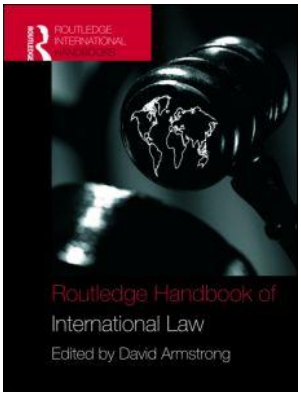

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Challenges of the "New Terrorism"

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Challenges of the "new terrorism"

John F. Murphy

An especially disquieting aspect of the "new terrorism" is the increased willingness of terrorists to kill large numbers of people and to make no distinction between military and civilian targets. Another facet is the extraordinary extent to which it has been able to globalize itself. Still another is the debate over the appropriate legal regime to apply to it. Prior to the September 11, 2001 attacks, international terrorism had been treated primarily as a criminal law matter with emphasis placed on preventing the commission of the crime through intelligence or law enforcement means, or, if prevention failed, on the apprehension, prosecution and punishment of the perpetrators. After September 11, however, the criminal justice approach was de-emphasized and to a considerable extent supplanted by the use of military means. A decision to employ the military model of counter-terrorism in place of the law enforcement model, or vice versa, may have serious functional consequences. For example, under the law enforcement model, it is impermissible to pursue and kill a suspected criminal before his capture, unless it is necessary to do so as a matter of self-defense. Under the military model, it is permissible to pursue the enemy with the intent to kill. Under normally applicable criminal law, moreover, conviction may be difficult because of the requirement that the crime be proved "beyond a reasonable doubt" and other barriers posed by criminal procedure and constitutional standards. Because of the nature of the new terrorism, it has proved to be necessary to employ some modern approaches to combating terrorism. For example, it is clear that terrorists in several locations have now moved beyond conventional tactics to engage in well supplied and well-planned insurgencies. Whether one approaches counterterrorism from the military or the law enforcement model, it is clear that an ideological struggle is a key part of the counter-terrorism effort. The most important ideological struggle, however, is not likely to be that between al Qaeda and the west. Rather, it is the struggle within Islam itself. Other important methods of combating terrorism, such as the gathering of intelligence, recent resolutions of the U.N. Security Council, efforts to block the financing of terrorism, and civil lawsuits against terrorists, terrorist organizations, and states that sponsor terrorism, are also briefly explored in this essay and in some concluding observations.

> We have cause to regret that a legal concept of "terrorism" was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose.
>
> (Baxter 1974: 380)

The trenchant observation of Richard Baxter, late Professor of Law at Harvard and

Judge on the International Court of Justice, published in 1974, has stood the test of time. The term "terrorism" is imprecise, it is ambiguous, and, furthermore, serves no operative legal purpose. But above all, the hard school of experience has shown, it has constituted, and continues to constitute, a major barrier to efforts to combat the criminal acts often loosely described as "terrorism."

In practice, the terms "terrorism" and "terrorists" have been used by politicians and diplomats as labels to pin on their enemies. The cliché "One man's terrorist is another man's freedom fighter" is a notorious reflection of this game of semantics. It also reflects a serious conflict of values between those who believe that the end always justifies the means and those who do not. Thus, in the current environment especially, there are those, apparently increasing dramatically in number, who, in an effort to reach their end or goal, are perfectly willing to engage in the deliberate targeting and massive slaughter of civilians, employ suicide bombers, use children as shields, and behead helpless hostages before a worldwide audience.

This clash of fundamental values has been a major factor contributing to the failure to agree on a definition of terrorism in the United Nations and in other international fora.[1] Some countries believe that the causes of terrorism or the political motivation of the individual terrorists are relevant to the problem of definition. For example, the position of some governments has been that individual acts of violence can be defined as terrorism only if they are employed solely for personal gain or caprice; acts committed in connection with a political cause, especially against colonialism and for national liberation, fall outside the definition and constitute legitimate measures of self-defense. Another variant but closely related approach is to define as terrorism only the use of terror by governments, or so-called "state terrorism." Indeed, the word "terror" was first used in connection with the Jacobin "Reign of Terror" during the French Revolution.

Because of these varying approaches and the "clash of values" among its member states, with the result being an inability to reach agreement on a definition, the United Nations has been unsuccessful in its efforts to conclude a comprehensive treaty against terrorism.[2] Instead, the world community has attempted to resolve the question of definition largely by ignoring it and focusing instead on identifying particular criminal acts to be prevented and punished and on particular targets to be protected. The result has been a "piecemeal" approach to combating international terrorism, an approach followed at several different levels. That is, a number of global treaties and conventions have been adopted at the United Nations and in other fora. At the same time, several regional conventions have been drafted to reflect the particular needs and perspectives of the states in the region concerned. Finally, a number of bilateral agreements have been adopted. Some of these deal specifically with a particular manifestation of international terrorism; others are relevant to international terrorism, although they cover a wide variety of other crimes as well.

