

## **The Difficulty With International Law During the War on Terror**

The Bush administration's war on terror has had a significant impact on the international community. This world-wide conflict has pushed the limits of international law and questioned its value. The lack of an agreement on the meaning of the word 'terrorism' is a major reason why problems arise when fighting this global problem. The American Heritage Dictionary defines terrorism as "the unlawful use or threatened use of force or violence by a person or an organized group against people or property with the intention of intimidating or coercing societies or governments, often for ideological or political reasons". But many questions arise from this definition. For example, how does one differentiate acts of terrorism from acts of war? Why does terrorism occur? Can terrorism ever be acceptable? The vagueness of the word 'terrorism' and other such language in international law lead to different interpretations and therefore disagreement on a standard rule. Many authors have attempted to shed light on this matter by offering their insights on policies of fighting terrorism. Authors Abraham Sofaer and Kenneth Roth highlight the ambiguity of language in international law during the fight against terrorism which leads to the need for international laws and treaties to be revised in order to keep up with the current status quo.

Abraham Sofaer begins his piece, "Terrorism and the Law", by discussing different means that a state can utilize while dealing with terrorism. There are diplomatic means and military means, but he focuses on the use of law. This is due to the fact that "Americans are particularly attracted to the law as a means for repressing violence, and are committed domestically and internationally to using law to control criminal conduct

and to resolve disputes”<sup>1</sup>. Although using the law is successful when dealing with domestic crime, problems arise when dealing with international terrorism mainly because the world has no international police force or judicial system. The lack of international cooperation is an even greater dilemma.

Terrorism’s association to negativity and evil is embedded in the minds of the majority of Americans. But in reality, the acceptance of terror is far more widespread around the world as many nations regard terrorism as a legitimate means of warfare<sup>2</sup>. Acts of terror may often be justified when they are attributed to injustice and frustration. Sofaer highlights a series of seven United Nations General Assembly resolutions on terrorism and its causes that were passed during the seventies and eighties to illustrate the inability of the international community to settle on a clear meaning of terrorism. There are attempts among radical groups that are responsible for terrorist acts to seek legitimacy by securing a legal status for terrorism that obscures its fundamentally criminal nature<sup>3</sup>. The extent to which the rules of the Geneva Convention should be applied was heavily debated.

Further disagreement was seen regarding treaties among states that obligate them to extradite to other states persons accused of committing, in those states, the crimes associated with terrorism. The political offense claim is often used as a defense against extradition. The UN Convention Against the Taking of Hostages also redefines some aspects of terrorism to include them under the rules applying to combatants. This ambiguity leads to differences while discussing the use of force against terrorists and their supporting states.

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<sup>1</sup> Sofaer, 901

<sup>2</sup> Sofaer, 903

<sup>3</sup> Sofaer, 912

In “The Law of War in the War on Terror”, Kenneth Roth describes how the actions of the Bush administration during the war on terror have threatened the most basic due rights. In an attempt to rally support for this cause, President George W Bush has stretched the meaning of the word ‘war’, referring to it in the literal sense as a real war. Therefore, unlike the war on drugs, which uses the term metaphorically, the literal rhetoric allows the Bush administration to “give itself the extraordinary powers enjoyed by a wartime government to detain or even kill suspects without trial”<sup>4</sup>.

Roth also questions the use of ‘war rules’ during the war on terror. He believes there is not enough explanation of when they should be applied. The International Committee of the Red Cross offers guidelines for determining an armed conflict, but they are more suited to address political conflicts rather than global terrorism. From these guidelines, it becomes unclear whether al Qaeda should be considered an organized criminal operation or a rebellion. The application of these terms to al Qaeda would each result in different consequences while handling the problem.

Roth continues by providing examples of how the Bush administration uses the rules which are in its best interest. The cases of Jose Padilla and Ali Saleh Kahlal al-Marri are of interest. They show how different classifications of suspects according to war time or law enforcement rules will be used to provide for the preferred outcome. Washington’s use of war rules when law enforcement rules could reasonably be followed when it has taken custody of a series of al Qaeda suspects in countries such as Indonesia, Pakistan, and Thailand is considered to be troubling by Roth. The murky intelligence that

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<sup>4</sup> Roth, 2

drives terrorist investigations often leads to mistakes which cannot be easily corrected if war rules apply, since the government is never obliged to prove a suspect's guilt<sup>5</sup>.

