INTERNATIONAL LAW AND THE WAR ON TERRORISM

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A. The Terrorist Threat

Terrorism is new neither as a crime nor as a security threat. It did not begin with September 11 and it has not ended since then. Rather terrorism is an age-old phenomenon, which however develops and changes over the years. None of the five continents has been spared this scourge; many countries have been the theater of the long and tragic history of terrorism.

Yet we have to realize that September 11 changed the world, even if many of the world’s most pressing problems remained the same. Modern terrorism has grown to an unprecedented extent and magnitude. The emergence of what some writers call mega-terrorism has changed some of the basic assumptions on terrorism. Brian Jenkins’ famous analysis that terrorists want a lot of people to watch and listen, but not a lot of people dead, seems nowadays to work the other way round: the more people dead the more will watch and listen. The lack of differentiation among terrorist targets (average train or plane passengers instead of political, economic or military leaders) is also a reason why religiously motivated terrorists are striving to achieve control over weapons of mass destruction, or at least radiological devices (dirty bombs).

Since this article does not discuss the development of terrorism as such, a brief summary of some main features which are of relevance for the pertaining legal issues will have to suffice. Contemporary terrorism is different from earlier forms because of (1) the globalization of terrorist movements in terms of their transnational ideology, agenda and

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membership together with network-style decentralized structures and 
(2) the perfection of asymmetric warfare, where the victim is not a tar-
get as such, but rather part of a communication strategy—resulting in 
the increased lethality of terrorist attacks, and (3) the fact that internal 
and external security have become less clearly separable.

B. THE FIGHT AGAINST TERRORISM AND INTERNATIONAL LAW

I. Challenges, Questions

Dealing with the legal framework for the fight against terrorism raises 
numerous legal challenges and questions. This article will deal with 
only a limited number of them, mostly relating to matters of the law on 
the use of force, international humanitarian law (IHL) and its relation-
ship with Human Rights Law (HRL):

– Is there a right to self-defence, as recognized in Art. 51 of the UN 
  Charter, against terrorist actors?
– Is the “global war on terrorism” a viable legal concept? Is an armed 
  conflict with terrorists at all legally possible and how do we deter-
  mine whether and where there is such an armed conflict?
– What are the consequences for a state hosting or sponsoring 
  terrorists?
– What is the relationship between International Humanitarian 
  Law (IHL) and Human Rights Law (HRL) in the context of fighting 
  terrorism?
– And, finally, is there enough common ground to establish minimum 
  safeguards or principles for the treatment of detainees, regardless of 
  whether or not a situation amounts to an (international or non-
  international) armed conflict?

II. Some Preliminary Remarks

Fighting against terrorism, global war on terrorism, combating terror-
ism: all three and many more terms abundantly used in politics and the 
media belong to an armed conflict nomenclature. It therefore seems 
necessary to underline that many, if not most, terrorist acts, as well as 
most activities to prevent and to counter terrorism, should be seen 
through a national and international criminal law prism. Even in times 
of modern, new, hyper- or mega-terrorism terrorist acts are first of all