

Terrorism and the Rule of Law: A European Perspective

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INTRODUCTION

Terrorism is not a new phenomenon. It has existed for centuries and from an early stage organized society has developed its responses and defense mechanisms. Traditionally terrorism has tended to be specific to states. What is, I believe, striking about modern terrorism—and its techniques—is the transnational nature and effect of the operations of some terrorist organizations. Frequently, modern day terrorist outrages are preceded by a conspiracy that involves activists located in many different countries and from many different parts of the globe. Because of this global network, it is not surprising that the international community has resolved that the response to transnational or global terrorism requires a response from the community of democratic states.

In light of the fact that the response to terrorism is, frequently, multi-lateral, it is not surprising that sovereign states seek some ground rules to guide and regulate their responses. A state that participates in a cooperative venture to suppress terrorism puts its reputation and international standing on the line. Such governments are accountable to their electorates. Errors, mistakes, and deliberate abuse of rights tarnish every state in that venture. Thus, to encourage and induce more states to collaborate with one another, I believe it is important that there be an agreed framework regulating that response.

The motivation for such a framework is, I believe, to be found in the following:

- (a) The inherent need for a legal basis.
- (b) The domestic accountability of a democratically elected government to its electorate, and
- (c) The need for a moral legitimacy underpinning that government's actions.

As one surveys world events, it is clear that in a rapidly changing world, marked by closer economic, political, and cultural ties, more international cooperation is required in defeating terrorism. And to induce and facilitate that cooperation there must, I suggest, be an agreed framework of ground rules based on shared values. I will now address what I believe to be an emerging consensus on those values and present the case for a framework—at either international or regional level—to secure compliance with those values in inter-state cooperation in defeating terrorism.

I. EMERGING CONSENSUS

I believe it is instructive to look at developments, over the last 50 years, among the community of democratic states. Such developments, I suggest, demonstrate the embryonic development of a consensus of common values. It is, I believe, these common values that represent the acceptable limitations on the response to the threat of terrorism—national and global. Unfortunately, that consensus is not itself clearly defined although its features and contours are becoming more apparent.

But how is this consensus emerging and what are its recognizable characteristics?

Since the Second World War there has been a pronounced increase in the national and international accountability of sovereign governments and their officials together with an acceptance of the criteria for that accountability. This is a development that reflects a growing international recognition of some fundamental common values that are at the heart of the rule of law. It is observed that there is now “a commitment of the international community to put in place—and to enforce—rules of international law which would bring to an end impunity for the most serious international crimes.”¹ This is an important stage in the evolution of this consensus. It is one that has happened in a somewhat disjointed manner. Its future development requires a more coordinated approach at the international level.

A moment’s reflection on some of these international developments demonstrates how such accountability and the mechanisms for holding one to account has expanded. Among these developments are the following:

- (a) The establishment of the United Nations and the adoption of the Universal Declaration of Human Rights.
- (b) The development of international human rights institutions based on multilateral conventions such as the European Court of Human Rights.
- (c) The establishment of the International Criminal Court pursuant to the Rome Statute.
- (d) The establishment of the ad-hoc tribunals for the trial of war crimes and the high profile prosecutions of senior state officials or Heads of State such as Slobodan Milosevic.

1. Phillippe Sands, *Preface* to FROM NUREMBERG TO THE HAGUE ix, x (Phillippe Sands ed., 2003).

(e) The evolution of common legal principles based on the rights of the individual and as its concomitant the greater recourse, by domestic courts, to the decisions of the courts in other democratic states. Time and time again recourse is had in different jurisdictions to decisions of the U.S. Supreme Court, the Canadian Supreme Court, the U.K. House of Lords, the Australian High Court, and, indeed, the Irish Supreme Court. One is thereby witnessing a golden thread of jurisprudence that stretches across various jurisdictions and that reflects a common value system.

(f) The existence of a robust and independent judiciary at both the national and international level.

(g) The exponential growth of non-governmental organizations (NGOs) and their legal recognition in some jurisdictions.

(h) The adoption in the constitutions of various states in different parts of the world of fundamental rights and freedoms, such as India, South Africa, and the draft Constitution for Europe.

(i) The recognition of individual culpability and personal responsibility for war crimes and other outrages and in particular by officials who do not necessarily pull the trigger. This has its genesis in the Nuremberg trials and in particular in the case of *United States v. Altstoetter*.²

(j) The limits now placed on sovereign immunity as evidenced by the Pinochet judgment.³

(k) The adoption of international conventions directed against egregious forms of conduct in times of war or crisis, such as the 1984 Convention Against Torture.⁴

I believe that the challenge now facing democratic societies is to achieve and promote in a more structured and dynamic way and on a world-wide or regional basis the common values that are at the heart of this consensus. And it must do so in a manner that does not render ineffective the responses of sovereign states and the community of democratic states to terrorism. The tension between the reality of an effective response to terrorism and the preservation of those common values

2. *United States v. Altstoetter (The Justice Case)*, in III TRIALS OF WAR CRIMINALS BEFORE THE NUREMBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1948).

