

# From Terrorism to War Crimes: Past Lessons and Future Outlook



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**From Terrorism to War Crimes:**  
**Past Lessons and Future Outlook**

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### **Professor Paul Pillar**

Thank you Yonah. I come at this from the perspective of a counter-terrorist consumer who is not himself a lawyer. I worked on that topic for a number of years in government service and I have looked at it from more of an academic perspective as of late. I have not recently been a consumer of legal advice, as I was when I worked in government service, but I still appreciate a good clear legal position on the issue. I want to put out as my main point this afternoon that there is a challenge and a problem, an inconsistency as I see it, in which we collectively—and this is a broad “we”—have drawn on peace time and war time legal frameworks as ways to think about terrorism and counterterrorism. Each one of those frameworks is quite internally consistent and has served us well in many other contexts other than terrorism. The problem is we have wound up selectively picking from one or the other in a way that, I think, overall has not been consistent. And I do not blame lawyers for that. I think the problem began with the application of the war metaphor to counter-terrorism, specifically in the immediate aftermath of 9/11, for reasons other than legal reasons. The “we are at war” cry served other purposes when the lawyers were not consulted.

One, it is simply an exhortation. An expression of the importance of the topic, that “we need to do more,” and so forth. Secondly, it became a kind of code word for those who wanted to express a preference for using the military instrument in the name of counterterrorism more so than other instruments, diplomatic, financial, and so on. You even heard people, especially in the immediate wake of 9/11, throw out a false syllogism saying, “this is an important problem right? That means we are at war. If we are at war that means using military force, right?” Well the logic does not actually quite flow but that is the way a lot of the thinking went. The real lawyers have had, I think, a mess to clean up.

We Americans have had, traditionally, more so I think than other people, a feeling that there are clear distinctions between time of war and time of peace. It is part of our broader black and white thinking that other people are not as necessarily prone to as much. I do not want to go into the whole background of that. But the distinctions, when it comes to terrorism, are not nearly as clear as we Americans like to think and the proclamation that “we are at war” after 9/11 really does not take into account some of the blurriness in the distinctions.

A pertinent observation is that if you look at what terrorism is, and how it has been defined, both by scholars who have followed it and even in some of our official United States government definitions, some of the most inherent aspects of terrorism involve violations of the laws of war. In at least a couple respects. One is that terrorists do not wear uniforms and insignia in a way in which an armed force under the laws of war is supposed to be clearly identified as a military force; stealth is instead the usual method. Another obvious respect is attacking civilians, which gets right to the essence of terrorism. In fact, some of our United States government definitions talk about attacking non-combatants, which are not always civilians, but it gets to the idea that this is something different from battle waged between uniformed forces on a battlefield. So terrorists attack civilians which is a violation of the law of war. The fact that others violate the laws of war is of course not reason for us to violate them, and we do not, not intentionally, but I think that our picking and choosing of peace time and war time frameworks does raise some legitimate questions.

We have referred to a war time legal framework to justify many of the things that we do including, but not limited to, use of military force, but we have not gone fully in that direction. People we capture on battlefields and other places, in Afghanistan and elsewhere, we have not

called prisoners of war, as they would be defined under the laws of war. We call them something else—illegal combatants. So we are still in the netherworld between peace time and war time.

I think major aspects of the current international terrorist threat, especially as it has evolved in recent years since 9/11, takes us farther and farther away from the types of armed conflicts and confrontations to which traditional law of war most clearly applies.

