

Opinion

In pursuit of an antidote: the response to September 11 and the rule of law

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Following the 11 September 2001 terrorist attacks on the World Trade Center in New York City and the Pentagon in Washington, DC, the administration of US President George W. Bush opted for a two-pronged response.¹ The initial and more prominent reaction was intended to be retributive: to bring the perpetrators to justice. The subsequent response was intended to be a deterrent: to impose order and security coercively in order to prevent a repeat of these deadly incidents. It was believed that, in this dual strategy, lay the antidote to September 11.

The international community largely endorsed the twin response. As the world remained transfixed on 'ground zero', the French Mission to the United Nations (UN) in New York was working to draft a Security Council resolution. Passed unanimously on 12 September 2001, resolution 1368 requested that all states 'work together urgently to bring to justice the perpetrators, organisers and sponsors of these terrorists acts'. It stressed that 'those responsible for aiding, supporting or harbouring the perpetrators, organisers and sponsors of these acts will be held responsible'. In the same resolution, the Security Council called on the international community 'to redouble [its] efforts to prevent and suppress terrorist acts'.² The UN General Assembly adopted a shorter but similarly worded resolution (A/Res/56/1) the same day. It highlighted the need for international cooperation 'to bring to justice the perpetrators, organisers and sponsors', as well as the need 'to prevent and eradicate acts of terrorism'.

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The global community of states, both in its most powerful and authoritative form, the UN Security Council, and in its most representative form, the UN General Assembly, seemingly endorsed the retributive and deterrent responses of the US government—with emphasis on the former.

This quest for ‘justice for perpetrators’ and ‘deterrence through law and order’ was an understandable approach in the immediate aftermath of September 11. However, the ramifications of this quest are less explicable and, indeed, inexcusable and dangerous. The ostensible pursuit of justice and law under the banner of the ‘war on terror’—spearheaded by the US administration, but backed by the diverse membership of the ‘coalition’—has actually subverted justice and perverted the rule of law. Any meaningful notion of justice is noticeably absent in the blind search for security through the strong arm of the law. National and international laws and legal principles have been bypassed, transgressed or simply overruled by new laws or executive decree.

The consequences of this strategy may appear minor, but they are alarming. First, the atavistic concept of state security has reasserted its primacy over emerging acceptance of ‘human security’ as an idea and practice more attuned to the needs of people in the twenty-first century. Second, while the term ‘law and order’ continues to be used glibly, as if the two are inseparable, order has, in fact, been divorced from law since September 11. Order has become the supreme objective, and law is merely the handmaiden used to attain this goal. Third, in this process, ‘law’ works against the very ‘justice’ it is intended to deliver.

One might ask whether this is a price worth paying. Did this quest provide the desired antidote to September 11? One could argue that it did not. The US administration and some other governments might claim some ‘strikes’, some tactical advantages in the ‘war on terror’, but the longer-term risks and effects outweigh any short-term political or security gains.

Was justice pursued?

There is a short, politically expedient answer, as well as a longer, philosophical and ethical answer to this question, depending on the notion of justice that one chooses to adopt. In politics and common parlance, justice is often reduced to getting one’s just desserts or to the righting of wrongs. At best, it is expressed in legal terms as the protection of certain liberties guaranteed by national constitutions or, in particular, by

the rights encoded in the 1976 International Covenant on Civil and Political Rights. The broader domain of rights encapsulated in the 1976 International Covenant on Economic, Social and Cultural Rights has been largely sidelined in Western thinking and practice, both by governments and by human-rights activists, and has only been marginally reinstated since 1993.³ If any of these conceptions of justice were employed, the short, politically expedient answer to the question posed above might be affirmative. The imperative to mete out just desserts to the perpetrators of September 11 and to right wrongs or to restore the rights of the victims required the global pursuit of al-Qaida operatives from Afghan caves to German cellars. However, such a reductionist and incomplete understanding of justice cannot yield a satisfactory response to the question.

In any meaningful sense, justice comprises at least three distinct albeit overlapping and related dimensions (Mani, 2002, pp. 3–22). One is ‘rectificatory’ justice: the setting right of wrong deeds or harm done to a person in violation of certain established, accepted codes of conduct. A second dimension is legal justice or the rule of law, referring to the institutions, processes, principles and laws designed to protect civilians and their rights. A third dimension is distributive or social justice: some notion of equality or equity between members of a national or global polity, primarily in terms of fair and undiscriminating access to resources, opportunities and power.

