

*Also by Ken Booth*

STRATEGIC CULTURES IN THE ASIA-PACIFIC REGION

*Also by Tim Dunne*

INVENTING INTERNATIONAL SOCIETY: A History of the English School

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# Worlds in Collision

## Terror and the Future of Global Order

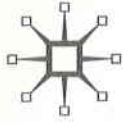
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## CHAPTER 14

## Upholding International Legality Against Islamic and American Jihad<sup>1</sup>

Abdullahi Ahmed An-Na'im

While condemning the terrorist attacks of September 11 on the United States in the most categorical and unqualified terms, I also hold that the failure of the international community in any way to check or to regulate the massive and indefinite unilateral response by the United States is a fundamental challenge to international legality. In retaliation since October 7, the United States has acted militarily on a global scale exclusively on its own perceptions of the immediate or anticipated danger to itself, without any assessment of those perceptions through accepted institutional arrangements and processes of international law. To simplify and illustrate the seriousness of this situation in domestic law terms, it is as though someone's house had been attacked and the aggressor had been killed in the attack, but the victim had then taken his gun and gone into the town killing those he believed to be responsible for or associated with the attack. This failure of international legality promotes the cause of militant Islamic fundamentalism and undermines possibilities of support for international peace and protection of universal human rights in Islamic societies.

Space would not permit discussion and assessment of the legality of all the actions of the United States since October 7, and it is probably too early to do so. But my main point in this respect is the *institutional and procedural failure* of international legality, even if the actions of the United States were found to be legal and appropriate if properly scrutinized and evaluated. The essence of the principle of legality, whether at the domestic or the international level, is essentially about the *standards and process* of independent and impartial investigation and adjudication of disputes, rather than subjective determinations of 'entitlement' to act in certain ways. Legality fails whenever actors resort to

self-help and vigilante justice, which is even more serious when perpetrated by the world's sole superpower and permanent member of the Security Council, which is supposed to be the guardian of international peace and security.

The serious implications of this failure can better be appreciated when it is viewed against a background of Western colonial and post-colonial hegemony and aggression in many parts of the world. Afghanistan itself was the target of repeated attempts at conquest by Britain and Russia in the past, and the site of Cold War confrontation between the Soviet Union and the United States in the 1980s and of regional conflicts up to the present. This context also includes the use or sponsorship of terrorism by the United States on the territory of other countries, especially in South and Central America, and its long-term support of the same forces it is now seeking to destroy in Afghanistan. As far as international legality is concerned, one should recall that the United States simply ignored the judgments of the International Court of Justice regarding its illegal activities in Nicaragua in the early 1980s, and invaded Panama in order to kidnap its president and bring him to trial in the United States, where he is still serving a prison sentence.

I am unable to appreciate any moral, political or legal difference between this *jihad* by the United States against those it deems to be its enemies and the *jihad* by Islamic groups against those they deem to be their enemies. The Arabic term *jihad* simply means 'self-exertion' or 'special effort', and is used in Islamic discourse to refer to a variety of activities undertaken in furtherance of the will of God. In fact, the primary religious meaning of *jihad* for Muslims is 'self-control', including checking any temptation to harm others.<sup>2</sup> However, the term can also refer to religiously sanctioned aggressive war to propagate or 'defend' the faith. What is problematic about this latter sense of *jihad* is that it involves direct and unregulated violent action in pursuit of political objectives, or self-help in redressing perceived injustice, at the risk of harm to innocent bystanders. It is in this very limited and specific sense of the term that I am comparing the actions of the United States since October 7 to claims of *jihad* by Islamic terrorists. The fact that one approach is rationalized as 'American exceptionalism' and the other as a religious duty is immaterial for my purposes here, as it relates only to the motivation of the actors and not to their deliberate intention to act in this way, nor to the consequences of their action. Moreover, these recent events have clearly shown that religious motivations have no 'advantage' over mundane calculations of material advantage.