Let me mention three respects in which that is true. One is the indefinite and ill-defined nature of the entities or organizations that we are combating. In the immediate aftermath of 9/11 at least it made some sense for those who said, “well we are at war with al-Qa’ida, the group that did 9/11 and a few other attacks against us.” And that made more sense than a “war on terror”; at least there was a specific entity we were fighting. But since then al-Qa’ida itself has metamorphosed into something much vaguer, harder to delimit in terms of what kind of organization it is. We still have al-Qa’ida Central in South Asia, the guys hiding out with Zawahiri somewhere along the Durand Line. But they are actually not the main threat these days. It is more of the so-called affiliates in places like North Africa and Middle East and elsewhere. Some of those, but not all of those, have adopted the al-Qa’ida name. The name does not really tell you whether it is part of a larger organization or not. Then you have all of the onesies and twosies and threesies in cells in the west and so on with individuals who express varying degrees of affiliation to, or allegiance to, or admiration for an organization like al-Qa’ida. Now we have got ISIS, or Islamic State, which started out as one of those affiliates of al-Qa’ida, and then broke with it. And now we have got other sorts of entities including those onesies and twosies and threesies on various continents that express various degrees of affiliation to ISIS.

How do you make sense of this in applying a legal framework that was devised with much clearer entities in mind, such as when we were making war against Germany or Japan. Or even in the case of internal conflicts, against a specific guerilla or insurgent movement, the adversary is a lot better defined, even though it is not a nation state, than the sort of thing I am talking about. So that is indefinite organizations.

Secondly, indefinite geographic limits. We are talking about a phenomenon we are combating that ranges across the world and blurs the distinction between domestic and international realms. That fact has been one of the big problems when we get into some specifics, one or two of which I will mention in just a moment.

Finally there is not a limit in terms of time. Again, especially here in the United States, we think there is a clear distinction between war time and peace time, even though we do not declare war in Congress these days anymore. We have certain specific beginnings to wars; there was a particular date, for example, when we began the war in Iraq in 2003. And we speak about how a lot of the problems of handling terrorists involve what are doing “for the duration—for as long as we are combating terrorism, or as long as we are waging a so called war on terror. But as even some of our leaders such as former Secretary of Defense Donald Rumsfeld have told us, we are not going to have a clear ending. My argument is we do not have an ending at all. Terrorism has been around for millennia, and so will counterterrorism. But even in the sense of counterterrorism as being a major United States policy preoccupation, we are not going to have anywhere near a clear ending. So what does that mean in terms of any kind of shift between war time and peace time legal frameworks?

Thus we have got a series of problems that I think are still unresolved. Just to name several, and I am sure we will have more discussion on this, one concerns congressional

Authorization for Use of Military Force (AUMF). I think it was good that the administration sent a draft to Congress a few months back. And I agree with those who say that the old resolutions, the one right after 9/11 and one before the Iraq War, really do not carry the freight in terms of what we are doing regarding military force and counterterrorism. But Congress seems most recently to have given up on this. Members are concerning themselves with the Iranian nuclear issue, but the last reports I have seen indicate that AUMF is just not going anywhere. We can think of political reasons for this but I think the main reason is it is hard to come up with a resolution that would really get around all of those problems I have described. It is difficult to come up with a formula that would authorize the President to do what he needs to do to combat terrorism but would place meaningful limits on what he does. So that is one problem.

A second problem concerns what was already mentioned by Professor Wallace regarding Guantanamo, and like him I share admiration for the President for trying to do something about this. He pledged to close it in a year, he was not able to meet that pledge, and of course we are way beyond that time limit. I think part of the reason why it would be good to close Guantanamo is not just the overall image it has but also a reason that gets back to the issue of the rule of law. Ask yourself, "Why was that particular location chosen for this detention facility?" Was it to give the detainees the cooling effect of Caribbean Sea breezes? No, of course not. It was chosen as this *sui generis* spot, a military base under a long-term lease in a country headed by a government that we do not even have diplomatic relations with (although we might soon), and the idea seemed to be to keep it out of the reach of anyone's law—U.S. law, Cuban law, or anyone's law. That is not a very good statement about counterterrorism and the rule of the law.

Another problem related to Guantanamo concerns military tribunals. I would assert, as we look at the shakiness with which that institution has tried to come into operation, that creation of the tribunals was for many people a matter of making, to put it quite bluntly, an ideological point that we are at war when it comes to counterterrorism. As a practical matter, relying as we have for many, many years on the Article III civilian courts, especially those that are most experienced in dealing with terrorism cases like the Southern District of New York, where our new Attorney General comes from, I see no reason why the tribunals had to be created in the first place and why those other courts, which have served us well, could not serve us in this case.