Rights discourse partially captures these three dimensions. Human rights conventions place obligations on signatory states, covering aspects of rectificatory and legal justice or rule of law in the International Convention on Civil and Political Rights, and aspects of distributive justice in the International Convention on Economic, Social and Cultural Rights. As a result, they enable at least some justice claims—mainly political and civic—to be protected, and they provide a framework for legal redress when they are violated. However, ‘justice’ is not reducible to ‘rights’.

We can now seek the ethical, albeit longer answer to the question set at the outset of this section: did the dual response of the US and the international community measure up to this tri-fold categorisation of justice?

Distributive justice

Looking first at distributive justice, September 11 did give vent to global soul-searching for the ‘root causes’ of terrorism, with everyone from politicians to scholars to sages offering a verdict.⁴ While theories proliferated and diverged, one segment of liberal

opinion—supported by several politicians, academics and activists in Western Europe—held that the background to September 11 lay in inequality and distributive injustice, in the widening gap between rich and poor. More precisely, this view acknowledged that the masterminds of global terrorism and the executives of September 11 were prosperous and well educated, but it recognised that they drew their support from desperate, aggrieved and marginalised people throughout the world. This debate did lead to political talk about increasing development aid flows and opening up trade to narrow the inequality gap, as a partial attempt to prevent, and not just to deter or suppress, terrorism. Clearly, a chasm has widened between the position of the European Union (EU), which supports tackling the root causes of terrorism, and that of the Bush administration, which prefers to address the symptoms (Freedland, 2002; McCarthy, 2002).

However, at the UN International Conference on Financing for Development in March 2002—the first opportunity for states to demonstrate their commitment to distributive justice—even European donors failed to meet the conference target of doubling aid budgets. The EU's phased increase of \$7 billion per year in overseas development assistance (ODA) by 2006 would represent 0.39% of gross national product (GNP), while Bush's vaunted increase in ODA to \$5 billion per annum over three years would represent 0.15% of GNP, short of the conference target of 0.5% (UNDP, 2002, p. 206). Effectively, the US 2003 aid package would total \$0.7 billion, compared to some \$1.8 billion per month spent on its war in Afghanistan, and the \$400 billion defence-budget proposal submitted to Congress to expand the war on terrorism (FCNL, 2002). Moreover, Bush's absence from the World Summit on Sustainable Development, held in Johannesburg, South Africa, from 26 August to 4 September 2002, indicates his administration's relative disinterest in distributive injustice and the underlying causes of terrorism. It signals a return to business as usual just a year after September 11.

Rectificatory justice and the rule of law

The US and the international community's response to September 11 emphasised the dimension of rectificatory justice. More precisely, the language used and the means employed underlined retribution or revenge rather than merely rectification. What occurred on September 11 was evil and criminal; the perpetrators and their abettors had to be punished at all costs and by whatever means. This reaction is psychologically

understandable in the aftermath of such a tragic event. Furthermore, it served to justify the launch (a month after September 11) of a military campaign by US-led coalition forces to eject the Taliban regime in Afghanistan, which was held responsible for harbouring key al-Qaida figures, including Osama bin Laden.

However, the means used to pursue alleged terrorists throughout the world, primarily by the US, but also by other coalition stalwarts, defy explanation or justification, and certainly any claim to being just or lawful. In its retributive pursuit, the US and its partners used and often abused the rule of law to track down suspects. Three patterns are discernible in the varied strategies adopted under the war on terror to satisfy the desire for retribution:

- bypassing of laws and principles of legality;
- transgression of national and international laws, norms and principles; and
- fabrication of new laws or executive orders to pursue objectives.

It is not possible to provide an exhaustive analysis of each case here, but a few examples illustrate the point.

Bypassing laws

In March 2002, an article in the *Washington Post* reported that the US government had arranged for the secret transfer of dozens of people arrested overseas to third countries like Egypt and Jordan for interrogation, circumventing extradition procedures and legal formalities (Chandrasekaran & Finn, 2002, p. A1). This procedure of 'rendition' of suspects to third countries also allows US officials to side-step American laws prohibiting torture and requiring fair trial (ICHRP, 2002, pp. 24–25). The most criticised attempt to bypass law was the transfer of al-Qaida suspects to the US base in Guantanamo Bay, Cuba, where, technically, US laws governing interrogation and treatment of suspects do not apply.

