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Campus Den Haag

Grotius Centre for International Legal Studies

Counter-terrorism strategies, human rights and international law: meeting the challenges

Final Report Poelgeest Seminar

Introduction

From 10 to 13 April 2007, the Grotius Centre for International Legal Studies of Leiden University and Campus The Hague convened a seminar of eminent persons at the Oud-Poelgeest estate, close to the city of Leiden. The seminar was organized with the full support of the Netherlands Ministry of Foreign Affairs. Earlier, the Minister for Foreign Affairs had expressed in parliament[1] his willingness to facilitate a meeting of eminent persons to discuss the challenges to current international law resulting from the struggle against transboundary terrorism.

The twenty-nine participants in the seminar came from ten countries and from a variety of backgrounds, including judges, UN rapporteurs, former ministers, academics and NGO representatives.[2] The seminar brought together people from the US and other Western States including Mediterranean States as well as from the Muslim and Arab world. Moreover, different lines of thought were represented. The debate that transpired was therefore not only transatlantic but truly international in character. The diversity of participants from various walks of life and from the fields of public international law, international criminal law, human rights law, international humanitarian law and peace and security studies constituted a unique feature for a seminar on this particular topic.

The participants were welcomed by Professor Paul van der Heijden, Rector of Leiden University, and subsequently addressed by the Netherlands Minister of Foreign Affairs Maxime Verhagen. Minister Verhagen emphasized the need for a proactive and integrated approach in counterterrorism strategies and for the observation of human rights norms. He challenged the participants to come forward with answers to the legal dilemmas. The seminar was not open to the public and the discussions were

[1] See letter of Minister Bot to Parliament, dated 4 December 2006. Parliamentary records 27 925, No. 240.
[2] See the list of participants in Annex I. Annex II contains the questions which were submitted to the participants in advance and Annex III the programme and working paper of the seminar.

informal, free and frank. The seminar took place under the so-called Chatham House rule: views expressed during the seminar are not attributed to a particular speaker. This report focuses on the most salient features of the seminar. It does not claim to be exhaustive or to reflect the individual views of all participants.

The main conclusions of the seminar were that all nations, whether or not directly affected by terrorist acts, share a common interest in being more proactive and adopting a preventive approach and that the challenge to be met does not primarily concern the lack of applicable rules. Consequently, there is no need for an entire new international law paradigm to address the problem of terrorism, even though it is true that not all relevant branches of international law have an equal level of sophistication and that some are in fact in need of further development. For example, the legal regime applicable to 'transfer' of persons may need to be strengthened. The main contentious issues spring from disagreement and confusion on how to qualify and define (certain acts of) terrorism in legal terms and which branch of law or which specific rules are applicable and govern a given situation. This report addresses these issues.

In section 1, the definitional problem is analyzed as well as the legal and non-legal implications of qualifying an act as terrorism. Subsequently, the applicability and interrelationship of specific branches of international law regulating counter-terrorism strategies are discussed. In section 2, the applicability of *ius ad bellum* rules is examined and more specifically the admissibility of the use of force in self-defence against terrorist acts. If armed force is used, then an armed conflict may arise to which international humanitarian law is applicable. In section 3, the applicability of international humanitarian law is discussed as well as the interrelationship between international humanitarian law and human rights law. The subject of section 4 is law enforcement outside the context of armed conflict and the need to improve transboundary assistance in criminal cases. In section 5, the focus is on law enforcement operations in failing states and the possible applicability of *ius ad bellum* and *ius in bello* to these operations. Section 6 addresses the preventive approach as a specific counter-terrorism strategy. Section 7 summarises the main findings of the report.

1. Positioning international terrorism and the challenge of agreeing on a definition

Terrorism constitutes an assault on universal human values and against humanity. Terrorist acts are a threat to civilized society for all states that must be addressed using the full range of legal mechanisms available and applicable. Principles and norms derived from various branches of international law are applicable to the prevention and punishment of terrorist acts. These branches include international human rights law, international humanitarian law, international criminal law, the law on peace and security, and chapters of general international law such as the law on state responsibility. In order to

determine which rules of international law are applicable in specific situations, it is first necessary to position the concept of international terrorism as such.

Distinction between domestic and international terrorism

It is generally acknowledged that a distinction can be made between international terrorism, also called modern terrorism, and domestic terrorism. While international law addresses both forms of terrorism, it seeks to regulate only international terrorism. However, lacking clear definitions, the precise boundaries between these two forms of terrorism are hard to draw. Moreover, there are also hybrid situations, which are not easily definable as either domestic or international terrorism, but are more a mixture of the two, such as domestic terrorism that is financed through foreign channels. It may further be observed that, on occasion, the UN Security Council has qualified what appeared to be an act of domestic terrorism as a threat to peace and security,[3] and thereafter generally determined that any "act of terrorism" amounted to such a threat.[4] This may also to some extent blur the conceptual differences between the two forms of terrorism.

