

TERRORISM IS ALSO DISRUPTING SOME CRUCIAL LEGAL CATEGORIES OF INTERNATIONAL LAW

by Antonio Cassese*

1. Introduction

The terrorist attack of 11 September has had atrocious effects not only at the human, psychological and political level. It is also having shattering consequences for international law. It is subverting some important legal categories, thereby imposing the need to rethink them, on the one hand, and to lay emphasis on general principles, on the other.

I shall not dwell on the use of the term ‘war’ by the American President and the whole US administration. It is obvious that in this case ‘war’ is a misnomer. War is an armed conflict between two or more States. Here we are confronted with an extremely serious terrorist attack by a non-State organization against a State. Admittedly, the use of the term ‘war’ has a huge psychological impact on public opinion. It is intended to emphasize both that the attack is so serious that it can be equated in its evil effects with a State aggression, and also that the necessary response exacts reliance on all resources and energies, as if in a state of war.

I shall rather discuss two other issues: the legal characterization of the terrorist attack from the viewpoint of international criminal law, and the question of what sort of forcible action international law permits the US to take, and against whom.

2. The definition of terrorism: a crime against humanity?

So far, terrorist attacks have usually been defined as serious offences, to be punished under national legislation by national courts. The numerous international treaties on the matter oblige the contracting States to engage in judicial cooperation for the repression of those offences. In my opinion, it may be safely contended that, in addition, at least trans-national, state-sponsored or state-condoned terrorism amounts to an international crime, and is already contemplated and prohibited by international customary law as a distinct category of such crimes.

Be that as it may, it is a fact that, when some States, in particular Algeria, India, Sri Lanka and Turkey, proposed that terrorism be considered as one of the international crimes to be subjected to the jurisdiction of the International Criminal Court (ICC), namely as a crime against humanity,¹ many States including the US opposed such proposal essentially on four grounds: (i) the offence was not well defined; (ii) in their view the inclusion of this crime would politicise the Court; (iii) some

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¹ See A/CONF.183/C.1/L.27.

acts of terrorism were not sufficiently serious to warrant prosecution by an international tribunal; (iv) generally speaking, prosecution and punishment by national courts were considered more efficient than by international tribunals. Many developing countries also opposed the proposal for they felt that the Statute should distinguish between terrorism and the struggle of peoples under foreign or colonial domination for self-determination and independence. As a result, both that proposal and a later one by India, Sri Lanka and Turkey,² were rejected. Recent cases are in line with this cautious attitude. In 1984, in *Tel Oren v. Libyan Arab Republic*, the Court of Appeals of the District of Columbia held³ that since there is no agreement on the definition of terrorism as an international crime under customary international law, this offence does not attract universal jurisdiction. Recently, on 13 March 2001, in a serious case of terrorism allegedly involving Ghaddafi, the French Court of Cassation held that terrorism was not an international crime entailing the lifting of immunity for heads of State; it therefore quashed proceedings initiated against the Libyan leader.⁴

The terrorist attack of 11 September has been defined a crime against humanity by a prominent French jurist and former Minister of Justice, Robert Badinter, by the UN Secretary-General Kofi Annan, as well as by the UN High Commissioner for Human Rights, Mary Robinson.⁵ Distinguished international lawyers have taken the same view.⁶ Indeed, that atrocious action exhibits all the hallmarks of crimes against humanity: the magnitude and extreme gravity of the attack as well as the fact that it has targeted civilians, is an affront to all humanity, and part of a widespread or systematic practice.

It may happen that States gradually come to share this characterization and consider serious crimes of terrorism as falling under crimes against humanity (in particular, under the subcategories of ‘murder’ or ‘extermination’ or ‘other inhumane acts’ included in Art. 7 of the ICC Statute). If this occurs, the notion of crimes against humanity would be broadened. However, the problem would then arise of (i) the specific conditions under which terrorist attacks fall under this notion, and of (ii) whether the future ICC would be authorized also to adjudicate serious cases of terrorism. It is perhaps plausible to contend that large-scale acts of terrorism showing the atrocious features of the attacks of 11 September, or similar to those attacks, fall under the notion of crime against humanity as long as they meet the requirements of that category of crimes (whereas no special account should be taken of one of the specific features of terrorism, namely the intent to spread terror among civilians).