Another problem area is surveillance and intelligence collection. Here I would just point out that the main reason for all of these controversies we have heard with regard to the NSA activities and so on is the previously mentioned blurring of what is domestic and what is international. Here we are getting into the technological fact of how a lot of the stuff the NSA would usefully collect, in terms of foreign terrorist communication, flows through switches or cables or whatever here in the United States. That is how we got into this whole business of what is considered domestic collection?

Finally I would mention, as a particularly sticky point, the issue of extra territorial execution, if you will, of people and specifically United States citizens. I think what particularly puts this into a very disturbing framework is the most recent case of an American citizen who reportedly was on one of these hit lists, or he was at least the target of a lot of discussion within government circles as to whether he ought be the target of a drone strike when he was still off in South Asia or wherever he was. But then he was captured and now he is in United States custody and he is being brought to trial in a United States court. That greatly weakens, of course, one of the rationales for the extra-judicial execution of an American citizen, which is that we have no

other way of reaching them and we cannot bring them into a court. I think this is a very disturbing issue and we are not close to a solution.

So my overall conclusion is that we have expected too much from the lawyers, who have done as well as they can in trying to maintain the consistency of peace time and war time legal frameworks. It is we as the public who have imposed unclear and inconsistent rhetorical, political, and even at times intellectual frameworks that have resulted in these.

## Issam Michael Saliba

Good afternoon. I also should note that I am here in a personal capacity. Opinions I express and statements I make are strictly mine and shall not be attributed to the Library of Congress or any other U.S. government institution.

I am going to speak only about one issue, and that is whether terrorism can be treated as an international crime—like war crimes, genocide, and crimes against humanity. In 1937, the League of Nations adopted the first multilateral convention for the prevention and punishment of terrorism. Article 1 of that convention defines acts of terrorism as “criminal acts directed against a state or intended to create a state of terror in the minds of particular persons, or a group of persons, or the general public.” Now this convention has not been ratified and never entered into force. Attempts to adopt a substitute treaty have been frustrated since. The United Nations member states are still unable, for several years now, to move forward on the draft Comprehensive Terrorism Convention which requires acts of terrorism to be intended, like the first convention, to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Now, the main stumbling block, why the world community is not able to agree on a convention, is the problem of defining what terrorism is. This is despite the existence of many definitions crafted by distinguished scholars in the field, including one by Professor Alexander, I do not know if you saw it on the internet. Unless we can define terrorism in terms of a criminal law language, there is no way that we can treat terrorism as an international crime. In *United States v. Yousef*, the United States Court of Appeal, Second Circuit ruled in 2003 that terrorism is not an international crime that can give rise to universal jurisdiction. Why? Because there is no international consensus on the definition of terrorism or even its proscription.

Yet a minority view exists to the effect that terrorism has already been defined by international customary law. In an article published about a decade ago the late Antonio Cassese, a distinguished professor of international law at the time, wrote, “Contrary to what many believe, a generally accepted definition of terrorism as an international crime in times of peace does exist.” And still I am quoting him, “This definition has evolved in the international community at the level of customary law.” Now more recently, in 2011, about six or seven years after he wrote that, the Special Tribunal for Lebanon, or STL, a mixed tribunal established to prosecute a local crime under Lebanese Law, issued an opinion in which it concludes that a customary rule of international law regarding the international crime of terrorism, at least in times of peace, has indeed emerged. This pronouncement is exactly or pretty much concordant with Professor Cassese’s opinion, and there should be no surprise there. Why? Because by that time Professor Cassese had become the President of the STL and acted as the Judge Rapporteur who drafted the STL opinion. In describing what constitutes the international crime of terrorism, the STL identified the following three elements: One, a perpetration of a criminal act, or threatening such an act. Two, the intent to spread fear among the population, or directly or indirectly coerce a national or international authority to take some action or to refrain from taking it. And three, the act involves a transnational element. In other words, in order for terrorism to be an international crime it has to be transnational; national terrorism would be excluded under the STL definition. And I do not know whether under this definition ISIS indiscriminate killing and murdering of innocent people could be described as international crimes of terrorism. If we were to take the STL opinion at its face value, the crime of terrorism should be an international crime, and would be by now working its way to being included within the jurisdiction of the International Criminal court, along with the crimes against humanity,

