

FOREWORD

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What we now call terrorism is not new. Violence for instrumental purposes has for a long time included the ambitions of murderers to influence political choices. ‘Death to all tyrants’ is, I think, a suggestion if not demonstration of terrorism. Its inspiring call also shows the root of current difficulty in defining terrorism for the purposes of international and municipal legal control. Tyrants, after all, are tyrants – and even if capital punishment is not warranted, cessation of their activities as such is almost universally regarded as good.

It is thus that the wearisome cliché that one person’s terrorist is another person’s freedom fighter continues to poison the intellectual and jurisprudential wells of social responses to this kind of violence. The articles in this Issue encompass many of the continuing conflicts inherent in the study of such violence and our responses to it.

Although the death and destruction wrought by terrorism is intensely local, the political world has decided to treat the phenomenon as a global one, deserving of attention at the highest levels of what is optimistically called international law. Thus, as Kimberley Trapp has noted, the Security Council seems to have assumed some aspects of a supranational legislature in promulgating *Resolution 1373* in the aftermath of 9/11. Immediately, the supposed imperative under Chapter VII of the *UN Charter* with respect to measures not involving the use of armed force in order to maintain or restore international law, peace and security in the face of determined threats to the peace and breaches of the peace has required consideration of widely differing national systems of criminal law. The work of See Seng Tan and Hitoshi Nasu reported in this Issue provides important insights into what may be called, in several senses, a sectoral view of those systems responding to that imperative.

If, as I believe to be the case, the true evil of terrorism is the fact or threat of murder to achieve political ends (however fatuous the ambition may be and regardless of the mental health of the perpetrator), it must be because murder is evil rather than political ends. It remains a nice question, at least for lawyers concerned with criminal defences, whether a murderer for thrills is better or worse than a murderer for a cause. To put it mildly, the answer is by no means obvious.

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Deep seated moral concerns about political resort to violence continue to impede international efforts to globalise counter-terrorism. That statement does not describe, necessarily, an undesirable state of affairs. We have not globalised opposition to rape or disapproval of burglary. If terrorism is murder (or its threat) for political ends, it is not thereby more obviously threatening to individuals as subjects of the basic dignity which grounds their human rights, than are domestic violence, sexual harassment or invasion of homes.

Of course, the real object of concern in relation to the definitionally distinctive element of terrorism is national government. And the *UN Charter* is the latest (in our dreams, the last) exertion of the Westphalian norm of nation states as the barely examinable integers of international law. In that context, it is obvious why the United Nations care about, say, murder in aid of overthrowing a regime, while not particularly caring about murder to express sexual jealousy. And yet so many more people, mostly women, are killed for the latter cause than for the former, whatever period or place one may select.

That is why there is a continuing need for the sharp calling to account of nation states in counter-terrorism, demonstrated with real substance by the contributions of Jon Moran and Fiona Lau in this Issue. In particular, they complement the studies of Trapp, and Tan and Nasu, in their challenge to fundamental framing of counter-terrorism.

Is counter-terrorism a kind of war? Is it simply a sadly fashionable kind of criminal justice? Is it just a phase, or should we regard it as likely to continue indefinitely?

By and large, the international choice has been for terrorism to be dealt with as crime rather than war. That reflects the centrality of non-state actors in most of the killings that have been regarded as terrorism, as Kimberley Trapp's illuminating survey emphasises. What the history of reactive treaty-making has not achieved is the confinement of terrorism to the status of anti-social behaviour which, though of the most serious kind, may nonetheless be confidently regarded as adequately addressed by conventional municipal criminal justice. The topical cases of Pakistan, Afghanistan, Iraq, Syria and Turkey suffice to illustrate this failure, as western Europe may soon as well.

The significance of colonial and post-colonial experiences is seen in the ASEAN approaches mapped by Tan and Nasu. There is likely to remain a problematic contamination, so to speak, of criminal law responses to terrorism that extend overtly or in practice to the suppression of mere dissidence. While it is straightforward to criminalise violence and preparatory acts towards violence, there is quite a wide range of legislative expedients that have been adopted in the more difficult attempt to exclude expressions of political opposition from conduct which it is the function and duty of a government to prevent and punish. Indeed, within the members of ASEAN itself, it is fair to regard the efforts of some of them as scarcely giving even lip service to that requirement for fundamental freedom of political freedom and association.

The crime/war dichotomy should not ever be regarded as complete, let alone mutually exclusive as categories. In particular, the salutary development of *jus in bello* has seen treaty-driven enactment of municipal criminal law specifically to

deal with war crimes. In this manner, conduct which would, but for its military or statist character, have all the elements of terrorism, can be treated as equally grave crimes by investigation, prosecution and punishment as war crimes. (An analogous relation can be seen with respect to crimes against humanity.)

The substance and reality of the terrorist/freedom-fighter identity remains as a current challenge to counter-terrorism. Unless the pretensions of ISIL are destroyed by armed resistance, it will (if it has not already) become a criminal group that has achieved the status of an object of international humanitarian law concerning its violence. Its crimes might lift it out of terrorism into war. The fact that its conduct is in aggregate the constant commission of war crimes of the worst kind cannot disguise the need to address its scale of operations and the threat they present to civil society as beyond the scope of municipal criminal law.

And given the style of military response at the international level to emergencies such as ISIL in its claimed home territory, it is timely for the law of that kind of war to be examined as it has been by Jon Moran in this Issue. Furthermore, as he demonstrates, these circumstances justify considering whether a radically different approach should now be preferred in relation to the accounting for special operations forces both to their respective nations' electors, and to the community of nations.

It is unlikely, I think, that consideration of these matters will support for much longer the 'whatever it takes' way of proceeding that may – for all we know officially – too frequently have been practised in these important but fraught military operations. This is just one aspect, although a prominent one, of counter-terrorism where I hope the principle will remain clear and unqualified that the forces engaged in counter-terrorism will not resort to violent conduct including killing, outside the limits imposed by municipal criminal law and the laws of war, whichever be applicable.

What may be called the case study presented by Fiona Lau discusses the possibility of holding the United States of America to such standards with respect to its extraordinary rendition programme. That deplorable strategy has, in my opinion, at its very core an acknowledgement of its vice. That is, its victims were removed from the control of persons in places amenable to US jurisdiction (criminal and military) precisely because it was recognised that the treatment of them would be condemned by that jurisdiction. The victims were rendered to the illicit violence by others in other places precisely because the authors of the programme recognised that their own norms would prohibit the intended treatment of the victims.

This unfortunate and counter-productive conduct presumably derived support from those who misunderstood the rhetoric in the label 'the global war on terror'. Even so, it remains a massive disappointment that the authorities of a country with a sophisticated and respectable body of military law and observance of international humanitarian law in military operations could act so oppositely against suspected terrorists. It opens the possibility that for some misguided national authorities, suspected terrorists are criminals without the rights of those accused of crime ordinarily, and are enemy combatants without the rights of soldiers who have been captured ordinarily. This perverse new taxonomy should

be resisted. The pointed contribution of Fiona Lau will lend support to that resistance.

I commend the *Journal* on the depth and range of these four contributions, and thank the authors for their scholarship.