Two phenomena that affect modern international terrorism are:

- Globalization. This process enhances the questioning and subsequent eroding of the power of states within their own territory and undermines their dominant status as subjects of international law. Increasingly more entities, such as international and financial organizations as well as terrorist groups, are emerging as relevant actors at the national level.
- Multiple identities. There is a tendency for people to have more than one single identity that may lead sometimes to the acceptance of multiple memberships or identities in a community (local, national, international), without a normative way of privileging one identity or membership over another. Multiple identities are facilitated by the ease of global communication through email and internet.

In view of the blurring of the distinction between international and domestic terrorism and in light of the two processes mentioned above, terrorist acts more often assume an international dimension and hence come more readily within the purview of international law.

The need for a definition

The definition of terrorism is a starting point in assessing counterterrorism measures by states. However, given the lack of a generally accepted international definition of terrorism, states are in a position to use their own national definitions and this opens the door to a fragmented approach and

[3] UN Security Council Resolution 1465, 13 February 2003, regarding the bomb attack in Bogota, Colombia on 7 February 2003. Furthermore, the general determination that any act of international terrorism is a threat to peace as in Security Council Resolution 1373 (2001) was not appropriate. Specific determinations are preferable.
[4] E.g. UN Security Council Resolution 1516, 20 November 2003 or Resolution 1530, 11 March 2004.

abuse. International treaties can provide a solution to this situation. Particular forms of terrorism have been defined in specific treaties. Yet, the crimes prescribed in these treaties are sometimes broader than what is generally understood as terrorism, while on the other hand not all forms of terrorism are covered. Therefore, a common definition in a comprehensive counter-terrorism convention should still be the goal even if the adoption of such a treaty in the near future is rather unlikely.

Nevertheless, some progress towards a general definition has been made. A notable example of a generic description of terrorist acts is Security Council Resolution 1566 (2004),[5] which builds on existing treaties and meets requirements of legality. In addition, definitions in regional instruments may be useful, in particular the EU definition as laid down in the Council Framework Decision of 13 June 2002.[6]

In spite of the lack of an international definition, it is important to realize that basic agreement exists on the core of what constitutes terrorism. In essence, a terrorist act is (1) an attack against civilians, committed with the intent to cause death or serious bodily injury, or (2) taking of civilian hostages, or (3) damage to property (e.g., an attack against a power plant or cyber terrorism), in all cases with the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population or compelling a government or an international organization to undertake or abstain from undertaking a certain act.[7] There is agreement that a terrorist act is never justifiable whatever the purpose for which the act is said to be committed.[8]

The implication of qualifying a certain act as an act of terrorism

The mere qualification of a certain act as a terrorist act has no immediate consequences for the applicability of a specific field of law, since a terrorist act may be committed in peace time as well as in times of war. A terrorist act does not necessarily in itself constitute an armed attack, nor does it necessarily give rise to an armed conflict. In this context, it may be noted that the term "global war against terror" which is currently used to describe the fight against terrorism has no legal significance but at the time was employed more as a means of garnering support for building a united front to fight terrorism.

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[5] UN Security Council Resolution 1566, 8 October 2004, unanimously adopted.

[6] Council Framework Decision of 13 June 2002 on combating terrorism, Decision 2002/475/JHA, Official Journal of the European Communities, L 164/3.

[7] UN Security Council Resolution 1566, 8 October 2004, para. 3. It may be noted that various counter-terrorism conventions contain so-called state military exclusion clauses, exempting "the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law" and "the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law". See, e.g., Art. 19, para. 2 of the Terrorist Bombing Convention of 1997 (in force since 2001).

[8] Cf. the World Summit Outcome document, *UN Doc.* A/RES/60/1, 16 September 2005, para. 81.

The dangers of misusing the term "terrorism"

From a strategic point of view, an inflated use of the term "terrorism" should be avoided, as this may have adverse consequences. It is preferable to speak of individual acts of terrorism and terrorist crimes that must be countered rather than to use the generic term "terrorism" or "terrorist organization". The depiction of a global network of international terrorism directed from one single centre might well be artificial. Furthermore, it may be counterproductive as such a portrayal of "the enemy" may induce individuals with dangerous intentions or in despair to copy terrorist acts or to seek channels to be recruited by this network.

- *The precise boundaries between international and domestic terrorism are difficult to draw and hybrid situations may occur, such as domestic terrorism that is financed through foreign channels.*
- *Consensus on a definition of terrorist acts is emerging in specific international instruments, but a comprehensive counter-terrorism convention with a clear definition is still desirable.*
- *A terrorist act does not necessarily in itself constitute an armed attack, nor does it necessarily give rise to an armed conflict.*
- *An inflated use of the term terrorism may well have adverse consequences and should be avoided.*

2. The use of force in self-defence against terrorist acts

The debate on the applicability of *ius ad bellum* rules to acts taken in response to terrorist acts concerns exclusively the use of *military* force and not other acts of extraterritorial law enforcement. The discussion centres on the scope of the right of self-defence as enshrined in Article 51 of the UN Charter and as it exists under customary international law.[9] The key questions in this discussion relate to the concept of "armed attack", and the possibility of self-defence against non-state actors.

