

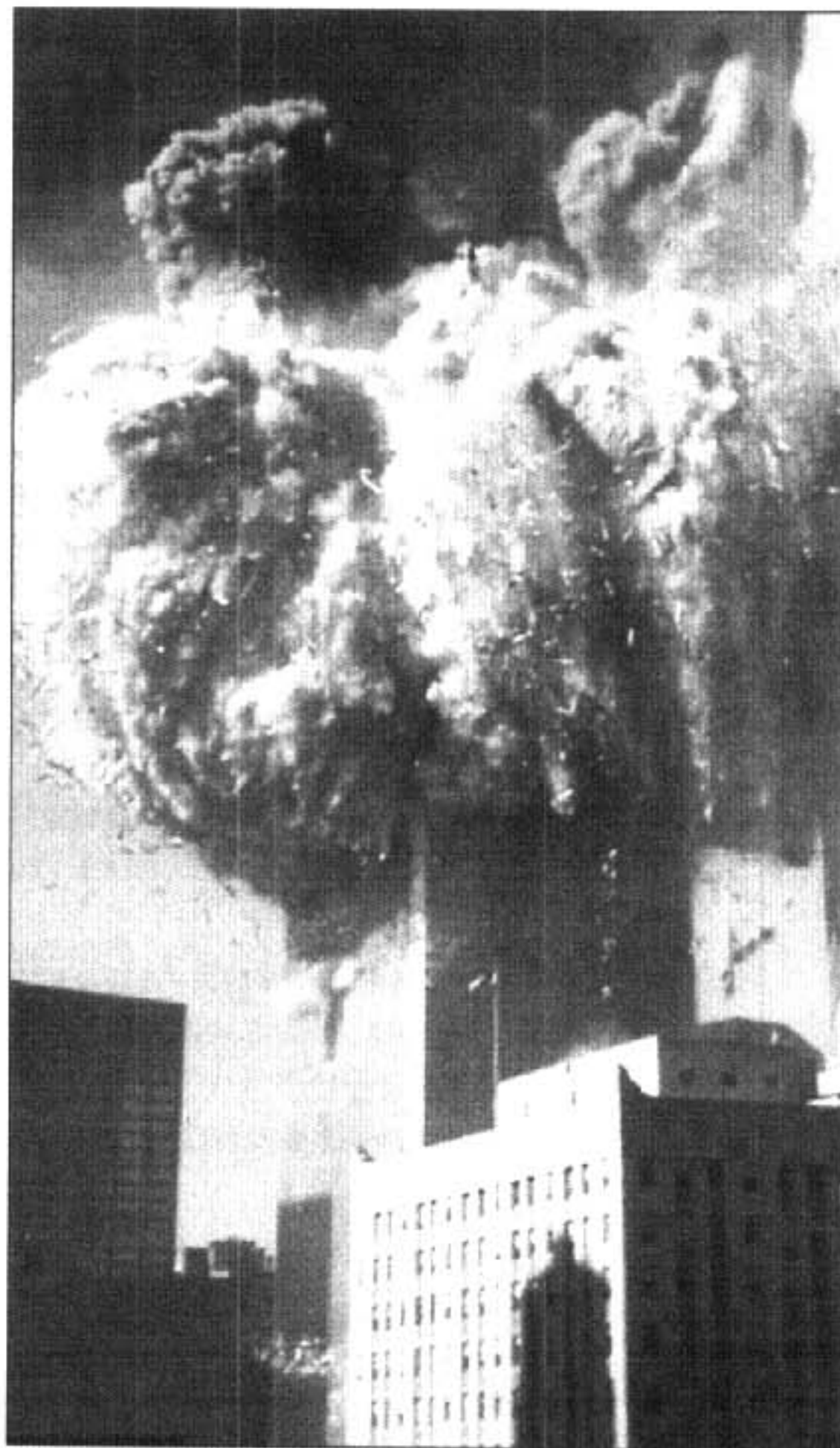
INTERNATIONAL TERRORISM: responses and justifications

Ron Smith discusses the problem of combating terrorism and suggests the need for international co-operation and co-ordination.

Old habits die hard and nowhere is this more evident than in talk about terrorism. For many this is still an incorrigibly contested concept, and thus the word and its cognates still tend to be used exactly as a particular speaker or writer may choose. This is clearly a state of affairs that hobbles rational debate. If we are effectively to deal with the problem of terrorism (and especially international terrorism) we must accept a clear definition of the concept and stop hiding behind arbitrary and self-serving usages. This should not be a difficult project since the United Nations has already set out a conceptual framework and begun filling in the detail. Of course, this is only the first stage in combating terrorism. The second is to amend the behaviour of states so that they no longer support such activities. For this to be effective it may be that strict measures will be required.

