.org/English/Terrorism.asp>>.

⁵ The convention was signed at Montreal on 23 Sep. 1971. *International Legal Materials*, vol. 10 (1970), Article 3.3, p. 133, also available at URL <<http://untreaty.un.org/English/Terrorism.asp>>.

⁶ The Montreal Protocol was signed at Montreal, Canada, on 24 Feb. 1988, available at URL <http://www.iasl.mcgill.ca/airlaw/public/aviation_security/montreal1988.pdf>.

⁷ The convention was adopted by the UN General Assembly on 17 Dec. 1979. *International Legal Materials*, vol. 18 (1979), p. 1460, also available at URL <<http://untreaty.un.org/English/Terrorism/Conv5.pdf>>.

⁸ The convention was signed at Rome on 10 Mar. 1988. *International Legal Materials*, vol. 27 (1988), p. 668, also available at URL <<http://untreaty.un.org/English/Terrorism.asp>>.

⁹ The UN General Assembly adopted the convention in Resolution 52/164 on 15 Dec. 1997. *International Legal Materials*, vol. 37 (1998), p. 249, also available at URL <<http://untreaty.un.org/English/Terrorism.asp>>.

¹⁰ The convention was signed by the member states of the Council of Europe on 27 Jan. 1977. *International Legal Materials*, vol. 15 (1977), p. 1272, also available at URL <http://ue.eu.int/ejn/data/vol_b/4b_convention_protocole_accords/terrorisme/090TEXTen.html>.

¹¹ The Bonn Declaration, stipulating a halt in air traffic to countries that do not extradite or prosecute terrorists, was signed by Japan, the USA and certain European states on 17 July 1978. *International Legal Materials*, vol. 17 (1978), p. 1285.

¹² The convention was adopted by the UN General Assembly on 9 Dec. 1999. *International Legal Material*, vol. 39 (2000), p. 270, also available at URL <<http://untreaty.un.org/English/Terrorism.asp>>.

¹³ The convention was adopted in UN General Assembly Resolution 2200A (XXI), 16 Dec. 1966—available at URL <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>—and entered into force on 23 Mar. 1976.

Alongside these human rights treaties there have been more fitful efforts to create international criminal tribunals to prosecute and try those individually responsible for such violations. The trials of the major German war criminals at the Nuremberg International Military Tribunal in 1945–46 promised to be the precursor to a fully-fledged international criminal law system, but this system, foundering on cold-war tension, remained in abeyance until the 1990s, when there was a proliferation of international war crimes tribunals.¹⁴

A body of law more closely associated with restrictions on the means open to states to act against terrorism is also itself partly dedicated to the prevention of terrorism in times of war. The 1949 Geneva Conventions and the two 1977 Protocols Additional to the Geneva Conventions¹⁵ contain numerous provisions seeking to ameliorate the effects of war and discourage behaviour that has the effect of or is intended to terrorize civilian populations. Indeed, a basic principle of international humanitarian law is that the means of warfare are not to be regarded as unlimited. This principle, first stated in the regulations in the Annex to 1907 Hague Convention IV respecting the Laws and Customs of War on Land,¹⁶ has been elaborated in provisions for the protection of civilian populations from direct attack found in international humanitarian law. In particular, 1977 Protocol I Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts prohibits: ‘Acts or threats of violence the primary purpose of which is to spread terror among the civilian population’. This sub-clause merely makes explicit the principles of humanity and discrimination that lie at the heart of *ius in bello* and make acts of terror a clear breach of the basic precepts of this body of law.¹⁷ Meanwhile, in the more conventional sense, terrorists are in effect unlawful combatants or unprivileged belligerents. For example, they fail to meet the conditions necessary for prisoner-of-war status under Article 4 of Geneva Convention (III).¹⁸

Domestic legislation to suppress terrorism. It is important to recognize that these measures remain at the core of states’ efforts to tackle the problem of terrorism. Ideally, states would rather deal with terrorism at the state level and have frequently attempted to do just that. The United Kingdom, for example, historically regarded the Northern Ireland troubles as an internal affair (although the 1985 Anglo-Irish Agreement¹⁹ changed this somewhat). In both the UK and the USA quite intrusive and

¹⁴ See e.g. the International Criminal Tribunal for the Former Yugoslavia (ICTY), established in 1993, at URL <<http://www.un.org/icty/>>; the International Criminal Tribunal for Rwanda (ICTR), established in 1994, at URL <<http://www.icty.org/>>; the Special Court for Sierra Leone, established on 16 Jan. 2002, at URL <<http://www.sierra-leone.org/specialcourtstatute.html>>; and the International Criminal Court (see the Rome Statute, UN document A/CONF.183/9, 17 July 1998, at URL <<http://www.un.org/law/icc/statute/romefra.htm>>).

