Conference Brief Strategic Studies Institute

U.S. Army War College and

The John Bassett Moore Society of International Law, University of Virginia School of Law

BEYOND THE U.S. WAR ON TERRORISM: COMPARING DOMESTIC LEGAL REMEDIES TO AN INTERNATIONAL DILEMMA

Compiled by
Dr. Dallas Owens
Strategic Studies Institute

Key Insights:

- Competing definitions of terrorism and war yield different diplomatic, legal, and military consequences. The definition a policymaker chooses is a key consideration.
- The United States defined the September 11, 2001, attacks as acts of war rather than crimes outside a war context. The resulting response was due in part to a lack of legal flexibility in U.S. law, not understanding the power imbedded in criminal categorization, and reliance on structural changes for solutions.
- European countries have a long history of individually and collectively responding to terrorism through their legal systems and the United States could profit from examining those responses.
- Latin America has a long history of contending with terrorism in a context of guerrilla warfare.
- Strategists and policymakers often incorrectly view the Islamic world as homogeneous and unchanging in its relationship to the West and to terrorism.
- Policy formulation could benefit from the many historical examples, some in U.S. history, of problems associated with applying laws of war to insurgencies and other irregular warfare.
- The United States should avoid: (1) limiting itself by adopting overly simple definitions; (2) characterizing offending groups by a tactic used and forgetting they have many other dimensions; (3) one-dimensional reactions to attacks; and (4) underestimating the value of legal solutions to international problems.

The John Bassett Moore Society of International Law, University of Virginia School of Law, in cooperation with the Strategic Studies Institute, U.S. Army War College, sponsored a conference, "Beyond the U.S. War on Terrorism: Comparing Domestic Legal Remedies to an International Dilemma," on February 25-26, 2005. Over 160 people participated in the conference conducted at The University of Virginia. Conference participants included representatives from government agencies involved in the U.S. war on terrorism, students and faculty members from other universities participating in fields related to the topic of the conference, and members of the local community and the University of Virginia.

The conference program was designed to discuss international legal remedies to terrorism in terms of: (1) the importance of definitions for war and terrorism, (2) the evolution of U.S. political and legal responses to terrorism, (3) the long and rich European experience, (4) the lessons from Latin America about terrorism and the dangers of oppressive reactions, (5) the Islamic world's role in and reaction to terrorism, and (6) the relationship between terrorism and the law of the battlefield. A panel, with members drawn from diverse backgrounds, was dedicated to each of these topics.

The Importance of Definitions for War and Terrorism.

The three panel members agreed on one theme, that definitions matter. Each elaborated on that theme to show how definitions of terrorism and war have diplomatic, legal, and military consequences.

Combining the terms into the phrase "war on terrorism" creates an even greater definitional problem, for it is used as a metaphor, an international response to a specific enemy, a description of an international armed conflict, and a proxy for long-standing internal conflicts. Each meaning has its usefulness; as a national or international unifying construct, a strategic campaign plan, or as an explanation and predictor of current and future international conflicts. But without agreement about the meaning of a hostile event, we can expect many different reactions to that event and an equal number of disagreements about the legality or legitimacy of subsequent reactions. U.S. reactions have been both curative and preventative, and have been clearly "war" in some places but not globally. Military lawyers have resisted world-wide application of a single set of operational laws, opting instead for a situational interpretation of legal concepts.

The Evolution of U.S. Political and Legal Responses to Terrorism.

The panel addressed three aspects of U.S. political and legal reactions to September 11, 2001. Panelists agreed that the U.S. response has been inadequate, but varied in the nature of and explanation of its inadequacy. One panelist thought the U.S. legal system, unlike European systems, has inadequate flexibility; another believed that defining activity as terrorist warfare rather than criminal enhanced perpetrators' status, thereby providing them what they wanted; and, the final panelist thought that emphasizing structural changes to increase security, rather than personnel solutions, was a mistake. Collectively, their advice to the U.S. Government was to treat perpetrators as criminals, add flexibility to the legal system for more efficient prosecution, and rely on existing enforcement organizations, but enhance their capabilities by recruiting the right people and offering the right training.

The Long and Robust European Experience.

The third panel presented two examples of how European countries individually (Germany) and collectively (European Union) respond to terrorism and contended that the United States could profit from examining those responses. Germany recognized the Islamic terrorist threat, but rejected the metaphor of war in favor of its constitutional law framework. That commitment provides for the same civil liberty protections for all acts, whether or not committed by citizens, and without regard for motivation.

The European Union (EU) has experienced monumental challenges with its efforts to expand its member countries, maintain its collective security, slowly eliminate internal borders, and concurrently encourage expansion of international trade. The EU certainly has not solved all of its external or internal border issues, but the United States can profit from its border protection and migration management organizational and technological efforts, in both pre- and post-9/11 years.

The Lessons from Latin America.

Like Europe, Latin America has a long history of contending with terrorism, but unlike Europe, in a context of guerrilla warfare. Though guerrilla warfare may be conducted without terrorist tactics, the association in Latin America was so prevalent that the two were often perceived incorrectly as the same. A derivation of terrorism that occurred in other regions, but became particularly common in Latin America was terrorism sponsored by the State. In many cases, dictatorships provided direction and support to groups that attacked the government's opponents using tactics of terrorism.

The region-wide level of terrorism has decreased in recent years, but remains high in some areas. In particular, Colombia and, to lesser extents, Venezuela and spill-over areas around Colombia continue to experience significant rates of terrorism. In Colombia, a hierarchical and fractured society, both parties to the

civil war have escalated terror against civilians, but the 50-year conflict has largely moved to rural areas. In the United States the conflict is seen as primarily about drugs and a sub-war of the Global War on Terrorism (GWOT); Colombians see it differently, but are willing to publicly represent the war in U.S. terms to obtain U.S. support.