In my view, the aftermath of the attacks of September 11 proves the fallacy of Samuel Huntington's 'clash of civilizations' thesis,<sup>3</sup> in addition to the grave risks it creates for peaceful international relations. The fallacy of this thesis is clear in that the attacks were motivated by specific political, security and human rights grievances against the foreign policy of the United States, rather than by an irrational, generalized Islamic hostility to so-called 'Western civilization' as such. More importantly, there was no indication of a clash of civilizations in the actual positions of any Islamic country, as they all either supported the massive and sustained military retaliation by the United States or acquiesced to it. Instead of standing in solidarity with the Muslims who are alleged to have attacked the United States, or the states accused of harbouring or supporting them, as Huntington's thesis would lead one to expect, all the governments of predominantly Islamic countries have clearly and consistently acted based on calculations of their own economic, political or security interests. What is happening everywhere is simply the politics of power, as usual, and not the manifestation of a clash of civilizations. Yet Huntington's thesis can be a dangerous self-fulfilling prophecy because its underlying premise may be 'vindicated' if either or both sides to this or other conflicts take it seriously and act upon it.

In this light, it becomes clear that the aftermath of September 11 and October 7 is more about the *difference in power* between the two sides of the conflict and their allies, regardless of cultural/religious affiliation, than the *power of difference* between so-called Islamic and Western civilizations. As would be the case everywhere in the world, culture and religion are important dimensions of the conflict only in relation to how events are perceived, interpreted, and reacted to by all sides; they are not independent and static variables. Recent global events do raise the risk of a deepening cultural/religious divide that will undermine the universality of human rights, but this alarming prospect is the product of moral and political choices constantly being made by all sides to this or other similar conflicts, and is not inherent in the nature of cultural/religious difference as such.

It is also important to emphasize that a failure of legality cannot be justified by its outcome. In this instance, the removal of the oppressive and violent Taliban regime from power in Afghanistan may be claimed as 'vindication' of the American military campaign, which has achieved immediate improvement of the protection of human rights for the vast majority of the population, as well as creating favourable conditions for peace, political stability and economic development for the country as

a whole. Even if this is a true and sustainable outcome in this case, which is far from clear anyway, such retroactive rationalization violates the essence of the principle of legality which requires legitimate results to be achieved in accordance with generally established principles and processes. Otherwise, other actors will use this dangerous precedent as justification for a wide variety of speculative adventures, some of which are bound to have disastrous consequences.

Underlying the whole analysis is my belief in the critical importance of the rule of law as a framework for responding to this challenge. It should be emphasized, however, that the rule of law in this sense means 'law' that is consistent with international human rights law, and not simply in any formal sense of the term. In my view, this is the only effective and sustainable response to the reality of *our shared vulnerability* as human beings everywhere – even the most privileged and apparently secure persons and groups, as painfully and dramatically illustrated by the attacks of September 11.

### The Challenge of Terrorism for Islamic Societies

A major issue facing Islamic societies today is the role of Islam in their national politics and international relations; especially regarding whether, and to what extent, traditional formulations of Sharia should apply today. Different positions on this basic issue have been reflected in the extensive public debate among Muslims since September 11, ranging from a categorical disassociation between Islam and the attacks, at one end, to strong support for them as justified, if not dictated, by Sharia, at the other. In fact, the relationship between Sharia and terrorism has always been an extremely contested subject among Muslims, ever since the first civil war (*al-fitnah al-Kubra*) following the rebellion against Uthman, the third Caliph, and his murder in the year 35 of *Hijrah* (656 CE).<sup>4</sup> Since *textual* sources (the Qur'an and Sunna, or traditions of the Prophet) as well as precedents in early Islamic history can be cited in support of either side in this controversy, I suggest that resolution should be sought in *contextual* mediation between these views; that is, competing textual sources can only be understood and reconciled with reference to a contextual framework for their meaning and practical application today.