Transgressing law

At least three bodies of international law have been transgressed in the war on terror. First, the Geneva Conventions of 12 August 1949 were violated—these conventions govern conduct in war, and with 189 signatory states, are the most widely accepted body of international law. Press and advocacy groups protested about several transgressions of

the Geneva Conventions, such as the number of civilian casualties resulting from air raids, violating non-combatant immunity, and the disproportionate use of force, violating proportionality. There was also vehement criticism in regard to the aforementioned use of Guantanamo Bay; the US argued that the suspects were not technically prisoners of war, and did not warrant the intervention and protection of the International Committee of the Red Cross (ICRC). These affronts to international humanitarian law elicited alarm even from the diplomatic Swiss government, the ‘depository of the Geneva Conventions and their additional protocols’. As the Swiss Foreign Minister Joseph Deiss urged in April 2002: ‘This is not the time to create an artificial legal vacuum in order to justify suspending or restricting the application of humanitarian law’ (Deiss, 2002).

A large-scale, life-threatening contravention, though, went largely unnoticed. Non-governmental organisations (NGOs) had observed that Afghans faced death by starvation absent massive relief supplies well before the military campaign. However, when the military campaign began and a no-fly zone was imposed over key areas, humanitarian access to Afghan civilians was severely hampered by security priorities. Yet, scant protest was registered by relief agencies of this violation of the right to humanitarian assistance on which Afghan lives—and, ironically, their own existence as an industry—depend. Indeed, selective protest by humanitarian agencies about coalition violations of the Geneva Conventions—apparently guided more by real politik than justice or solidarity—is a disquieting consequence of September 11 meriting profound reflection.

The 1951 Convention Relating to the Status of Refugees has been contravened on several fronts. Refugees and asylum seekers have become scapegoats, as refugee protection agencies have decried repeatedly (UNHCR, 2001). Less protested was the apparent violation in Afghanistan of the central principle of *non-refoulement* or non-return, which protects people from being returned to places where their lives or freedoms could be threatened. Having restricted humanitarian access, the coalition’s military campaign then blocked the only remaining escape route for Afghans fleeing the bombing and starvation. The governments of Iran and Pakistan were impressed on to seal their borders to refugee flows, to prevent any possible flight of al-Qaida operatives and to create a ‘pressure cooker’ within Afghanistan to facilitate the coalition’s hunt (Stockton, 2002, p. 268). However imperative the security rationale and, however unintentional its consequences, the ‘collateral damage’ is inestimable. Documentation or protest on this issue is quasi-absent.

A third body of international law that has been violated is human-rights law. Experts concurred that September 11 represented a crime against humanity, but expressed grave disquiet over violations of human rights and civil liberties committed in the rectification of this crime. The then UN High Commissioner for Human Rights (HCHR), Mary Robinson, the Secretary-General of the Council of Europe, Walter Schwimmer, and the Director of the Organisation for Security and Cooperation in Europe (OSCE)'s Office for Democratic Institutions and Human Rights, Gérard Stoudmann, issued a joint statement on 29 November 2001 on this subject. In it, they urged states to strike a fair balance between national security concerns and fundamental freedoms, and to act consistently with their international legal obligations (ICHRP, 2002, pp. 19–20).⁵ A joint NGO statement in March 2002 to the UN Commission on Human Rights raised serious concerns about violations of the human-rights principles of due process and fair trial committed by states in complying with the requirements of Security Council resolutions 1373 and 1377,⁶ regarding global strategies against terrorism, and obligations on member states.⁷ Thus, the Security Council itself was held indirectly responsible.

The various and varied violations of human rights and civil liberties have been extensively criticised in national and international media, and do not require repetition. One area that merits re-emphasis, though, is racial discrimination. In the year after the unprecedented World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, sponsored by the HCHR and held symbolically in Durban, South Africa, from 31 August to 8 September 2001, the rights most damaged and transgressed—as much by governments as by ordinary citizens—are those against racism and discrimination. Racial profiling by security and immigration officials in rich countries has been widely reported, and, according to British writer George Monbiot, has transformed the war on terror into a veritable ‘war on the third world’. In his analysis, ‘international’ terror is portrayed solely as ‘violence directed at US citizens, US commercial interests, or white citizens of other nations. Non-whites are perpetrators of terror, but not its victims’ (Monbiot, 2002). Widespread racist, ethnocentric and anti-Islamic attitudes in the West have risen apace with racist violence and dramatic electoral gains for ultra-nationalist political parties.