The scope of the right of self-defence

As a preliminary remark, it can be observed that there is sufficient leeway for the inherent right of self-defence as recorded in the UN Charter to be interpreted in such a way that the needs of the international society are taken into account. Through the reference to customary international law ("inherent right"), the principles of necessity and proportionality are widely understood to be part and

[9] Article 51 of the UN Charter reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of the right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

parcel of the international law of self-defence.[10] Their actual contents are not cast in stone but subject to evolution in the light of changing perceptions and needs. A traditional and too orthodox reading of Charter provisions may well result in rendering the UN Charter irrelevant. However, self-defence is not an unqualified right which can be invoked at the whim of the victim state. Apart from a reporting duty to the Security Council and recognition of the primacy of the Council should the Council itself take measures to maintain or restore international peace and security, any act of self-defence on the basis of Article 51 is also linked to a number of restrictions concerning the nature, scope, location and duration of the actions in self-defence.[11]

The concept of "armed attack"

As to the issue of what constitutes an armed attack, it may be questioned whether the guidance given by the International Court of Justice in the Nicaragua case in 1986 is sufficient, namely that the qualification of a military operation as an armed attack would depend on the scale and effect of that operation.[12] It seems now accepted that non-state actors can mount attacks of such a scale that they can be considered an armed attack sufficient to give recourse to the sovereign right of self-defence. In the context of terrorist acts, there may be a need for more specific threshold criteria regarding the level of severity, and the extension in time and space of different related acts, to determine whether the act(s) constitute an armed attack.

Self-defence against non-state actors

On the issue of terrorist acts committed by non-state actors, it may be observed that Article 51 of the UN Charter does not premise the right of self-defence on the commission of an armed attack *by a state*. In the immediate post-September 11th Resolutions 1368[13] and 1373[14], the UN Security Council recognized the right of self-defence without explicit reference to state involvement. However, in the Advisory Opinion on the Wall case, the International Court of Justice seemingly required that an armed attack should be committed by a state or be imputable to a foreign state to come within the purview of Article 51 of the UN Charter.[15] In his Separate Opinion to this Advisory Opinion, Judge Kooijmans underlined the need for a new interpretation of Article 51:

[10] See the ICJ case on Oil Platforms (Islamic Republic of Iran *v.* United States of America), Judgment, *ICJ Reports 2003*, p. 161, para. 43: "…the criteria of necessity and proportionality must be observed if a measure is to be qualified as self-defence".
[11] See also Advisory Council on International Affairs, *Counterterrorism from an International and European Perspective*, The Hague, report no. 49, 2006, also available at www.aiv-advice.nl.
[12] Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United State of America), Judgments on the Merits on 27 June 1986, *ICJ Reports 1986*, para. 195.
[13] UN Security Council Resolution 1368, 12 September 2001.
[14] UN Security Council Resolution 1373, 28 September 2001.
[15] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, *ICJ Reports 2004*, para. 139.

> "Resolutions 1368 (2001) and 1373 (2001) recognize the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. The Security Council called acts of international terrorism, without any further qualification, a threat to international peace and security which authorizes it to act under Chapter VII of the Charter. And it actually did so in Resolution 1373 (2001) without ascribing these acts of terrorism to a particular State. This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another state even if this has been the generally accepted interpretation for more than 50 years. The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence."[16]

It appears that a new understanding is emerging that the right of self-defence also exists in relation to an armed attack which cannot be directly ascribed to another state.[17] However, in exercising such a right of self-defence in response to a terrorist attack, force will be used on the territory of a third state, generally the host state of the terrorist organization. The use of force in self-defence in these cases is only permissible if the host state has demonstrated that it is unwilling or unable to take steps to suppress future terrorist acts and may only be directed against the non-state actor, and not against the government or state itself.

Criteria for the use of force in self-defence

Any use of force, if directed against a state or principally against non-state actors, must conform to conditions of necessity and proportionality. Military action in self-defence must be limited to repelling the (imminent threat of an) armed attack and/or seeking to prevent the threat of acute terrorist violence. These criteria have been emphasized by the High-level Panel in its report on the use of force authorized by the UN Security Council but by analogy they are also relevant for the use of

[16] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, Separate Opinion of Judge Kooijmans, *ICJ Reports 2004*, para. 35.