Whatever may have been the situation prior to 12 December 2000, it cannot now be said that there is no agreed definition of terrorism. On that date the UN General Assembly adopted a resolution from its Sixth Committee that characterised terrorism in the following terms:

criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for



The collapse of the World Trade Center's south tower

political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.

Also relevant is the International Convention for the Suppression of Terrorist Bombings, which came into force in May 2001. As well as accepting the basic concept, it also provides a definition of one kind of criminal act that qualifies as terrorism:

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 government facility, a public transportation system or an infrastructure facility.¹ (Article 2)

Four principle conceptual elements can be extracted from these definitions. Terrorism entails:

- certain criminal acts that target the public or public institutions (for example, terrorist bombing of public places);
- an intention to provoke extreme anxiety ('terror');
- a palpable political purpose; and,
- an explicit denial that such tactics are justified in any circumstances, or for any cause.

The first two elements in this conceptualisation conform quite precisely to the traditional understanding. Terrorism is a kind of propaganda. As the nineteenth century Russian theorist Bakunin had it, it is the 'propaganda of the deed'. In this original conception, the essence was the degree of atrocity (which made it newsworthy), not simply that 'innocents' were targeted, although this was the common association. In the modern context, any action against 'combatants'² that is likely to be viewed as atrocious is also very likely to be illegal under contemporary humanitarian law and thus, like targeting non-combatants, a crime.

Crucial feature

The crucial feature of terrorism, then, is that it is a kind of communication. There may be (usually are) victims (persons harmed), but these persons are not really the 'target' (the addressee of the message). This is typically whole societies and governments. In the present case, the addressee may be a whole 'civilisation'³ (the 'Western world') and the message, 'stop interfering in the world of Islam'. This is the third element of the United Nations' definition of terrorism, the political purpose. Whatever the detail of the message, it is intended to have some effect and achieving that effect is its political purpose.

It is noteworthy that the United Nations' definition of terrorism (to which the 11 September acts in the United States conform) does not allow for any justification (and this its fourth crucial element). Terrorism cannot be

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New Yorkers flee as one of the twin towers collapses on 11 September 2001

justified by any cause. It is simply an illegitimate political tactic. It is to be condemned everywhere and anywhere it occurs.

The fact that there is now an agreed international definition of terrorism has another clear implication. It is no longer possible to claim that the concept is undefined and thus avoid the consequences. It can no longer be said that 'my terrorist is your freedom-fighter'. Now, my terrorist is your terrorist and vice-versa. A terrorist is someone who intentionally targets civilians or civilian targets in order to further a political cause. In modern parlance, terrorism may be an obvious asymmetric response but it is an illegitimate response.

Obvious justification

The most obvious justification for an absolute prohibition on terrorism is a deontological one. The deliberate targeting of civilians is generally taken to be morally unacceptable and this is reflected in a variety of international agreements and scholarly opinion

down the ages. In the terrorist context, it also entails a lack of respect for the rights of the individuals concerned, who are effectively treated as means to an end and not as an end in themselves. Terrorism cannot be effectively justified on consequential grounds either. The historical record shows very few cases where a terrorist campaign has had the effect of changing policy or causing governments to act in such a way as to further the terrorist's ends. The psychology of the situation is rather to harden attitudes in the victims' societies and in their governments.

Notwithstanding this and the unequivocal nature of the UN definition of terrorism, there will be a considerable reluctance on the part of many states to end their support for what they see as liberation struggles or other just causes. The problem will be particularly acute where the tactics of the activists ('insurgents') are less obviously terroristic, or where they use a variety of tactics, some of which may be seen as legitimate and some not.

Progress in dealing with the scourge of international terrorism depends crucially on the acceptance of a precise and agreed definition of the concept. The international community, through the United Nations, has now effectively produced such a definition and it is also reflected in the Convention Against Terrorism Bombings, which came into force last year. This convention lays upon states strict duties in regard to their assistance to, or acquiescence in, international terrorism but compliance has so far been weak. This raises the additional question as to what else might be done to restrain support for such activity. In this context it is argued that a doctrine of strict responsibility (analogous to the doctrine of command responsibility for war crimes) ought to be adopted in respect of such support.

There is actually a clutch of problems here and all of them are difficult. The first is that of characterising what might be legitimate means of advancing a particular cause, supposing that a claim of just cause may be made. Elsewhere, this author has argued that the definitional features of such a 'just' strategy are a directness of agency (that is, it does not seek to attain its ends via raising apprehensions in a target population) and an intention to target only combatants.¹ This latter provision would allow for a moral defence of double effect in the event that non-combatants were harmed but it would not include actions that were manifestly indiscriminate or careless.