² See A/CONF.183/C.1/L.27/Rev.1.

³ 726 F.2d 774 (D.C. Cir. 1984).

⁴ See the text of the decision in *Bulletin des arrêts de la Cour de Cassation, Chambre criminelle, March 2001, no. 64, at 218-9*. See thereon the comments by S. Zappalà, in 12 EJIL (2001), 595-612 and by F. Boitard in 105 RGDIP (2001), at 474-91..

⁵ Badinter and Annan have made statements to the French radio and CNN respectively. For the statement of M. Robinson see *UN Daily Highlights*, 25 September 2001, <http://www.un.org/News/dh/20010925.htm>

3. Effects on the law of self-defence

The impact of the 11 September tragedy on the law of self-defence is more worrisome. So far, in spite of legal controversies among both states and scholars, the legal picture was sufficiently clear. In the case of an armed attack by a state on another state, pending action by the Security Council or in the absence of any action by this body, the victim could react in individual *self-defence*, until such time as the Security Council stepped in. The state aggressed could also request assistance of other states, who could thus act in collective self-defence. Resort to force in self-defence was however subject to stringent conditions:

- (i) The necessity for forcible reaction must be ‘instant, overwhelming, leaving no choice of means, and no moment for deliberation’ (according to the famous formula used by the US Secretary of State Webster in 1842 in the *Caroline* case and taken up by many for post-1945 self-defence);
- (ii) The use of force was to be exclusively directed to repel the armed attack of the aggressor state;
- (iii) force must be proportionate to this purpose of driving back aggression;
- (iv) The use of force must be terminated as soon as the aggression had come to an end or the Security Council had taken the necessary measures;
- (v) States acting in self-defence must comply with the fundamental principles of humanitarian law (hence, for instance, respect the civilian population, refrain from using arms causing unnecessary suffering, etc.).

Intervention of the Security Council was another possible reaction to aggression. The Security Council, being unable to apply Art. 42 of the UN Charter for lack of UN armed forces at its disposal, could however *authorize* the victim of aggression as well as other states to use force against the aggressor (this, as is well known, was done in 1950 in the case of Korea, and in 1990, in the case of the Iraqi aggression against Kuwait).

As to the specific question of how to react to *terrorist attacks*, some States (notably Israel, the United States and South Africa) argued in the past that they could use force in self-defence to respond to such attacks, by targeting terrorist bases in the host country. This recourse to self-defence was predicated on the principle that such countries, by harbouring terrorist organizations, in some way promoted or at least tolerated terrorism and were therefore ‘accomplices’: they were responsible for the so-called indirect armed aggression. However, the majority of states did not share let alone approve this view. Furthermore, *armed reprisals* in response to small-scale use of force short of an ‘armed attack’ proper, have been regarded as unlawful both against states and against terrorist organizations.

⁶ See for instance Alain Pellet, in *Le Monde*, 21 September 2001, at 12. Also the British lawyer G.Robertson, Q.C. had

The events of 11 September have dramatically altered this legal framework. On 12 September the UN Security Council unanimously passed a resolution on the terrorist attacks (res. 1368). This resolution is *ambiguous and contradictory*. In its preamble it recognizes the right of individual and collective self-defence; however, in operative para. 1 it defines the terrorist attacks of 11 September as a ‘threat to the peace’, hence not as an ‘armed attack’ legitimising self-defence under Art. 51 of the UN Charter.⁷ In operative para. 5 the resolution expresses the Security Council ‘readiness to take all necessary steps to respond to the terrorist attacks...in accordance with its responsibilities under the Charter of the United Nations’; in other words, it declares to be ready to authorize military and other action, if need be. Thus, by this resolution the Security Council wavers between the desire to take matters into its own hands and resignation to unilateral action by the US. Probably the will of the US to manage the crisis by itself (with the possible assistance of states of its own choice), without having to go through the Security Council and regularly report to it, accounts for the ambiguity of the resolution.