Some governments might proffer the excuse that September 11 created an unprecedented emergency situation warranting the abrogation of international laws and obligations. This rings hollow. The fundamental human rights related to life and liberties are non-abrogable even in emergencies, and humanitarian and refugee laws are

specifically designed for application in wars and crises. It is nothing short of a catastrophe that the international laws painstakingly devised to protect civilians from war and unscrupulous governments following the Second World War have been repeatedly contravened by some of their architects.

Fabricating laws or decrees

An innovative move by coalition governments was to create new legislation to permit and legalise official conduct that normally would be considered a violation of national and international law and legal obligations. The Brussels-based International Federation of Journalists (IFJ) reported in October 2001 that new legislation was rushed through in Australia, Canada, France, Russia, the UK and the US to allow, for instance, phone-tapping, internet control, detention of migrants, police surveillance and restricted freedom of movement. Both the 'Patriot Act' in the US, which became law in October 2001, and the UK's Anti-Terrorism, Crime and Security Bill, passed in November 2001, which restricts civil liberties and targets non-citizens, have frequently victimised and made scapegoats of innocent persons (IFJ, 2001; ICHRP, 2002, pp. 24–25).

Expedient, executive decrees have been passed to evade legislative processes. Notably, Bush established military tribunals to try non-citizens suspected of terrorism via an executive order. As US commentator, William Saphire observes, despite improvements to tribunal procedures and in response to harsh criticism, hearsay is still acceptable as evidence, there is still no jury and no civilian review, and, most seriously, the executive order evaded the participation of Congress in the making of law. He protests: 'But ours is a government of laws, not of executive fiats' (Saphire, 2002). The racist, anti-citizen, anti-immigrant and anti-refugee orientation and/or the implications of several anti-terrorist measures adopted by ostensibly democratic regimes based on the rule of law are perturbing (HRW, 2002).⁸

Unfortunately, manipulation of the law in pursuit of terrorists is not a Western phenomenon, but a more universal one. Indeed, many non-Western countries have made opportunistic use of the war on terror to satisfy domestic preoccupations. China, India, Israel, the Philippines and Russia, for example, have defended wars in their neighbourhoods as anti-terrorist, in order to gain legitimacy or military assistance. Several regimes, such as that of Zimbabwe, have used September 11 to tighten domestic laws and measures designed to muzzle or persecute political opponents (Grier, 2002; ICHRP, 2002, pp. 26–27).

Did retribution respect the rule of law?

The question raised is whether the bypassing, transgressing and fabricating of laws in pursuing rectificatory justice was consistent with the rule of law. The answer depends, again, on the meaning of the rule of law adopted. In its full meaning, the rule of law is an umbrella term embracing both the form and content of the law, as well as the conduct of lawmakers and enforcers. As expressed by the OSCE: ‘The rule of law does not merely mean formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression’ (CSCE, 1990, p. 3; Mani, 2002, pp. 27–29). Clearly, the conduct of several coalition states, including members of the OSCE, was not consistent with this definition.

In a narrower sense, the rule of law requires that, at a minimum, citizens are protected from the arbitrariness of state power, and, as implied by the OSCE above, that formal legality and consistency be respected. ‘Stripped of all its technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of that knowledge’ (Von Hayek, 1986).

The conduct of coalition states fails even to satisfy this minimalist definition, as ordinary people were not protected from arbitrary state action either in their own countries or abroad. Rather, such intrusions on individual freedoms were tolerated or endorsed in the pursuit of justice and security in the war on terror, despite public opposition.

Some might argue that the rule of law was indeed respected, in that scrupulous attempts were made to respect principles of legality and legal obligations impinging on states. For instance, by bypassing laws and procedures wherever possible rather than violating them overtly, or by creating laws or announcing executive orders publicly rather than acting extra-legally. This might be described as rule *by* law, but it is insufficient to qualify as rule *of* law.

