



Israel, China, and US/NATO – Counter-Terrorism as War Crimes?

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Abstract

In asymmetric warfare whereby the weaker attempts to defeat the stronger, lawfare is increasingly proving to be an effective weapon for terrorists. Defined as a method of using law as a means of realizing a military objective, terrorists are waging lawfare and hijacking the rule of law as another way of fighting, to the detriment of humanitarian values as well as the law itself. Using human shields, abusing international law and post-conflict investigations to blur the line between legitimate counter-terror tactics and human rights violations, lawfare – similar to terror tunnels – is also becoming an effective counter-measure against the superiority of western air power. As such, the international community needs to forge a new normative consensus on terrorism and establish a global counter-terrorism regime to counter this emerging challenge.

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ANALYSIS

As Israel is gearing up for a UN probe on the recent conflict with Hamas, this is once again shedding light on the need for an international counter-terrorism regime.

With China cracking down on terrorists in Xinjiang, Russia in Chechnya, Israel in Gaza, US and Europe on home grown-jihadists in their homeland, the international community needs a clear definition of terrorism and to establish an international anti-terror regime similar to the nuclear non-proliferation regime (especially on nuclear terrorism).

This is especially pressing given jihadists are now waging “lawfare” – defined as a method of using law as a means of realizing a military objective – and hijacking the rule of law as another way of fighting to the detriment of humanitarian values as well as the law itself.

In order to establish global governance of counter-terrorism, stakeholders such as China, Russia, US, Europe and the broader international community, need to eventually determine at what point does a government’s legitimate counter-terror operations and right to self-defense or force protection cross over to become human rights violations, genocide or war crimes?

In instances when terrorists use human shields and abuse international law to unnecessarily handcuff a government when force is required to restore and safeguard human rights generally, what counter-measures does a government have to lawfully defend its freedom of action?

These are questions vexing Israel, China, and US/NATO as they face the growing reach of terrorist groups such as ISIS, Al-Qaeda and its affiliates, Hamas, Hezbollah, Taliban, ETIM and TIP that are attempting to blur the line between counter-terrorism and human rights violations.

Counter-Terrorism and Human Rights

China is currently facing accusations of genocide. In the aftermath of China’s July terror attacks in Xinjiang whereby 100 people were killed, on August 8th, Turkey’s *Daily Sabah* (Erdogan’s AKP mouthpiece) featured an interview with chairwoman of the World Uyghur Congress Rebiya Khadeer. She praised Turkey’s support for human rights and Erdogan’s labeling of Chinese counter-terrorism efforts in Xinjiang as “genocide.”

Khadeer said “We would tell the world that China has been committing genocide in the Uyghur region since the 1990s but no political figure gave voice to our cry except Prime Minister Erdogan.”

A few days after this article appeared, Amnesty International released a report on August 11th accusing US/NATO of possible war crimes during its operations in Afghanistan.

“None of the cases that we looked into – involving more than 140 civilian deaths – were prosecuted by the US military,” Richard Bennett, Amnesty International’s Asia Pacific Director, said in a statement. “Evidence of possible war crimes and unlawful killings has seemingly been ignored.” Amnesty estimates some 1,800 civilians deaths in NATO military operations between 2009-2013.



Now, Israel is facing UN probe for possible war crimes in its counter-terror operations. Would this then open the door for subsequent probes to China's "genocide" in Xinjiang or US/NATO "war crimes" in Afghanistan? If so, would it hamper their future counter-terror operations?

Terrorism and Lawfare

In asymmetric warfare whereby the weaker attempts to defeat the stronger, lawfare is increasingly proving to be an effective weapon for terrorists.

General Charles Dunlap, former deputy Judge Advocate General for the US Air Force, describes lawfare as the newest feature of 21st century combat. He noted how hyper-legalism regarding collateral damage, applied to NATO's air campaign in the Balkan war, prompted NATO's lawyers to effectively become its "tactical commanders."

Terrorists understand this Achilles heel, and as General Dunlap observed, they are more than ready to exploit humanitarian values to defeat their targets.

For example, Taliban and al Qaeda's greatest vulnerability is precision air strikes. In 2008 the *Washington Times* reported a Taliban fighter lamenting, "tanks and armor are not a big deal. The fighters are the killers. I can handle everything but the jet fighters." As such they attempt to demonize the air weapon through manipulation of civilian casualties that NATO airstrikes can produce – hiding heavy weaponry in mosques and NGO compounds such as CARE International in hopes of deterring attacks or producing collateral damage media events.

Given this, what should be the international normative consensus on counter-terror tactics? If an NGO area is surreptitiously employed to hide military equipment, and the NGO fails to report this, do they become culpable as aiders and abettors of deceitful conduct which itself is a war crime? Moreover, if civilians volunteer as human shields, do they forfeit their non-combatant immunity?

Need for Counter-Terrorism Regime

Again, the Balkan war is instructive.

According General Dunlap, during the Balkan war when Serb civilians deliberately occupied bridges in Belgrade to deter NATO attacks, they relinquished their immunity. Attempting to defend an otherwise legitimate target from attack, the bridge occupiers relinquished their non-combatant immunity since they in essence made themselves part of the bridge's defense system.

Nonetheless, without a normative consensus for a global counter-terror regime, terrorists would be able to continue waging lawfare via NGOs and international law against various sovereign states due to their different interpretations and definitions of terrorism.



Finally, post-conflict investigations can be another form of lawfare – both formal ones like the International Criminal Tribunal for the Former Yugoslavia examination of the Kosovo operation, as well as those conducted by NGOs and academics.

However, Helle Bering argued in her *Washington Times* article “International Criminal Circus” that Americans would not allow U.S. troops to be tried before a forum such as the International Criminal Court (ICC) that fails to meet even the minimum standards of an American court-martial. Indeed, spurious allegations of Laws of Armed Conflict violations after the Balkan War all but guaranteed US would not ratify the ICC treaty any time soon.

Thus, as the PA is currently threatening to seek ICC membership in order to try the IDF for war crimes, US and most NATO members would unlikely support this lawfare tactic.

Remarks: Opinions expressed in this contribution are those of the author.

About the Author of this Issue

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