3. *R v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet*, [2000] 1 A.C. 61 (H.L.) (appeal taken from Eng.) (U.K.).

4. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, 23 I.L.M. 1027 (1984), as modified 24 I.L.M. 535 (1985).

needs to be reconciled and a moral legitimacy maintained. I suggest one possible mechanism for so doing.

These developments have not occurred in a vacuum. I will now consider the context that is accelerating the emergence of this consensus.

II. GLOBALIZATION AND COMMUNICATIONS

This phenomenon of the globalization of legal principles and practices has, in many regions of the world, a parallel in greater economic cooperation. This consists, in some instances, of a common customs area and a free-trade area. In others, such as the European Union, its Member States have moved from an economic community to a political union of some twenty-seven Member States. In addition, the international community through the World Trade Organization has been put in a robust regime to encourage free trade.

What has developed over the last 50 years economically and legally are two streams. The first is loosely described as globalization. The second, I believe, is that of internationalization of legal norms. Unfortunately, while the former exists in a sophisticated form, the latter (loosely described as global legalization) is still in an embryonic stage. It is in need of some shape and coherency. And those who seek to promote the rule of law and a general recognition of constraints in the war on terrorism need to embrace the challenge that this presents. What I believe is now required—in terms of terrorism and the rule of law—is the globalization of human rights as a concomitant of economic globalization.

It is in the sphere of international terrorism that this legal globalization is particularly important. It is through acts of terrorism that the greatest stresses and strains are imposed on democratic society. And it is at these very moments of crisis that the temptation to deviate from acceptable standards is strongest. Terrorist outrages can result in counter-terrorist outrages. Thus a vicious circle begins. The international community needs a robust regime to set an acceptable framework for cooperation in dealing with terrorism that will maintain a moral authority but that will not compromise the momentum of the defense of democratic societies.

It is through a popular recognition that a State has defended its interests against terrorism within agreed boundaries that its citizens give legitimacy to that State's actions. Once legitimacy is confirmed a State or group of States enjoys a legal and moral authority that commands inter-

national respect and cooperation. It is that moral authority that is a *sine qua non* of success in protecting democracy.

III. LEGITIMACY AND THE NEW GLOBAL JURY

Why is this legitimacy so important? In short, it is legitimacy that will be the litmus test of real global cooperation in defeating terrorism. Without that cooperation, individual States will struggle with a globalized threat of terror.

In this context I believe we need to look at the phenomenon of rapid communications throughout the world. We can all view from the comfort of our homes tragedies and outrages in remote corners of the world. Few do not recall where they were on September 11. We all recall the horror and evil of the attack on the World Trade Center. Communications have truly created the virtual global village.

One of the effects of this development of rapid communication is that the ordinary man in the street can now form his or her own judgment as to the standard of behaviour of his or her own government and the governments of foreign nations. We are no longer dependent upon diplomatic communiqués, newspaper reports from columnists, or letters from remote corners of the world that arrive months after an atrocity. Satellite and the internet have constituted us as a global jury on the actions of others. And it is that jury that gives the ultimate verdict on legitimacy—it can remove sovereign democratic governments who offend the basic standards of those common values. Thus, should a State's actions exceed the bounds of common decency and our shared values, they are devoid of any legitimacy. Popular support will be withdrawn. Governments will fall and be held to account in a way that is unprecedented.

People expect and are entitled to a morally legitimate policy in defeating terror. But like any jury that must act on the directions of the trial judge so must the new global jury use some criteria by which it sits in judgment on the legitimacy of the actions of its government or foreign governments. We cannot abdicate this function to a media that is frequently partisan. It is, I believe, a framework representative of common values that gives guidance to the jury. Once the verdict is reached that a state has acted within acceptable boundaries its moral authority is preserved, the legitimacy of its actions is upheld and an entitlement to international cooperation secured. The foundations of the rule of law are not eroded.

In this information society one cannot ignore civic society and its impact on its own sovereign governments in terms of cooperating with other states in seeking to defeat terror. A framework of common values helps to consolidate the support of civic society for anti-terrorist measures.

There is another dimension to this cooperation that shows its necessity. It is only by international cooperation that terror—in all of its manifestations—can be addressed. It is frequently the case that the solution to terrorism is at a variety of levels. A diplomatic or political accommodation may be required. In those circumstances a solution—of a political dimension—will not be found unless other states are willing to cooperate. They will withhold that cooperation if they believe the tactics of counterterrorism violate fundamental values. That is why I believe a shared consensus and an agreed framework (to which I refer below) is so important both morally and legally.

There are practical reasons to support such a framework. At a minimum it is a method of self-preservation for governments who commit to supporting anti-terrorist campaigns. A real dilemma for the international community is that a just war can—in the public mind—become unjust by the techniques of war. Counterterrorism will fail unless it enjoys popular approval based on its legitimacy. To obviate that risk a shared and effective framework of common values is required. I will now outline one possible framework.

IV. AN INTERNATIONAL FRAMEWORK

There are, I believe, a number of fundamental characteristics required for an effective framework. These essential elements are to be found in the constitutional and legal dispensation, in the European Union, for the protection and promotion of human rights. In particular, in making this proposal I draw upon the provisions of the European Convention on Human Rights and the Treaty of European Union. The former legal instrument is dedicated to protecting human rights. The latter is a treaty regulating the political union of its Member States.