¹⁵ Protocol I on the Protection of Victims of International Armed Conflicts, and Protocol II on Victims of Non-International Armed Conflicts. International Committee of the Red Cross (ICRC), *Protocols Additional to the Geneva Conventions of 12 August 1949, Resolutions of the Diplomatic Conference, Extracts from the Final Act of the Diplomatic Conference* (ICRC: Geneva, 1977), also available at URL <<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/77EA1BDEE20B4CCDC1256B6600595596>>.

¹⁶ Scott, J. B. (ed.), *The Hague Conventions and Declarations of 1899 and 1907* (Oxford University Press: New York, 1918), available at URL <<http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6?OpenDocument>>.

¹⁷ 1977 Protocol I Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (note 15), Article 51.

¹⁸ The 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War, which entered into force on 21 Oct. 1950, is available at URL <<http://193.194.138.190/html/menu3/b/91.htm>>.

¹⁹ The 1985 Anglo-Irish Agreement is available at URL <<http://cain.ulst.ac.uk/events/aia/aiadoc.htm.htm>>.

wide-ranging powers have been given to the authorities to pre-empt or forestall terrorist activities in instruments such as the US Anti-Terrorism and Effective Death Penalty Act of 1996²⁰ and the British Anti-Terrorism Act of 2000.²¹

Universal jurisdiction. Although states have tended to focus on the establishment of new treaty regimes, there are certain powers or sources of jurisdiction available under customary international law. Clearly, a state has the right to exercise jurisdiction over terrorist offences committed on the territory of that state or against the nationals of that state. However, terrorist offences do not fall under the general category of particularly heinous acts giving rise to universal jurisdiction, that is, jurisdiction exercisable by all states regardless of any nexus between the state and the acts in question. Possible parallels between piracy (a crime giving rise to universal jurisdiction) and terrorism are discussed below.

The use of force and the UN Charter. The 1945 Charter of the United Nations outlaws the use of force in situations not covered by self-defence under Article 51 or collective security authorized under Chapter VII.²² This area of law, known as *ius ad bellum*, is relevant to the discussion on terrorism for three reasons.

First, the project to constrain the range of legitimate means of warfare is also a project to prevent and eliminate terrorism since there is no doubt that a secondary effect (and sometimes a primary purpose) of war is to create terror among civilian populations. To this extent, one might say that terrorists use some of the same methods, with similar goals, that are regarded by the laws of war as war crimes when employed by state actors.

Second, the UN Charter restricts the sort of activities that states are permitted to engage in as part of an anti-terrorism campaign. For example, it was widely argued that the US attacks on Libya in 1986 and on Sudan in 1999 were illegal under the laws regulating the use of force since they did not meet the requirements of self-defence, nor were they authorized by the UN Security Council.²³ No doubt, at some level such attacks are an effective means of combating terrorism, but the law is an instrument of constraint as well as a potential 'weapon' in counter-terrorism and such attacks may need to be discouraged as part of a wider imperative to reduce the incidence of armed force in international society.

Third, and perhaps most importantly, the UN Charter does permit the use of force in cases of self-defence where terrorist attacks rise to the level of an armed attack. The United States took this view after the attacks of 11 September 2001.²⁴ The UN Charter also envisages action by the Security Council to deter and punish terrorist acts, and since 2001 the Council has become much more active in anti-terrorist activities. It is now clear that the Council regards certain forms of terrorism as a threat to the peace, and in Security Council Resolution 1373²⁵ it established a Counter-Terror-

²⁰ Codified in Title 28, U.S.C., section 1605 ff., reproduced in *International Legal Materials*, vol. 36 (1997), p. 759. See also the Australian Criminal Code Act (Amendments) (1995) at URL <<http://scaletext.law.gov.au/html/pasteact/1/686/top.htm>>. For details of other national initiatives see United Nations, 'Reports from member states pursuant to paragraph 6 of Security Council Resolution 1373 (2001)', URL <<http://www.un.org/Docs/sc/committees/1373/1373reportsEng.htm>>.