The author then reminds the readers that the conduct of the United States sets an example for governments around the world. Many other states would be all too eager to find an excuse to eliminate their enemies through war rules<sup>6</sup>. Therefore, there should be strict criteria that a situation must meet in order for a nation to invoke war rules. Even then, war rules should be used sparingly, especially when local authorities can and are willing to arrest and deliver a suspect to an independent tribunal – regardless of how the tribunal then rules<sup>7</sup>. This will separate and make clearer distinctions between war rules and law enforcement rules.

There is no doubt that both Sofaer and Roth see problems with the use of international law when fighting terrorism. Both authors believe that the ambiguity of terminology used in law-making creates problems down the road when these laws are applied. Sofaer discusses the international community's inability to decide on actions that are inclusive in terrorism. The final resolution of a series of seven General Assembly resolutions in December of 1985 unequivocally condemned, as criminal, all acts, methods and practices of terrorism. But at the same time, it reaffirmed each people's inalienable right to self-determination, and the legitimacy of struggles against colonial and racist regimes and other forms of alien domination<sup>8</sup>. It was a sign that many states still believed that wars of national liberation justified or excused terrorist acts.

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<sup>5</sup> Roth, 5

<sup>6</sup> Roth, 6

<sup>7</sup> Roth, 7

<sup>8</sup> Sofaer, 905

Meanwhile, Roth is critical of the lack of guidelines for the use of war rules versus law enforcement rules. He uses the case of the six Algerian men arrested in Bosnia to show how precarious this situation is. The United States government initially followed law-enforcement rules and secured the men's arrest. After a three-month investigation, Bosnia's Supreme Court ordered the suspects released for lack of evidence. Instead of providing additional evidence, however, Washington simply switched to war rules and pressured the Bosnian government to hand the men over to indefinite detention at Guantanamo Bay<sup>9</sup>.

The ideals of Sofaer and Roth are different in that the former criticizes the law itself while the latter focuses on the abuse of the laws that are in place while fighting terrorism. Sofaer argues that the law is not presently being used to counter terrorism. He even says that it has been placed very much at the service of those who embrace political violence. A resolution condemning the United States in 1985 for bombing raids in Libya in retaliation to an attack in Rome and Vienna which killed five Americans would have given state-sponsored terrorism its ultimate legal defense, immunizing international aggression against noncombatants from the use of force in self defense, had it not been vetoed<sup>10</sup>. This proves worrisome for Sofaer as he calls for a change in the issues that international law is designed to serve.

John Yoo and Robert Delahunty of the American Enterprise Institute for Public Policy Research would relate to Sofaer's stance considering their article, "Rewriting the Laws of War for a New Enemy". The authors believe that the Geneva Convention will become increasingly obsolete because it makes little sense when applied to a terrorist

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<sup>9</sup> Roth, 5

<sup>10</sup> Sofaer, 922

group or a pseudo-state<sup>11</sup>. This is evident in their defense of attorney general Alberto Gonzales in response to accusations by his critics that he opened the door to the abuse of Al Qaeda, Afghan, and Iraqi prisoners. The Geneva Convention rules should not apply to terrorists since they thrive on killing civilians and have nothing riding on the humane treatment of American prisoners. Similarly to Sofaer, these authors believe that today's international laws are not fit to provide successful results during the fight against terrorism.

On the other hand, Roth condemns the abuse of international law by states, specifically the United States. He is troubled by Washington's excessive use of war rules to serve its interest. In response, Roth comes up with a three-part test for states to determine if war rules should apply to a situation. First, an organized group must be directing repeated acts of violence against a state, its citizens, or its interests with sufficient intensity that it be fairly recognized as an armed conflict. Second, the suspect must be an active member of an opposing armed force or must be an active participant in the violence. Third, law enforcement means must not be available<sup>12</sup>. This will limit the use of war rules to situations that it is necessary for. It also puts greater significance on law enforcement rules. Unlike Sofaer, Roth believes that the laws in place are appropriate and should be followed.