Two problems

Of course, this still leaves two major problems. Insurgencies of whatever character are clearly illegal from the point of view of domestic law in the country concerned, even if those harmed are 'combatants' by some humanitarian criteria. International law and humanitarian sentiment may accept or justify the actions of the insurgents but they are nonetheless crimes as far as the affected states are concerned. There is also a substantial difficulty in determining who are the legitimate combatants in these sub-national conflicts. In some cases the Geneva concept of 'participation in hostilities' may be enough but, again, there is a formidable problem in interpretation. To this we need to add the problem of making a judgment where the insurgents vary their tactics over time and in response to circumstances as they evolve. If some of their modes of action are clearly terroristic and some legitimate guerrilla actions (as defined above), what judgment is to be made in the end? A start can clearly be made with the easy cases but it might be hard to convince the many interested parties that this is anything but arbitrary.

As the Afghan conflict comes to a resolution there is going to be an enormous demand for the international community to address other conflicts that appear to involve terrorism (or what is claimed to be terrorism). If the enormous amount of non-combatant killing that has characterised informal conflict since the Second World War is to be reduced, it will be necessary for the international community to persist, both with the definition of terrorism as adopted in December 2000 and with the adoption of further conventions that make explicit the obligations of states. Until a new norm is established (and conformity is wide-



Firemen search among the rubble of the World Trade Center

spread) there may also be a need to take direct action where states persist in permitting or supporting terrorist action from their territory.

Ineffective law

Terrorism, then, is already clearly enough defined and it is also clearly contrary to international law. There are international conventions and there are also clear statements of policy from the United Nations (both the General Assembly and the Security Council). These instruments provide unambiguous obligations for states together with a clear mechanism for bringing perpetrators of terrorism to account. Notwithstanding this, the law is manifestly ineffective. It is failing largely because too many states perceive terrorist activity to serve their interests, and because it is in the nature of international terrorism that establishing criminal responsibility for particular acts in particular cases can be very difficult. It is also noteworthy that such international law as there is does not provide sanctions against states that fail to fulfil their obligations.

The problem of attributing responsibility for acts of international terrorism is analogous to the general problem of attributing responsibility for war crimes. To deal with this, in the trials following the Second World War at Nuremberg, Tokyo and other places, there was adopted a strict principle of 'command responsibility'. Under this principle, it was not necessary to show that a *particular* per-

son or persons gave specific orders for a specific atrocity or that the individuals concerned knew that particular outrages were being committed. They were guilty if they ought to have known that actions of a particular character were being planned or attempted and did nothing to prevent it.

A number of high-profile German or Japanese military commanders were condemned under this principle. An example of this is General Yamashita, who was condemned by an American military tribunal in relation to war crimes committed in the Philippines in the closing stages of the Second World War. The principle of command responsibility was subsequently adopted into international law. It was applied in the Pinochet case and is now incorporated in the Statute for the International Criminal Court (Article 20). Under this principle, criminal responsibility is established if

- crimes are committed by forces under the effective command, or control, of the individuals concerned;
- that they knew, or ought to have known, that these forces were committing, or were about to commit, these crimes;
- that they failed to take all necessary steps to prevent or repress their commission.

It seems evident that the political leaders of states that allow or support terrorism from their territory may be held responsible in an analogous way, and

the widespread calls for 'proof' in relation to the atrocities in New York and Washington should be responded to accordingly.

International law

The UN General Assembly resolution of 12 December 2000 and the now-in-force International Convention for the Suppression of Terrorist Bombings establish international law in the matter of terrorism (the relevant portions are cited above). As far as the convention is concerned, it would seem that the forcible taking control of an aeroplane that is then flown into a public building is a terrorist act and thus the events of 11 September 2001 fall within the scope of the convention and of the General Assembly resolution. It was thus entirely appropriate that resolutions passed by the Security Council and the General Assembly would unequivocally condemn them as terrorism.

More generally, the actions of those responsible for the 11 September attacks could be seen as criminal under established international law as codified in the statutes of the proposed International Criminal Court.⁵ Terrorist acts of the kind committed on 11 September 2001 could be seen as coming within Article 7 of this document ('Crimes against humanity'). Crimes under this section include murder or other inhumane acts as part of any attack directed against a civilian population, which is part of a systematic plan to commit such an attack.