At this writing, the United Nations or its specialized agencies have adopted 13 global, multilateral antiterrorist conventions. These include: Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963); Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aviation (1971); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973); International Convention against the Taking of Hostages (1979); Convention on the Physical Protection of Nuclear Material (1979); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988); Convention against the Safety of Maritime Navigation (1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed

Platforms Located on the Continental Shelf (1988); Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991); International Convention for the Suppression of Terrorist Bombing (1997); International Convention for the Suppression of the Financing of Terrorism (1999);[3] and, most recently, International Convention on the Suppression of Acts of Nuclear Terrorism (United Nations 2005b), which entered into force in 2007. Most of these conventions contain no definition of terrorism whatsoever. A few, such as the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism, contain definitions of the crime they cover that contain elements of the crime of terrorism, but they are limited in effect to the conventions in which they appear and do not represent agreement on a comprehensive definition of terrorism per se.[4]

Despite the world community's inability to agree on a definition of terrorism, and despite the many practical problems definitions of terrorism pose, it is necessary at a minimum to have a rough working definition of the subject we are discussing. To this end, one might consider the definition of "international terrorism" that appears in the U.S. federal crime code's chapter on terrorism. According to this definition, "international terrorism" means activities that:

- involve violent acts dangerous to human life that are a violation of the criminal laws of the United States or of any state, or that would be a violation if committed within the jurisdiction of the United States or of any state
- appear to be intended:
  - to intimidate or coerce a civilian population
  - to influence the policy of a government by intimidation or coercion
  - to affect the conduct of a government by mass destruction, assassination, or kidnapping
- occur primarily outside the territorial jurisdiction of the United States or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.[5]

With this brief background to some of the definitional problems of terrorism, let us consider some of the salient aspects of the "new terrorism."

The "new terrorism"

Back in the (relatively) halcyon days of the "old terrorism," the conventional wisdom was that terrorists had little interest in killing large numbers of people because it would undermine their efforts to gain sympathy for their cause. An especially disquieting aspect of the new terrorism is the increased willingness of terrorists to kill large numbers of people and to make no distinction between military and civilian targets.[6] A major cause of this radical change in attitude has been aptly pinpointed by Jeffrey D. Simon (2002: 11):

> Al Qaeda . . . is representative of the emergence of the religious-inspired terrorist groups that have become the predominant form of terrorism in recent years. One of the key differences between religious-inspired terrorists and politically motivated ones is that the religious-inspired terrorists have fewer constraints in their minds about killing large numbers of people. All nonbelievers are viewed as the enemy, and the religious terrorists are less concerned than political terrorists about a possible backlash from their supporters if they kill large numbers of innocent people. The goal of the religious terrorist is transformation of all society to their religious beliefs, and they believe that killing infidels or nonbelievers will result in their being rewarded in the

afterlife. Bin Laden and Al Qaeda's goal was to drive U.S. and Western influences out of the Middle East and help bring to power radical Islamic regimes around the world. In February 1998, bin Laden and allied groups under the name "World Islamic Front for Jihad Against the Jews and Crusaders" issued a fatwa, which is a Muslim religious order, stating that it was the religious duty of all Muslims to wage a war on U.S. citizens, military and civilian, anywhere in the world.

Another facet of the new terrorism is the extraordinary extent to which it has been able to globalize itself. Although in many ways al Qaeda has been severely undermined, with many of its leaders dead or in jail, it has succeeded in promoting its violent fanaticism on a worldwide basis and thereby gaining substantial numbers of new militants to its cause. The result has been, in the words of some commentators, "terror by franchise" (see, e.g. Khalaf and Fidler 2007: 5, col. 1). That is, while the jihadi threat has been suppressed in some countries – for example, Saudi Arabia and Indonesia – it is increasing in places in North Africa and in Lebanon. These al Qaeda inspired groups in turn have established links with a new breed of home-grown terrorist. The problem is especially acute in the United Kingdom where radicalized British Muslims have established links with Al Qaeda- and Taliban-sponsored training camps in Pakistan (Fidler 2007: A1, col. 1). In continental Europe, home-grown terrorists have established links with radical cells in North Africa.

The current headquarters of Al Qaeda is reportedly in Waziristan and the Baujur region, wild tribal areas on the borders between Pakistan and Afghanistan (see Bokhari and Fidler 2007: 5, col. 8). The Pakistani government has been unsuccessful in its efforts to suppress the activities of al Qaeda and the Taliban in these areas, and a peace arrangement in 2006 between the Pakistani government and the tribal chiefs may have allowed al Qaeda more freedom to operate.