[17] It may often be rather difficult to legally attribute terrorist acts to the state hosting the terrorist organization. In this respect, it was more generally observed that the International Court of Justice has set a high standard for attribution of private acts to states in the Nicaragua Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United State of America), Judgments on the Merits on 27 June 1986, *ICJ Reports 1986*, para. 115-116, which it has recently reaffirmed in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina *v.* Serbia and Montenegro, 26 February 2007, *ICJ Reports 2007,* para. 391-395, 396-412, and 413-415. In the Case Concerning Armed Activities on the Territory of Congo (Democratic Republic of Congo *v.* Uganda), Judgement on the Merits on 19 December 2005, the Court did not answer the question as to the action a victim State may take in the case of an armed attack by irregular forces, where no involvement of the State can be proved. According to Judges Kooijmans and Simma the occurrence of an armed attack is sufficient to create a right of action in self-defence, whether or not the actions are attributable to a State (Separate Opinions of Judge Kooijmans, *ICJ Reports 2005*, para. 26-30 and of Judge Simma, *ICJ Reports 2005*, para. 7-12).

force in self-defence.[18] As a further guideline enhancing the legitimacy of the use of force, the High-level Panel referred to the balance of consequences.[19] In the context of self-defence, the guideline on the balance of consequences would require an assessment before using force as to what the chances are that the use of force will be effective in addressing the threat and what the risks are that it will actually exacerbate the situation. In sum, the decision to use force, even in the context of self-defence, must be made as part of a wider strategy to address a certain threat.

- *In the context of terrorist acts, there is a need for more specific criteria regarding the level of severity, and the extension in time and space of different related acts, to determine whether the act(s) constitute an armed attack.*
- *There is a new understanding that the right of self-defence also exists in relation to an armed attack which cannot be directly ascribed to another state. The use of force in self-defence in these cases is only allowed if the host state has demonstrated that it is unwilling or unable to take steps to suppress future terrorist acts and may only be directed against the non-state actor, and not against the government or state itself.*
- *Any use of force in self-defence is subject to conditions of necessity and proportionality. These conditions pose restrictions on the nature, scope, location and duration of the actions in self-defence. Military action must be limited to repelling the (imminent threat of) armed attack and/or seeking to prevent the threat of acute terrorist violence.*
- *The decision to use force must be made as part of a wider strategy to address a certain threat.*

3. The interrelationship between international humanitarian law and human rights law

There are divergent views as to the applicability of international humanitarian law and human rights law and their interrelationship in the context of the fight against terrorism. Each of these bodies of law was designed for a different situation and therefore has a different underlying logic and rules. For example, the right to life is very differently protected under these two branches of law, and therefore it is necessary to determine for each specific situation which rules govern the taking of life. Outside the context of an armed conflict, the use of lethal force against persons ("targeted killing") may be lawful only if it can, *inter alia*, be proved that it was the only option available, i.e. a last resort, and that it was absolutely necessary. Pursuant to international humanitarian law, persons taking a direct part in hostilities, combatants and civilians, may be lawfully attacked (civilians only for such time as they are directly participating). International humanitarian law also recognizes that, under specific circumstances, civilian injury, deaths or destruction of civilian property may be the incidental result of the conduct of hostilities ("collateral damage"), which is not a result contemplated by human rights

[18] A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change, *UN Doc.* A/59/565. 2 December 2004, para. 207.
[19] *Ibid.*

law in peacetime. Another example of the different rules stemming from the two bodies of law, which reflects the different circumstances for which they were crafted, relates to the issue of procedural safeguards governing detention. Thus, human rights law requires judicial supervision of detention in all circumstances, which is not the case with the detention of prisoners-of-war or civilian internees in international armed conflict. In this respect, the context in which an individual was apprehended – armed conflict or not – as well as the reasons for which he was detained – to keep him out of the hostilities or because he was suspected of being implicated in the commission of a crime – are decisive for which rule is applicable. A last important difference between the two branches of law relates to the enforcement mechanisms. Whereas human rights treaties often establish international supervising and monitoring bodies, such as the UN Human Rights Committee and the European Court of Human Rights, there are no equivalent international humanitarian law courts. The question arises as to whether and to what extent human rights courts are competent to handle intricate questions of international humanitarian law if these come up in the context of cases submitted to them. Obviously, issues of international humanitarian law are in principle outside the mandate of human rights courts and committees, but may be taken into account using the tool of interpretation.

The scope of the term "armed conflict"

Given the examples related to the taking of life, "collateral damage", detention and judicial review, which demonstrate the importance of identifying the appropriate legal regime, the key issue of the debate on the applicable law relates to the scope of the term "armed conflict", since international humanitarian law only applies in situations of armed conflict. In the context of counter-terrorism the debate has centred around how violence between a state and a transnational non-state actor may be legally characterized. Armed conflicts between a state and non-state actors cannot be defined as international, because international armed conflicts involve only states. Where fighting occurs between states and non-state armed groups, under international humanitarian law these conflicts are non-international in nature. The open question is whether an armed conflict between a group of states and certain transnational armed groups can be characterized as an armed conflict not of an international character, even if some parts of that conflict are occurring outside those states' territories. Most seminar participants seemed to think not, and were of the opinion that each situation should be legally analyzed on a case-by-case basis.