²¹ See URL <<http://www.homeoffice.gov.uk/terrorism/>>.

²² For the UN Charter see URL <<http://www.un.org/aboutun/charter/>>.

²³ See, e.g., draft Security Council Draft Resolution condemning air strikes (vote 11–4: majority in favour, but vetoed by the USA, the UK and France). UN document S/PV.2682, 21 Apr. 1986.

²⁴ See also the NATO invocation of Article 5 of the 1949 North Atlantic Treaty, URL <<http://www.nato.int/docu/basicxt/treaty.htm>>.

²⁵ UN Security Council Resolution 1373, 28 Sep. 2001, available at URL <<http://ods-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>>. See also UN Security

ism Committee to monitor the activities of states in suppressing this threat to international peace and security.²⁶

Developments in 2002

Having established the areas of law relevant to a discussion of terrorism, some of the developments in 2002 are discussed under each of these headings below.

International conventions. Perhaps the most notable development in treaty law in 2002 was the entry into force on 10 April of the 1999 Convention for the Suppression of the Financing of Terrorism. This convention had 64 states parties as of 1 January 2003, including France, the UK, the USA and Russia, four of the five permanent members of the UN Security Council.²⁷ In addition to the fact that it includes a definition of terrorism, it is notable for a number of provisions that strike at the funding of terrorist organizations. Article 2(1)(b) of the convention describes terrorism as 'Any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a government or international organization to do or abstain from doing any act'. The convention also sets out the elements of the specific offence (this includes sponsoring terrorists or raising monies for them and could cover some of the activities of Irish Northern Aid, NORAIID,²⁸ in relation to the IRA) as well as providing a broader basis for the exercise of jurisdiction of states than that found in many other conventions.²⁹ Other, *regional* initiatives occurring since 2001 include the European Union's Council Framework Decision of 13 June 2002 on combating terrorism and the 2002 Inter-American Convention Against Terrorism.³⁰

Human rights law and international humanitarian law. An important development in 2002 in this area was the entry into force of the Rome Statute, establishing the International Criminal Court (ICC).³¹ The ICC, based in The Hague, has jurisdiction over individuals (including officials and heads of state) who are accused of having committed certain crimes laid out in Article 5 of the Statute. Genocide, crimes against humanity and serious violations of the laws of war are each crimes of terror in the broadest sense. They involve human practices which have the effect of sowing terror among both civilian populations and/or combatants. The ICC can thus be viewed as an enforcement arm of the human rights system and as a further method of punishing acts of terrorism. A number of delegations (notably the Israeli and Turkish delegations), during the drafting of the Statute at the 1998 Rome Conference, pushed for the inclusion of a crime of 'terrorism'. This proposal was rejected because of various definitional difficulties alluded to above. However, it remains the case that ter-

Council Resolution 1438, at URL <<http://www.un.org/terrorism/sc.htm>> (describing the Bali bombing as a threat to international peace and security).

²⁶ For the Counter-Terrorism Committee see also chapter 1 in this volume.

²⁷ For the list of signatures and ratifications, see URL <http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty11.asp>.

²⁸ See the NORAIID Internet site at URL <<http://www.noraid.com/>>.

²⁹ Brandon, B., 'Recent developments in the law on terrorism', unpublished, on file with author.

³⁰ See EU Council Decision (2002), URL <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002F0475&model=guichett>; and UN General Assembly Resolution 1840, 3 June 2002, Inter-American Convention Against Terrorism, URL <http://www.oas.org/xxxiiga/english/docs_en/docs_items/AGres1840_02.htm>.

³¹ For a discussion of the ICC see appendix 3A in this volume. The Rome Statute entered into force on 1 July 2002 and is available at URL <<http://www.un.org/law/icc/>>.

rorist outrages such as the destruction of the World Trade Center in 2001, the Baghdad cafe bombing in 1998 and the Oklahoma bombing in 1995 can be conceived of as crimes against humanity (thus bringing them within the scope of the Rome Statute) because they represent widespread or systematic attacks on a civilian population.