Indeed, on July 17, 2007, the U.S. White House released a National Intelligence Estimate, which represents the consensus view of all 16 agencies that make up the American intelligence community (see Mazzetti and Sanger 2007: A1, col. 1). The report concludes that the United States is losing ground on a number of fronts in the fight against al Qaeda and that the terrorist front has significantly strengthened over the past 2 years. One of the main reasons for al Qaeda's resurgence, according to intelligence officials and White House aides, is the "hands-off approach toward the tribal areas by Pakistan's president, Gen. Pervez Musharraf" (Mazzetti and Sanger 2007: A1, col. 1). As a result, American officials have reportedly been meeting and discussing "an aggressive new strategy, one that would include both public and covert elements" because of "growing concern that pinprick attacks on Qaeda targets were not enough" (see Mazzetti and Sanger 2007: A6, col. 1).

The implication in this report that it might be necessary for U.S. military forces to take action in the tribal areas of Pakistan illustrates another facet of the "new terrorism": the debate over the appropriate legal regime to apply to efforts to combat terrorism after the September 11, 2001 attacks. Prior to those attacks, international terrorism had been treated primarily as a criminal law matter with emphasis placed on preventing the commission of the crime through intelligence or law enforcement means; or, if prevention failed, on the apprehension, prosecution and punishment of the perpetrators. After September 11, however, the criminal justice approach was deemphasized and to a considerable extent supplanted by the use of military means. (On this point, see Power 2007: 1.)

This shift to the military model of counterterrorism has engendered considerable controversy. Critics of this approach argue that it threatens fundamental human rights and that it is unnecessary because normal law enforcement measures can effectively combat the terrorist threat (see, e.g. Roth 2004: 2).

In sharp contrast, supporters of the military model contend that criminal law is "too weak a weapon" and that it was inadequate to stop al Qaeda from planning and carrying out the attacks of September 11 (see, e.g. Wedgwood and Roth 2004: 126).

A decision to employ the military model of counterterrorism in place of the law enforcement model, or vice versa, may have serious functional consequences.[7] For example, under the law enforcement model, it is impermissible to pursue and kill a suspected criminal before his capture, unless it is necessary to do so as a matter of self-defense. The goal here is to capture the suspect, subject him to trial in accordance with due process, and then, if he is convicted, impose an appropriate sanction, which, in some cases, especially under U.S. law, could include the death penalty. Under the military model, it is permissible to pursue the enemy with the intent to kill. Capture in place of killing is required only when the enemy has surrendered. If the enemy surrenders, and he qualifies as a prisoner of war, he may not be subject to sanction unless he has committed a war crime. He may, however, be detained until the end of the conflict to prevent him from returning to the battlefield; if the law enforcement model applies, he normally cannot be detained after trial unless he has been convicted of a crime. Under normally applicable criminal law, moreover, conviction may be difficult because of the requirement that the crime be proved "beyond a reasonable doubt" and other barriers posed by criminal procedure and constitutional standards.

Because of these and many other differences between the law enforcement and military models of counterterrorism, a heated debate has arisen, especially in the United States, between those who favor trying alleged terrorists in civilian courts and those who favor military commissions as the appropriate forum.[8] For its part, the Bush administration, through an executive order issued by President George W. Bush providing for the creation of special military commissions to try members of al Qaeda,[9] has opted, at least in significant part, for the military model . The President's order and subsequent developments from it have raised a host of international and constitutional law issues. Space limitations preclude a discussion of these in this essay. For present purposes, suffice it to note that in *Hamdan vs. Rumsfeld*,[10] by a 5–4 majority, the U.S. Supreme Court decided that the military commissions established by the President lacked the authority to try suspects like Hamdan because their structure and procedures violated both the Uniform Code of Military Justice and the Geneva Conventions. In response, after strenuous negotiations, the Bush administration convinced Congress to pass the Military Commissions Act of 2006,[11] which, among other things, authorizes "the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission"; precludes *habeas corpus* review on behalf of any detainee classified as an "unlawful enemy combatant"; and permits only D.C. Circuit Court of Appeals review of such determinations by Combatant Status Review Tribunals; and provides that "no person in any *habeas* action or any other action may invoke the Geneva Conventions or any protocols thereto as a source of rights, whether directly or indirectly, for any purpose in any court of the United States." Shortly after the passage of the Military Commissions Act, the Court of Appeals for the D.C. Circuit, in *Boumediene [and Al Odah] vs. Bush* (2007), rejected, by a 2–1 vote, petitions filed for writs of *habeas corpus* filed by aliens captured abroad and detained as enemy aliens at the Guantanamo Bay Naval base in Cuba, on the ground that it had no jurisdiction in such cases. It is likely that this and other issues will ultimately be decided by the U.S. Supreme Court.