genocide, war crimes, and the newly added crime of aggression. A member of the Department of International Law at the Military Advocate General Corps of the Israeli Defense Force cites the opinion of the STL to argue for the prosecuting of terrorists before the International Criminal Court.

Despite the STL opinion we are still, I think, very far from being able to use the international criminal law as an effective tool in the fight against terrorism, or claim terrorism as an international crime under international customary law.

First, it is reasonable to suggest that a rule outlawing all acts of terrorism has emerged under international customary law, because the many specific anti-terrorism treaties, such as the International Convention Against the Taking of Hostages, the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism, and another 12 or 13 similar conventions, and also because of the plethora of U.N. resolutions and pronouncements requiring states to take certain specific actions in matters related to terrorism. But such a rule outlawing terrorism is not sufficient of and by itself to make terrorism an international crime. As Kai Ambos, Chair of International Criminal Law at the George August University in Germany, and Anina Timmermann explained in their comments on the STL opinion, “while it is difficult to disagree with the chamber,” meaning the appellate chamber of the STL Tribunal, “as to a (*primary*) customary rule outlawing terrorism and the ensuing obligation of states in its preventions and repression, it is a different matter to infer from this prohibition, without further ado, the existence of a *secondary* rule in the form of an international crime of terrorism.”

Second, it is counter intuitive to assert that an international customary rule defining terrorism has emerged while the United Nations has not been able to agree on what terrorism is. And if we go to the various pronouncements and treaties that have been adopted by the United Nations, we find different definitions, even now. I just would give an example, in the Declaration on Measures to Eliminate International Terrorism adopted in 1994, the General Assembly defines terrorism as criminal acts intended or calculated to provoke a state of terror in the general public for political reasons or political purposes. Now the International Convention for the Suppression of the Financing of Terrorism defines it as acts intended to cause death or serious bodily injury to a civilian or any other person not involved in war, when the purpose of such act by its nature or context is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act.

Now we can notice that these two definitions differ from each other and from the definition offered by the STL notwithstanding the existence of some elements that are common among all of these definitions.

Third, regardless of what definition is adopted or agreed upon on what terrorism is, the word terrorism and the meaning of the crime appears to be evolving and changing at a rapid pace. I wonder, for example, whether any of the definitions we mentioned would be able to capture all the acts that the civilized world today considers to be acts of terrorism. For example, let us take the killing of Christians and Yazidis who refused to convert or pay the *jizya* as demanded by ISIS or ISIL. Would such killings be covered in any of the foregoing definition if the real motive behind the killing was a distorted belief of the killers that their action is required by the command of God? Would any of these definitions capture such crimes if the intention of the killers was truly a belief that they are carrying the dictates of their religious belief and not to influence a foreign government or to spread fear among the population?

Let me close by asking a challenging, rather than a rhetorical, question, and this has nothing really to do with the law: are we really determined to fight terrorism as one of the most serious crimes of our time, no matter where, by whom, and for what purpose, it is committed? The evidence is less than clear on this point. In a recent speech at Harvard University, probably all of you know of it, the U.S. Vice President revealed that Washington's biggest problem in fighting ISIS and other terrorist groups in the Middle East is not the rebels fighting in Syria and Iraq but rather the United States' allies in the region. He named three countries as being so determined to take down Assad that they started a proxy Sunni-Shi'a war, supplying cash to those fighting the Syrian president. Now this candid revelation by the Vice President, who is known to be candid, raises another question. Could three of our closest allies in the Middle East supply terrorist groups with cash and probably other material support without our tacit approval? Thank you very much.

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