Most of Latin America is committed to defense against terrorism through "rule of law." Many Latin Americans were killed on September 11, 2001, and the lingering impact of regional terrorism was a huge economic loss, through reduced tourism and trade. The Organization of American States (OAS) began efforts in the mid-1990s to address terrorism by creating legal standards, denying sanctuary, and cooperating to punish offenders. Those efforts received impetus in 2001 and expanded to emphasize training for port security.

The Islamic World's Role in and Reaction to Terrorism.

To view the Islamic world as either homogeneous or unchanging in its relationship to the West or to terrorism is tempting but incorrect. Experts on Turkey, Pakistan, Saudi Arabia, and Islamic law provided examples of a dynamic region and religion. Turkey is a Muslim democracy that has used tough measures to suppress insurrection, but recently has turned to more liberal methods and increased its tolerance for freedom of expression. Its desire to become part of the EU has accelerated the country's turn westward. That western orientation has, in turn, fueled internal conflict. The West has heralded Turkey as a democratic model for other Middle Eastern countries. The Turks see their democracy as a product of their national context and think other Muslim states must follow their own paths.

Pakistan is fighting terrorism while also contending with widespread lawlessness, ungoverned regions, and a serious lack of resources. It has successfully initiated some high level international cooperation and obtained technical resources, but these accomplishments have changed nothing for police officers in communities. These police forces must contend with the huge rift between followers of the secular tradition and jihad, who constitute only 5 to 10 percent of the population, but are thoroughly entrenched in some communities. Resources go to the military rather than the police. Hence, the police still have no interprovince communication and no link to Army intelligence. They lack training, and torture remains their primary interrogation means. The focus of the fight against terrorists should shift from the army to the police.

Saudi Arabia's royal family has long feared the country's religious leaders and avoids alienating them. The country systematically uses anti-Western propaganda to avoid or slow influences from western culture. Saudi Arabia also resents the United States for undermining Saudi leadership of OPEC, ignoring Saudi advice about Iraq, and other policies. After a brief liberalization in 2002-03, the Saudi government again became conservative to accommodate religious leaders. Saudi Arabia's reaction to physical attacks on its homeland has been to confront military aspects of terrorism; it has not, however, confronted its philosophical aspects. For the United States to gain endorsement from Saudi Arabia's Muslim leaders, it must correct perceptions of U.S. human rights violations, settle the Israel-Palestinian conflict, and begin exiting Iraq.

Finally, a new norm seems to be evolving in jihad behavior, that of self-annihilatory violence (suicide bombing). The Koran provides no compelling support for martyrdom, and Sunni tradition is decidedly on the side of compromise to avoid death. At least one branch of Shiite tradition celebrates martyrdom, but that tradition is far from gaining universal acceptance. Basing tactics on utilitarian adaptations such as suicide bombings, rather than relying on ideological absolutes for guidance, may cause long-term damage to Muslim jurisprudence. Unfortunately, few Muslims in positions of religious authority are discussing this theological issue.

Relationships between Terrorism and the Law of the Battlefield.

Historical examples, many involving the United States, of problems associated with applying laws of war to insurgencies and other irregular warfare abound. Soldiers and leaders must take existing law and apply it to their particular situation. This often results in the adjustment, change, or evolution of law. Examples of adjustments by governments and insurgents can be found in Chechnya, Israel, and Iraq.

In Chechnya, the rebels and Russian army both changed tactics from the first to second war. The first was bloody and included much direct conventional warfare. In the second, insurgent tactics shifted to urban guerrilla warfare and terrorist attacks; rebels introduced suicide attacks and more direct

roles for women. When choosing tactics, insurgents consider four audiences: opposing government, their own organization, constituent public opinions and international public opinion. The Russian government changed tactics in reaction to rebel initiatives, not from lessons learned in the earlier war.

Israel defines the current style of attacks on their citizens as "armed conflict short of war." Their defense forces hastily responded with three new programs: (1) targeted individual killings; (2) assigned residence (deportation); and (3) fence construction. Targeted individual killings were considered legal if intelligence was sufficient to confirm the identity of targets, and unreasonable collateral damage was avoided. The program was evaluated as successful because replacement enemy leaders are less effective, and the program keeps the enemy on the run. Assigned residence, deemed ineffective, has been discontinued. Fence construction was begun with misgiving, but proved to be practical at reducing infiltration. Where fences were constructed, terror events were reduced by 90 percent.

Iraq offers examples of applying rules of war to fiscal, legal, contractual, and detention problems. The context of conducting combat operations in a sovereign nation is an important consideration, but supporting troops in small unit day-to-day operations is the greatest challenge. Legal support was designed to help soldiers understand the rule of law, reduce unnecessary suffering by both combatants and noncombatants, and cope with war's inherent brutality. Measures that help reach this goal include lawyer assistance in the targeting process, adopting a gradual response policy, relying on precision munitions and other technological advances, and flexibility in operating procedures.

Even the best intended military policies and comprehensive programs will not eliminate all violations of the laws of war. They can, however, establish a clear legal line, reduce the frequency of violation, and punish violators. Leaders who have formal training and legal support systems enhance effectiveness.

The Way Ahead.

The United States should avoid limiting itself by adopting overly simple definitions; characterizing offending groups by a tactic used and forgetting they have many other dimensions; one-dimensional reactions to attacks; and underestimating the value of legal solutions. If these pitfalls are avoided, the United States can better understand the nature of threats to its security; treat opponents as complex organizations with various motives and means; better understand consequences of its actions for enemies, its own citizens, and the international legal order; and more easily accept the responsibility to conduct international affairs in harmony with international law.

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