Parenthetically, it should be noted that since September 11 European states have largely reacted to the new terrorism threats by means of traditional law enforcement

methods (see Warbrick 2004). Recently, however, there has been some recognition in Europe that the law enforcement model may not suffice in all circumstances to cope with the new terrorism.[12] It has been suggested, moreover, that, with the United States beginning to recognize that the early post-September 11 position that terrorist detainees have few enforceable legal rights is unacceptable, a "global convergence on terror" may be developing (Goldsmith 2007: 11, col. 2).[13]

The concern that terrorists may resort to the use of weapons of mass destruction – nuclear, chemical, or biological – is of long standing (see, e.g. Jenkins and Rubin 1978). Since September 11, however, this concern has been greatly heightened. Moreover, Osama bin Laden and al Qaeda have made plain on many occasions their desire to obtain weapons of mass destruction, especially nuclear weapons, and their use of civilian aircraft on September 11 and their effective employment of the internet since have demonstrated their technological competence. Their competence with computers has led one commentator to suggest that they now have the capacity for hijacking satellites. "Capturing signals beamed from outer space [it is alleged] terrorists could devastate the communications industry, shut down power grids, and paralyze the ability of developed countries to defend themselves" (see Wright 2004: 40, 50).[14]

We turn now to examine some modern approaches of counterterrorism.

Counterinsurgency

Staying with the military model of counterterrorism for the moment, it is clear that terrorists in several locations have now moved beyond conventional tactics to engage in well-supplied and well-planned insurgencies. This is most evident in Iraq and Afghanistan, but significant terrorist insurgencies are also present in such countries as the Philippines and Malaysia. Indeed, according to the U.S. Department of State (2007: 2): "Al-Qaeda openly describes itself as a transnational guerrilla movement; it applies classic insurgent strategies at the global level."

Unfortunately, it is also clear that, when the magnitude of the September 11 attacks demonstrated the seriousness of the threat al Qaeda had become, the United States military was woefully unprepared to cope with insurgencies. As noted by Samantha Power (2007: 9): "[T]he Army counterinsurgency manual had not been updated since 1986 and the Marine Corps guide had not been revised since 1986." Power (2007: 9) further elaborates on the impact of such lack of preparation: "In Afghanistan and Iraq, the armed forces did not have the appropriate intelligence, linguistic capabilities, weapons, equipment, force structures, civil affairs know-how or capacity to train security forces in other countries."

In 2006 a new *U.S. Army/Marine Corps Counterinsurgency Field Manual*[15] was published. In the new foreward in the University of Chicago version of the Manual, Lt. Colonel John A. Nagel writes that: "It is fair to say that in 2003 most Army officers knew more about the U.S. Civil War than they did about counterinsurgency" (Department of the Army 2007: xv).

The primary architect of the Manual was General David Petraeus, who currently is the overall American commander in Iraq. At the time of writing there is some evidence that the military aspects of the counterinsurgency in Iraq are going well (see, e.g. O'Hanlon and Pollack 2007: A17, col. 2), but, as General Petraeus and other military officers have noted, success in counterinsurgency requires more than military capability, and there is so far little evidence that the Iraqi government has the capacity or the will necessary to take the steps required for quelling the insurgency (see Mazzetti 2007: A11, col. 1).[16]

There is also the crucial issue of the time required, in both Iraq and Afghanistan, for a well-run counterinsurgency strategy to work. Sara Sewall (2006: xxi, xxxviii–xxxix),

a former Pentagon official who wrote the introduction to the University of Chicago edition of the manual, for one is skeptical that the U.S. public will be willing to "supply greater concentrations of forces, accept higher casualties, fund serious nation-building and stay many long years to conduct counterinsurgency by the book."

The ideological struggle

Whether one approaches counterterrorism from the military or the law enforcement model, it is clear that, to quote a phrase that borders on being a cliché, an ideological struggle for hearts and minds is a key part of the counterterrorism effort. It is, moreover, a struggle that fundamentalist terror is wining.