The characterization of a situation as being an armed conflict or not cannot be done *in abstracto*, but should be made dependent on the specific factual circumstances. Not every use of force necessarily results in the existence of an armed conflict. For instance, the use of lethal force against persons may under certain circumstances involve the use of armed forces, but does not necessarily result in an armed conflict, especially if the state on whose territory the operation occurs has consented to it or even invited the third state to undertake it.

A further issue identified concerns the practical and policy consequences that have arisen as a result of the blurring of the distinction between terrorism and armed conflict, particularly in situations of non-international armed conflict. In principle, the law of non-international armed conflict regulates which "rebel-behaviour" is admissible and which is not during non-international armed conflict. Rebels who wage war in a non-international armed conflict while respecting those rules may well be violating domestic law but should not be classified as criminals committing war crimes and may enjoy the benefit of an amnesty pursuant to Article 6(5) of Additional Protocol II at the end of hostilities (such amnesty may never be granted for crimes under international law, but only for acts lawful under international humanitarian law). However, if members of armed groups that have conducted themselves in accordance with the laws of war are nevertheless labelled as "terrorist" – in addition to being already prosecutable under domestic law - there is no incentive whatsoever for them to comply with international humanitarian law, as the distinction between lawful and unlawful behaviour during the conflict is further eroded.

A premise of international humanitarian law

A more abstract problem of applying international humanitarian law to the new type of transnational conflicts relates to a basic premise of international humanitarian law, which is that parties to an armed conflict enjoy equality of rights and obligations under this body of law (in contrast to domestic law). In other words, international humanitarian law is based on the premise that its rules apply equally and equally bind both sides, regardless of the causes of an armed conflict. The fight against international terrorism contrasts with this fundamental proposition, as terrorist acts are criminal. To regard their perpetrators as "combatants" or "belligerents" gives them a political and legal standing which they should not have.

In sum, to place the new type of transnational conflict between a state and a non-state actor within the realm of international humanitarian law has two adverse consequences, namely that it may give states enhanced powers to combat the threat and that the premise of equality tends to attribute undeserved standing to transnational criminal organizations. The international humanitarian law paradigm may thus not be best suited to address the threat. Rather than classifying this conflict situation as a third type of armed conflict, another course of action may be considered. If a terrorist threat is indeed of such a magnitude that it deserves special measures, these measures should be called by their proper name, i.e. military means in asymmetric situations. These measures should be in line with human rights standards and explicitly justified as exceptional deviations from the norm or assessed under derogation clauses. These clauses may need to be tailored to the specificities of terrorist acts.

- *International humanitarian law and international human rights law, while complementary, were tailored for different situations. There is no single answer to the question of what legal regime applies in the fight against terrorism. The applicable legal regime, and the necessary concurrent application of several legal regimes, can only be determined on a case-by-case basis.*
- *Terrorist acts are criminal acts prohibited by both international and domestic law. Applying international humanitarian law to the spectrum of acts that need to be undertaken in the fight against terrorism is not appropriate, as international humanitarian law governs only acts of violence which reach the threshold of armed conflict.*
- *Agreement on the applicable legal rules can be instrumental in reducing the international disagreement that currently exists on questions such as rules governing the taking of life, "collateral damage", and detention.*

4. The need for closer cooperation between states in criminal matters

During the 1990s, great emphasis was placed on the development of international criminal law culminating in the establishment of the International Criminal Court. The Statute of this Court does not include the crime of terrorism as such.[20] However, in specific circumstances, terrorist acts may well be classified as ICC crimes, for instance as a crime against humanity or as a war crime.

Further developing the legal framework on state cooperation

Apart from implementing international criminal law, more attention in the fight against terrorism needs to be paid to the further strengthening of inter-state cooperation in criminal matters. States should expand the range of assistance available in the apprehension of terrorists and in the investigation and prevention of terrorist acts. Such assistance should, of necessity, include channels for the provision of sensitive information between governments, provided that clear procedures are in place to protect the sources of sensitive national security information. Moreover, states should cooperate more closely in ensuring the admissibility of evidence obtained abroad without compromising the rights of the accused. In addition to developing an adequate legal framework to improve mutual legal assistance and ensure independent review, it is also crucial that there is a willingness to share information and to make robust use of that legal framework rather than to engage in extralegal activities such as extraordinary rendition, i.e. rendition of an individual outside any legal framework. Moreover, implementation of the counter-terrorism conventions and related UN Security Council resolutions, and capacity-building in developing states is vital for a well-functioning universal criminal law approach towards terrorism.