Washington Post staff writers Charles Babington and Michael Abramowitz show similar views to Roth in their article "U.S. Shifts Policy on Geneva Conventions". They outline a recent Supreme Court decision which overturned the Bush administration's policy that the Geneva Conventions did not apply by law to terrorism suspects held at

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<sup>11</sup> Yoo and Delahunty

<sup>12</sup> Roth, 7

Guantanamo Bay, Cuba or in U.S. military custody elsewhere<sup>13</sup>. It is considered a triumph that these suspects, some who might be innocent civilians mistakenly swept up in U.S. military raids, may now be brought to trial. In accordance with Roth, these authors want to see the United States better adhere to existing rules of international law during the fight against terrorism.

The position of Kenneth Roth in “The Law of War in the War on Terror” is especially interesting as he offers a realistic view on the issue. Existing international agreements such as the Geneva Convention rules were developed for a reason. The United States is arguably the most powerful nation in the world. With this title comes responsibility of setting an example for governments around the world. If the U.S. does not follow the Geneva Conventions, then these rules may as well be of no use. The decisions of powerful nations often influence the decisions of other nations. For example, as Roth stated, other states would be eager to find an excuse to eliminate their enemies through war rules if the United States’ excessive use of war rules continued. Israel has already used this rationale to justify its assassination of terrorist suspects in Gaza and the West Bank, but it is not difficult to imagine Russia doing the same to Chechen leaders in Europe, Turkey using a similar pretext against Kurds in Iraq, China against Uighurs in Central Asia, or Egypt against Islamists at home<sup>14</sup>. American interests may even be hurt because of other nations using this policy.

To provide world-wide stability, it is best if the powerful nations follow the laws that have been agreed upon. If these laws are no longer effective, states should agree to discuss and provide amendments to them. For example, conventional state-to-state

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<sup>13</sup> Babington and Abramowitz

<sup>14</sup> Roth, 6

warfare is becoming less common due to the rise of terrorism and guerilla warfare. This was seen with Israel's clash with Hezbollah in Lebanon during the summer of 2006. The constitutions of many states are constantly being revised because of changing circumstances. Therefore, it would also be smart to adjust the Geneva Conventions and United Nations resolutions to match the current norm. Those who have ratified the Geneva Convention rules and any other states which are interested should assemble perhaps under the supervision of the United Nations. These states should work to assess the new and dissimilar conflicts that arise in the present day. Amendments can then be made to certain rules which are deemed outdated with a majority vote. For example, new and clearly defined vocabulary should be added to reflect the new types of warfare which are seen today. At the same time, parts of the text which no longer apply can be removed. The process of amending a constitution in the congress or parliament of a state can be used as a template. These changes will prevent states from using loopholes around certain laws to do what they want. These loopholes are often what make international laws and treaties ineffective. The laws become more legitimate if they are updated and well-defined, and they will be better suited to fulfill their purpose.

It is also interesting to note how the language that is used in international law can be problematic. One does not think of the different interpretations and exclusivity of words such as 'war' and 'terrorism' in every day life, but it is necessary to provide solid and exact definitions for vague terminology if positive results are desired. An ideal situation would be if all states could agree on precise terminology for multi-lateral treaties and other agreements. It could then be known when the determined law applies to a certain situation or not. But in reality, this seems highly improbable. One can see



problems arising just by considering the number of nations involved in these decision processes. It becomes increasingly difficult to agree on a specific decision when more parties are involved. This is because each state will have its own unique interests which it would like to adhere to. During the cold war, it was impossible for the United States and the Soviet Union to come to a shared agreement on any question brought forth in the United Nations Security Council.

The use of international law in the fight against terrorism has proved controversial in most cases. Abraham Sofaer and Kenneth Roth have exposed problems in two different areas, the laws themselves and the adherence to them. Some of these laws are outdated and have lost touch with the status quo. This difficulty is seen with the sharp divide among the supporters and opponents of the Bush administration's policies during the war on terror. This is an example of the broad implications that this international problem has, in this case affecting domestic issues in the United States. Without a solid international consensus for clear-cut agreements, the importance of international laws will remain diminish and additional conflict will arise.

### **References**

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