According to *The 9/11 Commission Report* (2004: 50): "[T]he extreme Islamist version of history blames the decline from Islam's golden age on the rulers and people who turned away from the true path of their religion, thereby leaving Islam vulnerable to encroaching foreign powers eager to steal their land, wealth and even their souls." In the modern context, the rulers who have turned away from the true path of Islam include the rulers of Muslim countries, most especially the rulers of Saudi Arabia, where Mecca, the birthplace of Mohammed and Islam's most holy city, is located. The primary encroaching foreign power is the United States, with its placement of troops in Saudi Arabia (now removed) being a particular source of outrage. In the view of bin Laden and al Qaeda, according to the *9/11 Commission Report* (2004: 51):

> America is responsible for all conflicts involving Muslims. Thus, Americans are blamed when Israelis fight with Palestinians, when Russians fight with Chechens, when Indians fight with Kashmiri Muslims, and when the Philippine Government fights ethnic Muslims in its Southern islands. America is also held responsible for the governments of Muslim countries, derided by al Qaeda as "your agents." Bin Laden has stated flatly, "our fight against these governments is not separate from our fight against you." These charges found a ready audience among millions of Arabs and Muslims angry at the United States because of issues ranging from Iraq to Palestine to America's support for their countries' repressive rulers.

Al Qaeda and other Islamic fundamentalist terror groups have made good use of modern technology, especially the internet, in propagating their message (see Wright 2004: 40, 50). They were also successful in portraying both the U.S. invasion of Afghanistan and that of Iraq as a "war against Islam." As a result, Bruce Hoffman of Georgetown University, an eminent authority on terrorism, has recently been quoted as saying that "Al-Qaeda is not on the run. It is on the march" (2007: 72).

The most important ideological struggle, however, is not likely to be that between al Qaeda and the west. Rather, it is the struggle within Islam itself. At the present time "those Muslim preachers with authenticity tend to be the street preachers–firebrands, who gain legitimacy by spewing hatred at both their own regimes and the western powers that support them" (Friedman 2006: A23, Col 5). Unless and until more moderate voices within Islam succeed in getting their message across, al Qaeda's recruitment of converts to its cause is likely to continue to enjoy substantial success.[17]

Prevention of terrorism

Ideally, the goal of law enforcement and, for that matter, the use of military force, is to prevent international terrorism from being carried out. With the advent of the "new" terrorist's willingness to kill large numbers of people, perhaps through the use of weapons of mass destruction, fulfillment of this goal has become of crucial importance. There are two primary methods for preventing the

commission of terrorism: (1) hardening of possible targets; and (2) use of intelligence gathering by intelligence agents and of information resulting from investigations by law enforcement officials to intercept terrorists before they can commit their crimes. Examples of the hardening of possible targets are the barricades that surround Congress and key governmental agencies in Washington, D.C. and other primary possible targets such as financial institutions in New York City or nuclear facilities in various locations in the United States. Screening of passengers and baggage on civilian aircraft flights for weapons or bombs is another example. Special problems surround efforts to harden computer networks against attack because of their vulnerability (see United States 1996: 5).

The gathering of intelligence and investigations for law enforcement purposes have both an international and domestic dimension. On a global basis, an important player is Interpol, the international police organization. According to Interpol: "[S]trict limits on intelligence sharing are hindering efforts by law enforcement agencies to understand how the global threat is changing" (see Huban 2004: 5, col. 3).

At the domestic level, in the United States, there has long been a separation between intelligence gathering agencies, such as the Central Intelligence Agency, and investigation for law enforcement purposes, such as by the Federal Bureau of Investigation. The *9/11 Commission Report* (2004: 73–82) emphasizes the failure of intelligence agents and law enforcement officials to share information ("connect the dots") that might have resulted in apprehending the 9/11 hijackers prior to the commission of their acts. To resolve this problem, the Commission (2004: 417) recommends that: "[I]nformation procedures should provide incentives for sharing, to restore a better balance between security and shared knowledge."

In both intelligence gathering and investigation for law enforcement purposes, there has been concern that there not be arbitrary or unlawful interference with privacy, family, home, or correspondence. The issue recently came to a head in the United States when it was revealed that surveillance was being conducted in secret by the National Security Agency and outside the Foreign Intelligence Surveillance Act,[18] which requires the government to seek approval from a special court to eavesdrop on Americans. After substantial debate over the legality of this practice, on August 5, 2007, President Bush signed into law legislation that amends the Foreign Intelligence Surveillance Act and greatly expands the government's ability to eavesdrop international telephone calls and email messages of U.S. citizens without warrants.[19] It allows intelligence agencies to intercept telephone calls and emails of foreign terror suspects routed through the United States, without a warrant. The law remains in effect for six months, at which point it will be revisited.