[20] At the Rome conference the participating States recognized that "terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community" and recommended that a future Review Conference consider including the crime of terrorism in the list of crimes within the jurisdiction of the Court. See Resolution E, annexed to the Final Act of the UN Diplomatic Conference of Plenipotentiaries on an ICC, 17 July 1998, *UN Doc.* A/Conf.183/10.

The role of national criminal law

National criminal law can also serve as a useful and effective tool in combating terrorism. Already before 9/11, a general tendency could be perceived in various domestic jurisdictions to extend the realm of criminal law by criminalizing preparatory acts and participation in a criminal organization as well as by extending investigative and prosecutorial powers. This has led some to argue that there was no need to adopt special anti-terrorism legislation. Criminal law has its limits and is in itself not an appropriate preventive tool in all cases. It may well be that the new criminal law provisions aimed at countering terrorism are in fact disguised norms of special prevention that lack the nature of criminal law and violate fundamental principles such as the culpability principle and the presumption of innocence. If individuals pose a security threat to society, states might consider adopting special anti-terrorism legislation providing for administrative measures rather than incorporating changes in the regular criminal law system. For such changes may affect the system and "contaminate" it. If special laws are drafted, however, it is necessary to include 'sunset' clauses, i.e. built-in provisions regulating periodic review of the new laws. Moreover, special anti-terrorism legislation should provide for guarantees such as independent judicial review since a regime of special anti-terrorism legislation carries the risk of undermining procedural safeguards.

- *Mutual legal assistance should include channels for the provision of sensitive information between governments with clear procedures in place to protect sources.*
- *It is crucial that there is a willingness to share information and to make robust use of the existing legal framework rather than to engage in extraordinary rendition outside any legal framework.*
- *Implementation of the counter-terrorism conventions and capacity-building in developing states is vital for a well-functioning universal criminal law approach towards terrorism.*
- *Criminal law has its limits and is in itself not in all cases an appropriate preventive tool.*

5. Law enforcement in failing and fragile states

A failing state is a state whose government is no longer capable of controlling its territory, or large parts of it, and no longer able to uphold its internal legal order. Consequently, such a state cannot guarantee the safety of its people since it has lost the monopoly on the use of force. There is no direct relationship between failing or fragile states and terrorism, but such states may be used as a place for harbouring terrorists and a meeting place for people from various countries who are associated with a terrorist organization. Furthermore, governments of failing states are often not in a position to co-operate in international arrest warrants and unable to accede to extradition requests. The failure of a state has numerous harmful repercussions: for the state's own population, for the region, for the international community, and for individual third states. These repercussions give rise to

corresponding grounds for intervention which may be put forward, such as solidarity with the population, the aim of regional stability, the aim of peace and security, and the interests of specific states. Ultimately, there is a certain overlap between these grounds and self-interest: a stable world is the best environment to promote economic interests, to maintain the international legal order, to prevent the proliferation of arms and to combat crime and terrorism.[21]

The use of force in failing states and the issue of consent

The question is at what moment and based on what criteria, a third state may resort to interference if a failing state cannot itself address the terrorist threat coming from its territory by regular law enforcement. Specific problems that arise in relation to cross-border military operations in failing states regard the issue of consent and/or invitation. In principle, the implied consent of a failing state cannot be assumed on the sole basis that there is no longer a recognized government to give express consent. In practice, third states continue to do business with what is left of the official government or with the *de facto* authorities in areas where the central government no longer has control. Obviously, the validity of such acts may be questioned by a new, legitimate government after restoration or partial restoration of central government authority. If the sitting government or *de facto* authorities consent to or even invite foreign military intervention, the conflict, if recognized as an armed conflict, should in principle be qualified as an armed conflict of a non-international character. In cases such as Somalia, where the formally recognized government of Abdullahi Yusuf Ahmed is different from the party that had *de facto* control (namely the Union of Islamic Courts), the question is which of these parties can issue a legal invitation on behalf of the State to intervene by force. The answer to this question again has direct relevance to the subsequent characterization of the armed conflict as either being international or non-international. It is thus clear that in the case of failing states, different branches of law are intertwined: since assistance between states in regular criminal law enforcement is impossible, there may be a need to resort to other bodies of law.

[21] See further on this Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law, *Failing States. A Global Responsibility*, The Hague, report no. 35, 2004, also available at www.aiv-advice.nl.