Domestic law. Under Article 17 of the Rome Statute, municipal legal orders are given primacy over the International Criminal Court. It is only when these domestic legal systems are 'unable or unwilling' to investigate and prosecute suspects that the ICC can step in. In 2002 a whole raft of anti-terrorist provisions were introduced into domestic law. For example, in the UK, the Anti-Terrorism, Crime and Security Act of 2001 entered into force. In the USA, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the USA Patriot Act) became operational and the Homeland Security Act of 2002 came into force.³²

Universal jurisdiction. The Convention for the Suppression of the Financing of Terrorism has widened the possible bases for asserting jurisdiction over terrorist offences, but the customary law position remains unchanged. While universal jurisdiction can be exercised over analogous offences such as genocide or crimes against humanity, terrorism itself does not give rise to universal jurisdiction. However, and this is offered as a suggestion rather than a statement of law, perhaps terrorists are simply pirates and like pirates can be subjected to a form of universal jurisdiction. Piracy is important because it provides international criminal law with a metaphor and with an originating point for the exercise of universal jurisdiction. Scattered throughout the jurisprudence of war crimes is the idea that the war criminal, like the pirate, is an enemy of mankind — '*hostis humanis*'—operating outside the bounds of law and outside the jurisdiction of national law engaging in *a form* of killing or plundering that is not just unacceptable but universally deplored.

In *Republic of Bolivia v Indemnity Mutual Marine Insurance Company Limited*, a case involving an insurance claim the success of which depended on the characterization of a certain group of rebels as pirates, defence lawyers argued that pirates were essentially 'criminals at war with society generally' and that mere rebels or insurgents did not fall into this category.³³ It was noted that the leader of El Acre, a revolutionary group in Bolivia, was '[n]ot only *not* the enemy of the human race but he is the enemy of a particular state'. The implication behind this and later work on piracy is that terrorists who are at war with the international community generally may fall into the category of pirates. Malvina Halberstam has suggested that this quality may allow for the exercise of universal jurisdiction over terrorists *qua* pirates and may also permit enforcement action on the high seas against such terrorists.³⁴

The use of force. The view of terrorists as enemies of humankind intersects rather well with the current rhetoric and policy of the Bush Administration. President Bush himself warned in October 2001 that: 'Every nation has a choice to make. . . . If any government sponsors the outlaws and killers of innocents, they have become

³² The British Anti-Terrorism, Crime and Security Act is available at URL <<http://www.hmso.gov.uk/acts/acts2001/20010024.htm>> and the USA Patriot Act at URL <<http://www.epic.org/privacy/terrorism/hr3162.html>>. See also the US Anti-Terrorism and Effective Death Penalty Act 1996, codified in Title 28, U.S.C. section 1605 ff, reproduced in *International Legal Materials*, vol. 36 (1997), p. 759; and the US Homeland Security Act of 2002, Public Law no. 107-296, available at URL <http://www.ars.usda.gov/newla/homeland_security.pdf>.

³³ *Republic of Bolivia v. Indemnity Mutual Marine Assurance Co.* (1909), *King's Bench*, vol. 1 (1909), p. 785.

³⁴ Halberstam, M., 'Terrorism on the high seas: the achille lauro, piracy and the IMO convention on maritime safety', *American Journal of International Law*, vol. 82 (1988), p. 269.

outlaws and murderers, themselves'.³⁵ The US administration has secured domestic legal power to strike at terrorists using military force wherever these terrorists may be located,³⁶ but what is the position under international law? This general assertion of a right to strike terrorists using a form of precautionary self-defence runs counter to the present legal position on self-defence, which requires either a pre-existing armed attack or at least a need to use self-defence in circumstances where a threat is 'instant, overwhelming, leaving no choice of means, and no moment of deliberation'.³⁷ Neither of these tests has been met in the case of responses to possible terrorist attacks.³⁸

In 2002, then, there was an articulation of a fresh approach to self-defence which, if it were to be accepted by other states, could dramatically expand the range of cases in which military force is acceptable.³⁹

Meanwhile, on the multilateral front, the UN Security Council has continued to adopt a stronger approach to the problem of terrorism. It declared the bombing on Bali in 2002 to be a threat to the international peace and security only days after the attack, and the Anti-Terrorist Committee established by the Security Council has continued to monitor the compliance of states with the various requirements set out under Resolution 1373 (e.g., the freezing of financial assets, and the criminalization in domestic law of terrorist funding and financing).