Was it worth it?

If this dual strategy met its objectives—if the perpetrators of September 11 were brought to justice and the threat of recurrent incidents of terrorism deterred—perhaps the

undermining of justice and the rule of law might be considered a temporary and worthwhile sacrifice for a greater good, and hence justifiable. Taking the first objective of retribution, it is doubtful whether the pursuit of the perpetrators and their abettors has borne a rich harvest, whether in terms of the Afghan military campaign, or other overseas counter-terrorist operations, such as the one in the Philippines. A year after September 11, 'retribution' for its victims, the paramount aim the following day, has not been achieved. Osama Bin Laden remains elusive, despite numerous raids and arrests worldwide, and his popularity with certain populations is undiminished.

One might argue that the 'war' is not yet over and judgement cannot yet be passed on whether rectificatory justice has been obtained. Let us look, therefore, at the second objective of deterrence. The US remains embroiled in Afghanistan at an alleged cost of \$1.8 billion per day estimated in late 2002 (FCNL, 2002), and the war in Iraq is much costlier. As senior US officials periodically remind their citizenry, though, the menace of a terrorist attack, anywhere, anytime, remains as alive. Murky evidence that the Central Intelligence Agency (CIA) and the White House were forewarned but failed to act effectively to prevent September 11 suggests that they could fail to foil terrorism in future. That is, despite the forceful establishment of the primacy of order and state or the ranking of 'homeland' security above human security, deterrence has not been attained.

Conclusion

The pursuit of retributive justice for September 11 by circumventing or subverting legal justice and evading distributive justice is a myopic strategy. Prioritising order to prevent a recurrence of the tragic events that occurred in New York City and Washington, DC, by violating international laws and constitutional rights, cannot result in any lasting sense of human or even state security. This dual pursuit may lead to a few perpetrators being punished, but without due process of law; the 'justice for perpetrators' that emerges will be a hollow victory, as it will have trumped the rule of law. It may delay a recurrence of September 11—at least on American or European soil—through strong-armed security measures, but it could fail to deter or prevent smaller-scale terrorist attacks, as seems to have been the case in Bali, Indonesia, in October 2002.

Whatever the short-term gains in state security or in popularity for political leaders, this strategy will not lay foundations for justice or peace. It will certainly not create

public confidence or trust in the US or its coalition partners. Terrorism that targets the perceived powerful ‘oppressor’ will continue as long as law is divorced from order and undermined to pursue security. Terrorism will recur wherever justice is reduced to retributive vengeance, social injustice is answered with miserliness and grievances with neglect or repression, and retribution and security for the few are pursued at the expense of justice and the rule of law for all.

Endnotes

1. The views expressed in this article are entirely those of the author, and should not be attributed to any other source.
2. The Security Council also adopted resolution 1373 on 28 September 2001, a comprehensive resolution detailing steps and strategies for all states to follow to combat terrorism, and resolution 1377 on 12 November 2001, urging states to comply urgently.
3. The ‘Vienna Declaration and Programme of Action’ (UN Document A/CONF.157/23, 12 July 1993), adopted by the World Conference on Human Rights, reasserted the indivisibility and interdependence of the two sets of rights. Mary Robinson, as UN High Commissioner for Human Rights, tried to develop the neglected body of social and economic rights, such as the right to development.
4. A ‘google’ search on the internet under ‘root causes of terrorism’ yielded 47,000 hits in just 0.16 seconds in mid-August 2002, and this is not necessarily an exhaustive inventory but merely indicative. Given the abundance of valuable opinion and analysis of September 11, the temptation to over-reference and the impossibility of being exhaustive, this author has tried to be frugal and cite only the most relevant or typically illustrative opinions.
5. ‘Governments using war on terrorism to erode human rights—Amnesty International’, *Associated Press*, 28 May 2002. Joint Statement issued on 29 November 2001. Discussed in ICHRP, ‘Human Rights after September 11’, *op. cit.*, pp. 19–20.
6. See endnote 2.
7. ‘NGO Joint Statement on the Violations of Human Rights in the “War Against Terror”’, presented to the 58th Session of the Commission on Human Rights, UNHCR, March 2002, (www.globalpolicy.org).
8. This documents cases that fit into all three categories of bypassing, transgressing and inventing new laws.

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