- *The government of a failing state is often no longer in a position to control its territory and uphold law and order, provide safety to its people and observe international obligations.*
- *When failing states are used for harbouring terrorists or as a place from which terrorist actions are being planned, the issue arises of the consent of the sitting government or the de facto authorities for foreign interference which may take the form of a military action. Such consent cannot be implied by the absence of a government.*
- *If consent is provided, a military intervention in a failing state in response to a terrorist act or threat thereof should be viewed as an armed conflict of a non-international character. If not, it is an international armed conflict. This particular issue has a direct bearing on the subsequent application of rules of ius in bello.*

6. The need for a preventive and integrated approach: the wider Agenda of Prevention

Action to prevent the failure of states and (where this is unsuccessful) to resuscitate failing states exemplifies the crucial importance of integrated policy. Policy instruments from the spheres of development co-operation, politics, diplomacy, peace-building, economic development, and defence must be employed in conjunction. It is of crucial importance to address the problems of a failing state at an early stage, i.e. the stage when growing internal divisions and a decline of the role of the state start to become apparent. This includes efforts to mitigate the effects of the adverse conditions that place the state under strain and make it vulnerable and receptive to radical groups and criminal activities and to seek to curtail the abuse of power by leading government officials. This means setting international standards, monitoring compliance, offering technical assistance, and conducting a political dialogue. In addition, states should respond appropriately to revelations of abuses involving international companies whose headquarters are under their jurisdiction and who operate in such countries. Once state failure is a fact, the international community has a responsibility to take effective measures in order to preserve international peace and security and respect for human rights.

The imperative for further progress is a refocused effort to collaborate across international boundaries and to increase the effective emphasis on prevention and proactive programmes rather than relying solely on existing punishment regimes that largely serve as a mechanism for responding to terrorist acts. As is noted in the United Nations Global Counter-Terrorism Strategy,[22] a comprehensive counter-terrorism strategy needs to embrace measures that address the conditions which are conducive to the spread of terrorism. Long-term promotion of the rule of law, human rights, education and economic opportunity are effective ways to counter terrorism in the long run. Sensitive political issues

[22] *UN Doc.* A/RES/60/288, 20 September 2006, especially chapter I.

such as the Israeli-Palestinian dispute should be addressed. In addition, there is clear need for a more intensive dialogue to cross divides that have been created in our post-cold war world.

There is agreement that there should be a renewed focus on a proactive and creative cooperation on the means of prevention, which is preferable to a retrospective punishment regime. Yet, a preventive approach does not only call for intensifying cooperation and coordination between states on security matters, but also demands a close analysis of the causes and factors that lead to various forms of terrorism. To curb terrorism, its very diverse manifestations need to be differentiated rather than conflated. Intra-group terrorism within religions and ethnicities, and inter-group terrorism in civil wars and failed states are hard to curb directly by professional military action. They will decline locally and nationally only after new power orders have crystallized and the driving force behind terrorism has been reduced by political conflict settlement.

International involvement in post-conflict state-building is essential. A larger part of economic development assistance and foreign defence operations than is currently being earmarked could be used to help recipient governments for Judicial and Security Sector Reform (JSSR). Special emphasis may be placed in this regard on reforming the police who are the face of the state in most communities.

- *It is of crucial importance to address the problems of a failing state at an early stage, i.e. the stage when growing internal divisions and a decline of the role of the state start to become apparent.*
- *Emphasis should be on prevention and proactive programmes rather than relying solely on existing punishment regimes that largely serve as a mechanism for responding to terrorist acts.*
- *International involvement in post-conflict state-building and Judicial and Security Sector Reform is essential. Reconstruction is prevention.*

7. Summary of most important findings and suggestions for a follow-up

The main conclusions of the seminar were that all nations, whether or not directly affected by terrorist acts, share a common interest in being more proactive and adopting a preventive approach while the challenge to be met does not primarily concern the lack of applicable rules. Rather there is an urgent need for a joint and coherent application of those rules. Consequently, there is no need for an entire new international law paradigm or grand design to address the problem of terrorism, even though it is true that not all relevant branches of international law have an equal level of sophistication and that some are in fact in need of further development. Yet, the main contentious issues spring from the existing disagreement and confusion on how to qualify and define (certain acts of) terrorism in legal

terms and which branch of law or which specific rules are applicable and govern a given situation. A summary of the conclusions follows:

Positioning international terrorism and the challenge of agreeing on a definition

- The precise boundaries between international and domestic terrorism are difficult to draw and hybrid situations may occur, such as domestic terrorism that is financed through foreign channels.
- Consensus on a definition of terrorist acts is emerging in specific international instruments, but a comprehensive counter-terrorism convention with a clear definition is still desirable.
- A terrorist act does not necessarily in itself constitute an armed attack, nor does it necessarily give rise to an armed conflict.
- An inflated use of the term terrorism may well have adverse consequences and should be avoided.

The use of force in self-defence against terrorist acts

- In the context of terrorist acts, there may be a need for more specific criteria regarding the level of severity, and the extension in time and space of different related acts, to determine whether the act(s) constitute an armed attack.
- There is a new understanding that the right of self-defence also applies in relation to an armed attack which cannot be directly ascribed to another state. The use of force in self-defence in these cases is only allowed if the host state has demonstrated that it is unwilling or unable to take steps to suppress future terrorist acts and may only be directed against the non-state actor, and not against the government or state itself.
- Any use of force in self-defence is subject to conditions of necessity and proportionality. These conditions pose restrictions on the nature, scope, location and duration of the actions in self-defence. Military action must be limited to repelling the (imminent threat of) armed attack and/or seeking to prevent the threat of acute terrorist violence.
- The decision to use force must be made as part of a wider strategy to address a certain threat.