Interrogation of persons suspected of terrorism, either to prevent the commission of future terrorist acts, or to ascertain the whereabouts of perpetrators of terrorism, since 9/11 has raised storms of controversy. Revelations, for example, that the U.S. Department of Justice's Office of Legal Counsel sent memoranda to the White House in January and August of 2002 (superseded in December of 2004)[20] approving interrogation tactics that stopped just short of a prisoner's death and arguably constituted torture precipitated a flurry of sharp reactions from both ends of the political spectrum, rejecting the arguments set forth in the memorandums. The Detainee Treatment Act of 2005,[21] while not expressly referring to torture, does require that persons in the control of the Department of Defense shall be subject only to interrogation techniques or treatment included in the U.S. Army Field Manual[22] and states that "no individual in the custody or under physical control of the United States Government shall be subject to cruel, inhuman, or degrading treatment or punishment."[23]

It is arguable that the U.S. Government has violated provisions of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the Torture Convention) through a program know as "extraordinary rendition," whereby an individual suspected of terrorism is transferred from one state to another for purposes of interrogation, detention, and possible prosecution. A Canadian commission of inquiry, for example, found that Maher Arar, a dual national of Canada and Syria, was detained by U.S. officials as he changed planes in New York on September 26, 2002, and subsequently deported to Syria where he was tortured (see Zagaris 2006). Reportedly, other governments also have engaged in extraordinary renditions.[24] Article 3(1) of the Torture Convention provides: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Condoleezza Rice, U.S. Secretary of State has "repeatedly insisted that the U.S. did not deliver prisoners to governments it believed would torture them" (Dinmore 2006: 3, col. 1).

Prosecution and punishment

If a suspected terrorist is apprehended abroad, the issue arises whether, and if so where, he will be prosecuted. If the United States wishes to prosecute him, it will seek his return, either through extradition or some other process of "rendition" such as exclusion, deportation, or, in extreme cases, abduction. (For further discussion, see Gilbert 1998.) The so-called antiterrorism conventions of the United Nations normally contain, as a basic provision, an "extradite or prosecute" requirement. That is, a state party that apprehends a person who allegedly committed a terrorist act covered by the convention must either extradite him to a state party seeking his extradition or submit his case to its authorities for prosecution. Normally, the decision whether to extradite or prosecute is in the sole discretion of the state party that has the accused in custody. The primary goal of the antiterrorist conventions is that persons accused of crimes covered by the conventions be prosecuted before the national courts of states parties in accordance with procedures that safeguard their due process rights.

It is not at all clear, however, that this goal is met with any degree of consistency. A major part of the problem is the lack of adequate data on the extent of successful actions to prevent terrorist acts and of successful prosecutions of terrorists. (For further discussion of this problem, see Murphy 2005: 465–8.) The crucial issue is the extent to which the global antiterrorist conventions have been or will be vigorously implemented. Conclusion of antiterrorist conventions is only the first step in the process. Unfortunately, many states parties seem to regard it as the last. But recent action by the U.N. Security Council has made it more difficult for states in general and states parties in particular to persist in this attitude.

Security council resolutions 1373 and 1540

U.N. Security Council Resolution 1373[25] "[c]alls upon all states" to take a number of steps in cooperation with other states to combat terrorism.[26] These steps include, "intensifying and accelerating the exchange of operational information," becoming parties to the relevant antiterrorist conventions and ensuring, "in conformity with international law," that refugee status is not abused by terrorists, and that "claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists."

Significantly, to monitor implementation of Resolution 1373, the Council established the Counter-Terrorism Committee (CTC) and called on all states to report to the

committee – no later than 90 days after the date of adoption of the resolution – on the steps they have taken to implement the resolution.[27] The Council further "[e]xpresse[d] its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter."[28] Similarly, Ambassador Jeremy Greenstock, the first chairman of the CTC, emphasized the importance of implementing antiterrorist measures. According to Ambassador Greenstock (2002), prior to the resolution "[governments] were already familiar with what needed to be done. But few had done it. Resolution 1373 drew on the language negotiated by all U.N. members in the twelve Conventions against terrorism, but also delivered a strong operational message: get going on effective measures now."

Although the record is somewhat mixed, Resolution 1373's "strong operational message" has been heard. According to Eric Rosand (2005: 548–9): "[P]artly as a result of Resolution 1373, and the work of its offspring, the Counter-Terrorism Committee ('CTC'), almost every country has taken steps to enhance its counter-terrorism machinery, whether in the form of adopting anti-terrorism legislation, strengthening border controls, becoming party to international treaties related to terrorism, or becoming proactive in denying safe-haven to terrorists and their supporters."

As noted by Rosand, in adopting Resolution 1540:[29]

> Again, faced with a global threat potentially emanating from both non-State actors as well as any State, the Council decided to adopt a resolution that imposed a series of far-reaching obligations on all States. It required them to refrain from providing support to non-State actors attempting to manufactures, possess, transport, or use WMD [weapons of mass destruction] and their means of delivery. It further required them to prohibit in domestic law any such activities by non-State actors, particularly for terrorist purposes, and prohibit assistance or financing of such activities. It obligated States to adopt measures to prevent the proliferation of WMD and their means of delivery, including by accounting for and physically protecting such items, establishing effective border controls and law enforcement measures.
>
> (Rosand 2005: 547)

Following the lead of Resolution 1373 in establishing the CTC, the Security Council decided, in adopting Resolution 1540, to create a similar committee to monitor the implementation of the latter Resolution.[30]

Space limitations allow only a (very) brief consideration of two other modern methods of counterterrorism.