The Convention for the Suppression of Terrorist Bombings provides for the extradition of suspected terrorists to the states within whose jurisdiction the offences were committed and states that may harbour such persons are obliged to co-operate with this process. The latter may not (for example) refuse extradition on the grounds that the offence was 'political'. However, it is very evident that in practice these provisions do not take us very far. In the first place only 53 states have committed themselves by ratifying the convention and only 58 have signed (as of March 2002). This is less than one-third of all states. Those outside the process include many of the most significant states in this context: Afghanistan, Pakistan, Iran, Iraq and Syria.⁶ Interestingly, states that have bound themselves include Azerbaijan, India, Kyrgyzstan, Russia, Turkmenistan and Uzbekistan. Even a significant increase in ratifications and a widening acceptance on the part of states of the obligation to hand over terrorism suspects

would not of itself alter the fundamental problem.

Missing dimension

The crucial missing dimension here is the responsibility of states in respect of the planning and preparation of terrorist acts within their jurisdiction. Again, their duty is clear. The General Assembly resolution of 12 December 2000, cited above, called upon states to refrain from any participation (either active or passive) in terrorist activities. (The same resolution calls upon member states to become parties to the relevant international conventions and protocols relating to terrorism.)

[E]very State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.⁷

A similar duty is set out in the Suppression of Terrorist Bombing Convention. The problem is that many states do not apparently see themselves as bound by these strictures. They are apt to avoid any obligation to act by feigning ignorance of what may be going on within their jurisdiction, or demanding 'evidence' that particular activities may be linked to particular terrorist events.

This is where the analogy with strict command responsibility may be pertinent. It should be adopted as a principle of law in relation to international terrorism that states have an absolute obligation to know what is happening within their jurisdiction and, if what is happening is in any way connected with the financing and planning of terrorism, to stop it. Of course, this much is implicit in the resolution

of 12 December 2000 and the Terrorist Bombing Convention. The crucial question is, what is to be done if, notwithstanding a clear duty, states do encourage or permit acts of terrorism from their territory, as most recently Afghanistan has done?

The answer seems clear. Such states effectively commit an act of war. Parties against whom such acts have been committed have a clear right to respond (this, too, is enshrined in the UN Charter). Their objective in such an event would be to defeat the party responsible for the attack (in the most recent case the government of Afghanistan) and thus end the threat from that particular source. This is what the United States and its allies set out to do. It is also clear that what is being done is in the interests of a much wider community. The use of terrorism (the deliberate targeting of civilians for political purposes) is a scourge of contemporary society.

Clear need

It is evident that the terrorism threat cannot be securely dealt with at the back-end (that is, in the place where and at the time when terrorist acts are perpetrated). The range and extent of possible targets is too large to ensure complete protection through security regimes, however extensive these may be. Terrorism must be dealt with primarily at the front-end, where it is being planned and organised.

For nationally based terrorism, this is clearly a responsibility for the security agencies of the state concerned. For international terrorism (where options are planned in places beyond the jurisdiction of the target state) there is a clear need for international co-operation and co-ordination. However, the major responsibility must lie

with the law enforcement agencies of the states in which these planning and organisational activities take place. Those states that are reluctant to co-operate must be obliged to do so. Without this, there is every reason to anticipate further attacks, and perhaps of increasing atrocity.

Justified outrage and global sympathy at a new attack using chemical, biological or even nuclear materials is no substitute for a determined programme of prevention. In its resolution of 12 December 2000, the United Nations is envisaging further additions to the international instruments to counter terrorism. These efforts need support. A law-based approach to countering terrorism is clearly to be preferred to an occasional outburst of military activity. But there is still a question as to what is to be done about those states that defy international law and the common interests of humanity, by not doing all that they can to prevent or repress terrorist activity on their territory. It is a question we need to address.

NOTES

1. The International Convention for the Suppression of Terrorist Bombings, Art 2.
2. It is recognised that the definition of 'combatant' (as opposed to 'non-combatant', or 'innocent', or 'member of the public') is itself controversial. For present purposes the distinction adopted in the Geneva Conventions and Protocols is accepted. Combatants (legitimate targets in war) are members of the armed forces of a party to a conflict or those who 'participate in the conflict'. For a more detailed discussion see my *Violence, Politics and Morality*, Ch 7 (Hillcrest Books, 1999).
3. I am using the word here in the sense intended by Samuel Huntington in his *Clash of Civilisations*. However, the present conflict is not such a clash, since the terrorist actors do not appear to represent mainstream Islam. It is to be hoped that it does not develop in this way, but that is clearly the objective of at least some of its promoters.
4. R.C. Smith, *Ethics and Informal War* (New York, 1991).
5. As adopted by the UN Diplomatic Conference of Plenipotentiaries in Rome on 17 July 1998.
6. Amongst other non-signatories are Australia and New Zealand.
7. Resolution of the UN Security Council, adopted 28 Sep 2001.

Biological terrorism is a major danger