The interrelationship between international humanitarian law and human rights law

- International humanitarian law and international human rights law, while complementary, were tailored for different situations. There is no single answer to the question of what legal regime applies in the fight against terrorism. The applicable legal regime, and the necessary concurrent application of several legal regimes, can only be determined on a case-by-case basis.
- Terrorist acts are criminal acts prohibited by both international and domestic law. Applying international humanitarian law to the spectrum of acts that need to be undertaken in the fight against terrorism is not appropriate, as international humanitarian law governs only acts of violence which reach the threshold of armed conflict.

- Agreement on the applicable legal rules can be instrumental in reducing the international disagreement that currently exists on questions such as rules governing the taking of life, "collateral damage", and detention.

The need for closer cooperation between states in criminal matters

- Mutual legal assistance should include channels for the provision of sensitive information between governments with clear procedures in place to protect sources.
- It is crucial that there is a willingness to share information and to make robust use of the existing legal framework rather than engage in extraordinary rendition outside any legal framework.
- Implementation of the counter-terrorism conventions and capacity-building in developing states is vital for a well-functioning universal criminal law approach towards terrorism.
- Criminal law has its limits and is in itself not in all cases an appropriate preventive tool.

Law enforcement in failing and fragile states

- The government of a failing state is often no longer in a position to control its territory and uphold law and order, provide safety to its people and observe international obligations.
- When failing states are used for harbouring terrorists or as a place from which terrorist actions are being planned, the issue arises of the consent of the sitting government or the *de facto* authorities for foreign interference which may take the form of a military action. Such consent cannot be implied by the absence of a government.
- If consent is provided, a military intervention in a failing state in response to a terrorist act or threat thereof should be viewed as an armed conflict of a non-international character. If not, it is an international armed conflict. This particular issue has a direct bearing on the subsequent application of rules of *ius in bello*.

The need for a preventive and integrated approach: the wider Agenda of Prevention

- It is of crucial importance to address the problems of a failing state at an early stage, i.e. the stage when growing internal divisions and a decline of the role of the state start to become apparent.
- Emphasis should be on prevention and proactive programmes rather than relying solely on existing punishment regimes that largely serve as a mechanism for responding to terrorist acts.
- International involvement in post-conflict state-building is essential. Reconstruction is prevention.

Suggestions for a follow-up process

All participants agreed that exchanges such as this seminar, contribute to a better understanding of the challenges to be met in developing and executing counter-terrorism strategies in accordance with international law. There are considerable merits in departing from confrontational approaches and

moving towards a more solution-oriented dialogue. As indicated below, various issues are in need of further investigation. Therefore, a follow-up process is proposed.

Six issues that warrant further investigation:

- What criteria should define a terrorist attack as an armed attack and under which circumstances may the victim state use force in self-defence against this attack? In this respect, it is particularly relevant to assess at which stage a state hosting the terrorist organization can be said to have demonstrated that it is unwilling or unable to take steps to suppress future terrorist acts launched from its territory.
- The applicability and interrelationship between the various branches of international law, especially international humanitarian law and human rights law. Specific issues such as detention, use of lethal force against persons and "collateral damage", could be addressed as well as the consequences of labelling certain actions as constituting the use of force - by consent or upon invitation – for the subsequent characterization of an armed conflict under international humanitarian law.
- The question whether and to what extent in the context of human rights law there is a need of specific derogations tailored to the threat of terrorist acts and to what extent human rights courts and commissions are competent and appropriate bodies to deal with questions of international humanitarian law.
- The need for further discussion on how to fine tune the existing legal and political framework of traditional criminal law, especially regarding the sharing of national security information and the protection of sources, but also regarding the transfer of persons and the basic protection that should apply in that process.
- The role of the international community in a situation in which a government is failing and no longer in a position to control its territory, uphold law and order, and prevent its territory from being used for harbouring terrorists or as a place from which terrorist actions are being planned.
- The role of international law in establishing and implementing an Agenda for Prevention. More specifically, the extent to which international law can be instrumental in addressing relevant economic, cultural and political factors which may be considered as the structural causes of terrorism and thus contribute to the prevention or deterrence of terrorism and the promotion of human security.

As to the modalities of the follow-up process, a core group of 5-7 prominent specialists could take the lead over a period of two years with a view to providing detailed answers to the legal issues raised above. These answers could be recorded in a further summary report or a Declaration. In the course of

these two years, the core group could occasionally convene further seminars on specific legal issues in which the participants to the Poelgeest seminar and other specialists in relevant fields are asked to participate or they can be requested to provide input in the form of written interventions and email questionnaires.

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