I will now set out what I believe to be the elements that are a *sine qua non* of an effective framework of common values:

A. *Absolute and Qualified Rights*

The distinction between absolute and qualified human rights is of cardinal importance. Some rights can be qualified in the interests of a

common good. Other rights, however, represent in themselves what is the common good. Let me explain this dichotomy. In the European Convention on Human Rights it is recognized that the right to one's liberty can be curtailed. In times of crisis States Parties are entitled to derogate from Article 5 which protects the liberty of the citizen.⁵ It is thus a qualified right.

In contrast, Article 3 of the European Convention on Human Rights provides for an absolute right. It states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."⁶ No exceptions are permissible.

B. Domestic and International Judicial Supervision

The European Convention on Human Rights imposes obligations directly on States Parties. Hence, the rights for which it provides must be made available within the domestic legal system of the States Parties. One must, initially, have recourse to and exhaust all domestic remedies. This typically means that the courts in a State Party are vested with the jurisdiction to determine violations and provide remedies in respect thereof. When that process is exhausted and an effective remedy has not been provided then international courts supervision is engaged. The European Court of Human Rights has jurisdiction to entertain claims between States Parties and between individuals or corporate entities and a State Party.

I believe that domestic and international accountability—that is accepted by States Parties—is required to give the necessary bite to a framework to protect human rights.

C. An Independent Commission

The function of an independent commission is to enforce human rights. One cannot simply rely upon States Parties. There must be a power, when it is invoked, for an independent body or agency to investigate abuses of human rights.

5. European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 5, 15, Nov. 4, 1950, 213 U.N.T.S. 222.

6. *Id.* arts. 3, 15.

D. *Sanctions and Admission*

I readily accept that in international affairs powers of compulsion are a last resort. There is, however, a useful template that consists of incentives and disincentives that is to be found in our European dispensation. The Treaty on European Union only permits of membership of the European Union to States that respect fundamental rights and freedoms.⁷ It specifically provides that where there is a continuing violation of human rights, by a Member State of the European Union, that Member State can be the subject of an investigation and, if found guilty, be subject to a curtailment of its treaty rights such as voting. This would have severe political and economic implications for any such State. It is thus a very powerful weapon in securing compliance with human rights standards as prescribed in Article 6 of that Treaty.⁸

E. *Sovereign Decision*

At the end of the day the heart of an emerging consensus is that of agreement. Sovereign states are required to agree to that consensus and to be bound by a framework to reflect its common values. It must be a voluntary process. A state that does not willingly participate in the framework cannot genuinely be said to be committed to the common values at the heart of that framework.

In practical terms this means recognizing that each state must enjoy a liberal margin of appreciation as to its response to terrorism in its territory. The circumstances that obtain in one state are not the same as those that obtain in other states. The extent of the terror, its impact on the life of the community and its potential duration differ from crisis to crisis. Likewise the response will differ. It is, I believe, foolhardy to seek to develop a one-size-fits-all response to terror.

In this regard it is instructive to look at the approach of the European Convention on Human Rights to this issue of governmental discretion or, as it is called in Europe, the “margin of appreciation.”

In the celebrated decision *Ireland v. United Kingdom*, the European Court of Human Rights observed as follows:

It falls in the first place to each Contracting State, with its responsibility for “the life of [its] nation”, to determine whether

7. Consolidated Version of the Treaty on European Union art. 49, Dec. 24, 2002, 2002 O.J. (C 325) 1.

8. *Id.* art. 6.

that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15(1) leaves those authorities a wide margin of appreciation.⁹

The *quid pro quo* for voluntary participation in an international framework on human rights is a recognition that the institutions of that framework cannot always second-guess the decisions of a State Party as to how it defends itself—provided absolute rights are not violated and the common values are vindicated.

V. THE FUTURE

It is probably too ambitious to expect the international community to agree to such a framework and its enforcement throughout the world. It is, I believe, a more realistic aspiration to seek to apply the European template on a regional basis. Moreover, that template where integrated into a regional economic and/or political arrangement (such as the European Union) probably presents the best opportunity for preserving the rule of law, promoting and developing human rights and agreeing a common ground rules in the defeat of terrorism and the preservation of democracy.

I believe there is much that the legal community, nationally and internationally, can contribute to such a development. Whether at the United Nations, the European Union, or other forums, greater cooperation is required. In this regard it is particularly appropriate that national human rights institutions should continue to engage with one another, to exchange experiences and seek to develop a common framework of values and, above all else, mechanisms for their enforcement.

It is by securing the rule of law—through the enforcement of shared values—that the international community can best cooperate to defeat a common terrorist threat.

9. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 70–71 (1978).

CONCLUSION

It is a great honour and privilege to have the opportunity to give you the benefit of my views today. I believe through such a framework of common values the community of nations will contribute, in the words of the Treaty of the European Union, to a world of freedom, justice, and security. That must be the objective of all civilized and democratic states.