In short, innovation has been a feature of efforts to tackle the post-11 September 2001 problems of terrorism, with the instruments and in the legal framework of the law.

Four dichotomies

There seem to be four dichotomies at work in efforts to define and respond to terrorism.

First, there is the possibility of tension (as well as symbiosis) between the international and domestic spheres. This is reflected in the debates about terrorism and, in particular, the disagreements over whether terrorists ought to be prosecuted before specially constituted international tribunals or before national courts (martial or federal, in the case of the USA).⁴⁰

Second, the response to terrorism has moved between viewing terrorism as a problem of war involving principles on the use of force and rules of international humanitarian law and conceiving of it as a problem of peace to be resolved through

³⁵ Bush, G., 'Address to the Nation announcing strikes against Al Qaida training camps and Taliban military installations', 7 Oct. 2001, available at URL <<http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html>>.

³⁶ In 2001 President Bush gained the approval of Congress to use all necessary and appropriate means to combat terrorism ('the President is authorised to use all necessary and appropriate force against those nations, organisations or persons . . . he determines planned, authorized, committed or aided the terrorist attacks . . . or harboured such organisations or persons'). Authorization for Use of Military Force, Public Law no. 107-40, 115 Stat. 224 (18 Sep. 2001), available at URL <<http://www.counterterrorismtraining.gov/leg/>>.

³⁷ The Caroline Case, *British and Foreign State Papers*, vol. 29 (1841), pp. 1137–38, and vol. 30 (1842), pp. 195–96.

³⁸ 'The national security strategy of the United States of America', Sep. 2002, URL <<http://www.whitehouse.gov/nsc/nss.html>>. See chapter 1 in this volume for a discussion of the pre-emption concept within this strategy.

³⁹ For a detailed consideration of this question see Simpson, G., *Great Powers and Outlaw States in the International Legal Order* (Cambridge University Press: Cambridge, 2003), chapter 11.

⁴⁰ Wedgwood, R., 'Tribunals and the events of the 11th September', *ASIL Insights*, Dec. 2001, available at URL <<http://www.asil.org/insights/insigh80.htm>>.

law enforcement via either the domestic criminal law or the various anti-terrorism conventions adumbrated above.

Third, there is the question whether terrorism is primarily a political or a legal problem. In the case of the law on the use of force, commentators have argued that force is regulated at the level of international law through the voluntary compacts of nations, the enforcement capacity and will of the UN's executive arm, the structure of the international legal order, and/or the pacific tendencies of certain state forms (the democratic peace hypothesis).⁴¹ Others, of course, have asserted that peace has little to do with law and that to think so is to indulge in utopian legalism.⁴² Policy makers such as Richard Perle and statesmen such as Donald Rumsfeld have long de-emphasized the importance of legal solutions to problems of world order. For them, politics is predominant and power is anterior.

This debate has relevance for the way in which the question of terrorism is approached and points to a deeper dilemma about whether to view terrorism as primarily a problem of law (whether domestic or criminal, *ius ad bellum* or *ius in bello*) or as a disorder to be approached only through the councils of power and pragmatism.

Fourth, there is the question whether to view terrorism as a state-sponsored crime, a crime involving mainly non-state actors or a mixture of the two (as in the Afghanistan model, in which both the state and the terrorist organization were said to be responsible under international law). This dichotomy is likely to become more acute as the USA pushes for an approach to international peace and security that manifests itself in an unwillingness to defer to the prerogatives of sovereign states alleged to be harbouring or tolerating terrorists.

Conclusions

In the interstices of a wider discussion about post-2001 developments in relation to terrorism, four problems need to be confronted in any further development of policy responses: (a) the choice of domestic or international criminal enforcement; (b) the dichotomy between the way in which the phenomenon of terrorism arises in times of war and peace; (c) the tensions between legal solutions to terrorism and methods involved in direct action, including the use of force; and (d) the characterization of terrorism as a matter of state or individual culpability.

⁴¹ E.g., Franck, T., *Fairness in International Law and Institutions* (Clarendon Press: Oxford, 1995).

⁴² E.g., Grieco, J., 'Anarchy and the limits of cooperation: a realist critique of the newest liberal institutionalism', *International Organization*, vol. 42, no. 3 (1988), pp. 485–508.