On the same day, the North Atlantic Council unanimously adopted a statement where it relied upon Art. 5 of the NATO Statute, which provides for the right of collective self-defence in case of attack on one of the 19 members of the Alliance. By so doing, these 19 states opted for the solution based on Art. 51; they preferred this avenue to that of centralized use of force under the authority of the Security Council.⁸

It would thus seem that in a matter of a few days, practically all states (all members of the Security Council plus members of NATO other than those sitting on the Security Council, plus all states that have not objected to resort to Art. 51) have come to *assimilate* a terrorist attack by a terrorist organization to an armed aggression *by a State*, entitling the victim state to resort to individual self-defence and third states to act in collective self-defence (at the request of the former state).

The magnitude of the terrorist attack on New York and Washington may perhaps warrant this *broadening of the notion of self-defence*. I shall leave here in abeyance the question of whether one can speak of ‘instant custom’, that is of the instantaneous formation of a customary rule widening the scope of self-defence as laid down in Art. 51 of the UN Charter and in the corresponding rule of customary law. It is too early to take a stand on this difficult matter. Whether we are simply faced with an unsettling ‘precedent’ or with a conspicuous change in legal rules, the fact remains, however,

suggested this definition (see *The Times*, 18 September 2001, at 18).

⁷ The references to the ‘threat to the peace’ and ‘the right of self-defence’ have been reaffirmed in the preamble of the subsequent resolution adopted by the Security Council on 28 September 2001 (res. 1373(2001)).

⁸ NATO, press release 124 of 2001 (‘The Council agreed that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all’).

that this new conception of self-defence poses very serious problems. Let me discuss the principal ones.

So far, self-defence was justified only *against States*, under the conditions set out above. As a consequence, the target was specified: the aggressor state. The purpose was clear: to repel the aggression; hence also the duration of the armed action in self-defence was fairly clear: until the end of the aggression. Now, instead, all these conditions become fuzzy. Problems arise with regard to the *target* of self-defence, its *timing*, its *duration*, and the *admissible means*.

The issue of the *target* of the armed action in self-defence raises two serious problems. First, while in 'classic' self-defence the target is course the state author of the aggression, now it is the terrorist organization that must be targeted; it follows that force may be used against the territory of the state harbouring such organization. This violation of the sovereignty of that state is legally justified by its aiding and abetting terrorism, or in other words by its breach of the international 'duty' laid down in various UN resolutions,⁹ and incumbent upon any state, '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'. Thus, aiding and abetting international terrorism is equated with an 'armed attack' for the purpose of legitimising the use of force in self-defence. The second problem relates to the range of target states. We know that the entire network of terrorist cells making up the organization that has allegedly masterminded and organized the attack of 11 September sprawls across as many as 60 countries. May all these countries become the target of armed action? Definitely not, otherwise the armed conflict may lead to a third world war. But how may one delimit the number of states against which armed force in self-defence may be legitimately employed? (I shall try to answer this question below).

In addition, traditional or 'classic' self-defence must be an immediate reaction to aggression; if the victim state allows time to elapse, self-defence must be replaced by action under the authority of the UN Security Council. Nor can the victim state resort to armed reprisals, which, as I said before, are held to be contrary to international law. In the case under discussion states seem instead to have come to accept a *delayed response*.

Furthermore, while it is fairly easy to define when 'traditional' self-defence must come to an end, in this case the *duration* of the action in self-defence may not be established *a priori* for, it has been asserted, the 'war' will take years.

Things become even more complicated as regards the *means* to be used. 'Classic' self-defence authorised resort to armed force against military objectives, within the bounds set by international humanitarian law. It would seem that now some states tend to legitimise any kind of resort to

violence, including a vast range of means and methods that would even encompass extra-judicial assassination of terrorists or even use of nuclear weapons. This may turn out to be a Pandora's box, setting an extremely serious precedent for the international community.