Efforts to block the financing of international terrorism

As a follow-up to Resolution 1373, which had as its primary focus the financing of international terrorism, the Security Council adopted Resolution 1390,[31] which directs members of the United Nations to freeze without delay the financial assets or other economic resources of a lengthy list of individuals, groups, undertakings and entities in the annex to the resolution. Moreover, reportedly, between September 2001 and March 2002, $103.8 million in assets had been frozen on a worldwide basis, with roughly half of the funds connected to Osama bin Laden and al Qaeda. This amount pales, however, in comparison with the between $500 billion and $1 trillion reportedly laundered every year and illustrates how difficult it is to dry up terrorist funding.[32]

Civil suits

Using civil lawsuits against terrorists, terrorist organizations, and states that sponsor terrorism as a legal response to international

terrorism has only recently been undertaken and largely only in the United States. Traditionally, the emphasis has been on punishing terrorists with criminal penalties, not on holding them liable for their actions. Moreover, civil litigation in the United States as an alternative to criminal prosecution for the commission of international crimes or egregious human rights violations is a highly controversial subject. Subjecting foreign governments to such suits has been, if anything, even more controversial. Barriers to successful litigation in this area are formidable, and include, *inter alia*, resistance by the U.S. government, limits on the lifting of immunity of foreign states under the Foreign Sovereign Immunities Act, difficulties in collecting judgments in the United States and abroad, and possible hostile and retaliatory reaction on the part of foreign governments.

To the extent that actions against terrorist organizations are successful,[33] plaintiffs may have more success in collecting on their judgments because such organizations are likely to have substantial assets in the United States. But the debate continues on the desirability and feasibility of civil suits as a method of combating terrorism (see, e.g. various essays in Moore 2004).

Conclusion

This chapter has attempted to identify some of the major challenges of the new terrorism. Perhaps the overarching challenge is the complexity of these challenges and the heated debate that has arisen as to how best to meet them. The resolution of this debate is crucially important because, unlike traditional terrorism, the new or modern terrorism arguably constitutes the major current threat to the national security of numerous states, especially in the west.

Moreover, western governments, including that of the United States, are not particularly adept in some of the methods required to combat the new terrorism. These include, especially, counterinsurgency and effective use of "soft power," i.e. the ability to persuade others of the appeal of one's culture, values, and institutions,[34] to meet the ideological onslaught of Islamic fundamentalism.

An especially salient challenge of the new terrorism is that it requires a major effort to strike a proper balance between the need to safeguard national security, on the one hand, and to promote and protect human rights, on the other. Failure to prevent a future terrorist attack of the magnitude of 9/11 or greater would shift the balance alarmingly away from the concern to protect human rights.

It will also be necessary to make more effective use of international institutions, including the much maligned United Nations, to ensure the close international cooperation required to counter the globalization of terror. Recent reports that the United States and the United Nations are discussing a possible return of the United Nations to Iraq are a step in the right direction.

Lastly, it will be a challenge not to overreact to the threat of the new terrorism. We must not give in to the temptation to create a garrison state or interfere excessively with international travel and business (see Buck and Sevastopulo 2007: 1, col. 3).[35]

Notes

1 For a more extensive discussion of the obstacles to reaching agreement on a definition of terrorism, see Murphy 1990. Some recent writings on the issue of definition include Beres (1995); Byford (2002: 34); Tiefenbrun (2003); Young (2006: 23).

2 See, e.g. the Statement of Brigitte Mabandia, South Africa's Minister for Justice and Constitutional Development, on July 5, 2007, reported in AllAfrica, Inc., Africa News. In her statement, Ms. Mabandia reportedly said that the South Africa Government was of the view that the lack of consensus on the definition of terrorism in the U.N.'s Ad Hoc Committee established by the General Assembly Resolution 51/210 of December 17, 1996 was "problematic." She further reportedly said that with regard to the Comprehensive

Convention against Terrorism, South Africa "supported the early finalization of this convention but it was disappointing that the work of the U.N.'s Ad Hoc Committee was deadlocked." The reason for the deadlock, she said, "was a principled difference between states on whether or not national liberation movements should be exempted from the scope of the convention."