4. The need to rely upon the general principles of international law

These dramatic changes make reliance on the *general principles* constituting the foundation of the international community imperative and salutary. These principles impose, among other things: :

- (i) To pursue peace and refrain as much as possible from resort to armed violence,
- (ii) To respect human rights,
- (iii) To spare innocent civilians from belligerent action;
- (iv) To settle disputes or resolve crises within a multilateral framework, that is by refraining to act unilaterally, so as to limit arbitrary reactions as much as possible;
- (v) To pursue justice and consequently repress international crimes by bringing the alleged culprits to court.

These principles may serve to restrain the use of force and prevent its spawning violent reactions capable of undermining the very foundations of the international community.

The US initially code-named its action 'infinite justice'. Thus it laid emphasis on making justice rather than taking revenge or engaging in tit for tat action. It is suggested that, to be consistent, and comply with the existing legal principles of the international community, the action by the US should proceed as much as possible along the following lines:

- (i) It should be as little unilateral as possible. In the resolutions they have adopted on 12 September 2001, the UN Security Council (res. 1368) and the General Assembly (res. 56/1) have clearly (and rightly) stressed the need for *concerted and multilateral action*.¹⁰ In the same vein, the Security Council, in resolution 1373 unanimously adopted on 28 September 2001, rightly decided on a set of measures all states are obliged to take under Chapter VII to suppress terrorism. The Security Council is thus emphasizing its own authority and the need for collective action. Within this framework, it would seem that, although (subject to the conditions set out below) the US need not require the authorization of the Security Council to take military action, it should at least report to it immediately and, so far as possible, request that body to direct at least some of the military or economic responses to the terrorist attack.

⁹ See General Assembly res. 2625-XXV, of 24 October 1970 (so-called Declaration on Friendly Relations), as well as Security Council resolutions 1189 (1998) of 13 August 1998 and 1373(2001), of 28 September 2001.

¹⁰ The Security Council called upon 'all States to work together urgently to bring to justice the perpetrators, organizers and sponsors (operative para. 3), called upon the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation' (operative para. 4) and expressed 'its readiness to take all necessary steps to respond to the terrorist acts' (operative para. 5). The General Assembly in paras 3 and 4 urgently called for 'international cooperation', respectively to bring to justice the culprits and 'to prevent and eradicate acts of terrorism'.

(ii) As has been asserted, there is strong evidence suggesting that the terrorist organization that planned and executed the attacks is headquartered in Afghanistan. Since this state has long tolerated the presence and activities of terrorist organizations on its territory and is not willing to cooperate with the international community for detaining the terrorists, its territory may become a legitimate target.

However, the use of military force must *proportionate*, not to the massacre caused by the terrorists on 11 September, but to the purpose of such use, which is (i) to detain the persons allegedly responsible for the crimes, and (ii) to destroy military objectives, such as infrastructures, training bases and similar facilities used by the terrorists. Force *may not* be used to wipe out the Afghan leadership or destroy Afghan military installations and other military objectives that have nothing to do with the terrorist organizations, unless the Afghan central authorities show by words or deeds that they approve and endorse the action of terrorist organizations. In this last case one would be confronted with a condition similar to that described by the International Court of Justice in *US Diplomatic and Consular Staff*:¹¹ the terrorists would have to be assimilated to state agents and the Afghan state itself would bear international responsibility for their actions, with the consequence that the state's political and military structures could become the legitimate target of US military action in self-defence. In any case, all the fundamental principles of international humanitarian law need to be fully respected. Furthermore, as soon as legitimate military objectives are destroyed, military action must cease.

As for *other* states that allegedly host and protect terrorist organizations linked to the attacks of 11 September, it does not seem legally justified for the US to decide on its own whether or not to attack them.¹² First, the use of armed force against these states might expand the political and military crisis and eventually lead to a world conflict, contrary to the supreme goal of the UN (and indeed of the whole international community) to preserve peace and security. Second, self-defence is an *exception* to the ban on the threat or use of force laid down in Art. 2(4) of the UN Charter, which has by now become a peremptory norm of international law (*jus cogens*). Like any rule laying down exceptions, that on self-defence must be *strictly construed*. It would thus seem that the US is not entitled to further select states as targets of its military action. Such attitude would run contrary to the concept of self-defence and to the aforementioned conditions, to which it is subject. We are not faced here with the attack by five or six states on another state, legitimising the victim immediately to react

¹¹ See ICJ Reports 1980 at 36, para. 74. The Court held that the Iranian militants who had illegally occupied the US embassy and consular premises, once their action was approved and endorsed by the Iranian government, became 'agents' of the Iranian state, which therefore became internationally responsible for their action. As the Special Rapporteur on State responsibility J. Crawford rightly stated, acknowledgment and approval by a state conduct 'as its own' may have retroactive effect (International Law Commission, Fiftieth Session (1988), A/ CN.4/490/ Add. 5, paras 283-4).

¹² This would seem instead to be the US position. According to the US Secretary of Defence D. H. Rumsfeld, 'Our response may include firing cruise missiles into military targets somewhere in the world...our opponent is a global

militarily against all the aggressors, which are states well identified by the fact that they have participated in the aggression. Instead, we are confronted here with attacks emanating from non-state organizations, which may be hosted in various countries possibly not easy to identify and, what is more important, whose degree of 'complicity' may vary. It would be legally unwarranted to grant the state victim of terrorist attacks very sweeping discretionary powers that would include the power to decide what states are behind the terrorist organizations and to what degree they have tolerated, or approved or instigated and promoted terrorism. A sober consideration of the general legal principles governing the international community should lead us to a clear conclusion: it would only be for the Security Council to decide whether, and on what conditions, to authorize the use of force against specific states, on the basis of compelling evidence showing that those states, instead of stopping the action of terrorist organizations and detaining its members, harbour, protect, tolerate or promote such organizations, in breach of the general legal duty referred to above.

(iii) In addition to using military force the US should also aim at *bringing the persons accused of the crimes to justice*, by detaining them or inducing the states which host them to hand them over. Although of course the Americans are eager to have their own courts try the alleged culprits, the proposal recently made¹³ that those alleged perpetrators be handed over to the Hague International Criminal Tribunal for trial, after promptly revising its Statute, has much merit. An international trial would dispel any doubt about a possible bias (as has been noted, a New York jury 'would be too emotionally involved in the crime'¹⁴). In addition, an international trial would give greater resonance to the prosecution and punishment of the crimes allegedly committed by the accused.

(iv) If the US really wants to pursue justice it must not confine itself to repressive methods. This would be a short-term response. Things must be viewed in *a long-term perspective*. Justice also encompasses social justice, that is, eradication of deep social inequalities such as poverty, economic, social and cultural underdevelopment, ignorance, lack of political pluralism and democracy, and so on. It stands to reason that all these phenomena lie at the root of terrorism and contribute to fuel hatred and bigotry: as Kofi Annan recently stated, 'people who are desperate and in despair become easy recruits for terrorist organizations'.¹⁵ The US could promote a potent multilateral effort, lasting several years, to come to grips with these huge problems. In addition, it could promote the gradual solution of such festering questions as that of the Middle East.

network of terrorist organizations and their state sponsors...we may engage militarily against foreign governments..'(*The International Herald Tribune*, 28 September 2001, at 6.)

¹³ See G. Robertson, in *The Times*, cit.

¹⁴ See G. Robertson, cit.

¹⁵ Transcript of press conference of President Chirac and Secretary-General Kofi Annan, 19 September 2001, at 4 (<http://www.un.org/News/Press/docs/2001/sgsm7964.doc.htm>).

5. Conclusion

In sum, the response to the appalling tragedy of 11 September may lead to acceptable legal change in the international community only if reasonable measures are taken, as much as possible on a collective basis, which do not collide with the generally accepted principles of this community. Otherwise, the road would be open to the setting in of that *anarchy* in the international community so eagerly pursued by terrorists.