3 The texts of the foregoing conventions may most conveniently be found in United Nations 2001a.

4 Article 2 of the International Convention for the Suppression of Terrorist Bombing provides:

> Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or governmental facility, a public transportation system or an infrastructure facility:
> a. With the intent to cause death or serious bodily injury; or
> b. With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

Article 2 (1)(b) of the International Convention for the Suppression of the Financing of Terrorism comes closer to being a general definition of terrorism:

> Any . . . act intended to cause death or serious bodily injury to a civilian, or to any person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

For a variety of definitions of terrorism or terrorist acts, drawn from a variety of national and international sources, see van Schaack and Slye 2007: 541–44.

5 *United States Federal Crime Code* 18 U.S.C. section 2331 (1).

6 It is worth noting that in 1998 Osama bin Laden told ABC News that "he made no distinction between American military and civilian targets, despite the fact that the Koran itself is explicit about the protections offered to civilians" (see Bergen 2002: 28).

7 For an especially thoughtful treatment of these distinct consequences, see Feldman 2002: 466.

8 For various views on this issue, see Koh 2002.

9 Administration of George W. Bush (2001) Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57,833 (November 16, 2001).

10 *Hamdan v. Rumsfeld* (2006)126 S.Ct.2749.

11 United States (2006b) Pub. L. No 109-366, 120 Stat. 2600.

12 According to Jack Goldsmith, the German Interior Minister, Wolfgang Schauble, recently told the German magazine *Der Spiegel* that: "The old categories no longer apply. The fight against international terrorism cannot be mastered by the classic methods of the police . . . We have to clarify whether our constitutional state is sufficient for confronting the new threats" (see Goldsmith 2007: 11, col. 2).

13 See also Feldman 2002: 479: "More generally, however, what can we say about the use and the meaning of the categories of crime and war in this complicated situation . . . The key point . . . is surely that terror fits both categories – and neither."

14 For some of my views on the threat of computer attacks by terrorists, see Murphy 2002.

15 See Department of the Army, *Counterinsurgency* (December 2006). Because of high demand for the Manual, it also was published by the University of Chicago Press, with a new foreward by Lt. Colonel John A. Nagel and an introduction by Sarah Sewall (Department of the Army 2007).

16 Based on the testimony of Michael G. Mullen, nominee for chairman of the Joint Chiefs of Staff.

17 For a provocative thesis that modern Islam is an imperialist force, see Karsh 2006.

18 *United States Foreign Intelligence Surveillance Act* (1978) 50 U.S.C. sections 1801–1863.

19 See *United States Protect America Act of 2007* (2007) Pub.L. No 110-55, 121 Stat. 552.

20 See Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, Re: Application of Treaties and Law to al Qaeda and Taliban Detainees (January 25, 2002), available at http://msn.com/id/4999148/site/newsweek; Memorandum for Alberto R. Gonzales, Counsel to the President, Re; Standards of Conduct of Interrogation under 18 U.S.C. Sections 2340–2340A (Dec. 30, 2004), available at http://www.usdoj.gov/olc/18usc23402340a2.htm (superseding August 1, 2002 opinion outlining applicable Standards of Conduct).

21 On December 30, 2005, President Bush signed into law H.R., the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, Pub. L. No. 109-148. Title X of Division A of the Act is the Detainee Treatment Act of 2005. 10 U.S.C. section 801 Note.
22 Detainee Treatment Act, 2005: section 1002(a).
23 Detainee Treatment Act, 2005: section 1003(a).
24 Amnesty International has claimed Bosnia, Germany, Italy, Macedonia, Sweden, Turkey, and the United Kingdom have engaged in such practices (see Dinmore 2006: 3, col. 1).
25 U.N. Security Council, S.C. Res. 1373, U.N. SCOR, 56th Sess. 4385th mtg., U.N. Doc. S/Res/1373 (2001b).
26 U.N. Security Council, S.C. Res. 1373, 2001b: section 3, (a)–(g).
27 U.N. Security Council, S.C. Res. 1373, 2001b: section 6.
28 U.N. Security Council, S.C. Res. 1373, 2001b: section 8.
29 U.N. Security Council, S.C. Res. 1540, U.N. SCOR, 59th Sess. 4956th mtg., U.N. Doc. S/1540 (2004b).
30 U.N. Security Council, S.C. Res. 1540, 2004b: paragraph 6.
31 U.N. Security Council, S.C. Res. 1390, 57th Sess., 4452d mtg., U.N. Doc. S/Res/4452 (2002).
32 For a recent consideration of the difficulties in controlling the financing of terrorism, see Scott 2007.
33 For a recent example of such a case, see *Almog vs. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).
34 For a discussion of the possible uses of soft power, see Nye, Jr. 2002.
35 Reporting on European objections to a new U.S. visa law requiring travelers to the U.S. to give U.S. authorities at least 48 hours' notice of their plans to visit the country and to a U.S. law requiring the screening of all air and sea freight at foreign ports before being shipped to the U.S.