The main premise of this contextual mediation is that Islamic sources are supposed to provide moral and political guidance for drastically different Muslim communities living under radically different conditions – from the small city state of Medina in seventh-century



Arabia, to today's nation-state societies, and into the future.<sup>5</sup> The historical context within which Sharia was elaborated during the first three centuries of Islam was an extremely harsh and violent environment, where the use of force in intercommunal relations was the unquestioned norm. It was simply conceptually incoherent and practically impossible for Sharia regulation of intercommunal (international) relations to have been based on principles of peaceful coexistence and rule of law in the modern sense of these terms. The dominant traditional view is that Sharia restricted the causes of the legitimate use of aggressive force in *jihad* to propagating Islam. Sharia also regulated the conduct of hostilities, including the strict prohibition on killing children, old men, women and non-combatants.<sup>6</sup> But it is also clear that there is much ambiguity and diversity of opinion in the theory of Sharia on this subject, and that practice has been far from consistent with that theory throughout Islamic history.

Despite my deep concerns about the current serious threat to the credibility of international legality, I maintain that the traditional understandings of *jihad* are totally untenable today.<sup>7</sup> In my view, the serious threat to international legality posed by the recent conduct of the United States and the complicity of major world powers in this regard does not justify a re-enactment of that sense of *jihad*, and the realities of global power relations would not permit its practice today. The challenge facing Islamic societies today is how to authoritatively and effectively repudiate those notions of *jihad* in the hearts and minds of Muslims, and not only in the official policy and practice of their states. Since Islam addresses the individual Muslim directly, there is a strong sense of obligation to comply with what is believed to be Sharia, regardless of the official policy or action of the state as such. When there is no redress to grave injustice under the rule of law, individual Muslims are likely to invoke religious justification for direct violent action against corrupt regimes at home and perceived enemies abroad.<sup>8</sup>

There are internal and external dimensions to the proposed transformation of the nature and role of Sharia in the lives of modern Islamic societies. The internal dimension includes theological and theoretical debates about the rationale or justification of change, and ways of coping with its traumatic impact on personal and communal lives. This internal dimension also includes the political and sociological 'space' for such debates and experimentation with new ideas and lifestyles. The strong acceptance and effective implementation of universal human rights are critical for all of these facets of social change and cultural transformation.

Regarding the external dimension, if a society feels threatened or under attack, a siege mentality will take hold, whereby people and groups tend to become more conservative and entrenched in their traditional ways of seeing and interpreting things. From this perspective, US foreign policy contributes to the erosion of the internal prerequisites for social change and transformation, as well as reinforcing a sense of external threat that encourages conservative entrenchment. It also encourages strong scepticism about the validity of universal human rights, whether by supporting oppressive regimes like Saudi Arabia or by enabling that of Iraq to consolidate its control by citing the external pressure of sanctions and the constant threat of air strikes as justification for its behaviour. These long-term negative consequences are now drastically compounded by the military campaign in Afghanistan.

This recent failure of international legality severely undermines the conceptual and political premise of arguments against the traditional understanding and practice of *jihad* in Islamic society. This sequence of events is a betrayal of Muslim advocates of international legality because it undermines the conceptual as well as the political basis of their internal Islamic argument against *jihad* and in favour of the universality of human rights. The proponents of *jihad* as an aggressive war are more likely to be supported by the majority of Muslims in a world where military force and self-help prevail over the rule of law in international relations.

### The Challenge of American *Jihad* to International Legality

I am not suggesting that the United States should passively submit to repeated atrocious attacks against its citizens and interests at home and abroad, nor am I drawing any conclusions about the possible legal justification(s) for its military campaign in Afghanistan. Rather, my position is simply that the actions of the United States since October 7 cannot be accepted as being in conformity with international legality unless they are scrutinized and approved by the *institutional and procedural* requirements of that system. Whatever legal justification(s) may be claimed for the actions of the United States, they can never authorize it to act as prosecutor, judge, jury and executioner in its own cause and still claim the legitimacy of international legality.

While a detailed assessment of the legality of these actions is beyond the scope of this chapter, it is important to note that the limited activities of the UN Security Council in this regard only confirm the failure

of international legality. The Security Council adopted two resolutions prior to October 7: Resolution 1368 of September 12, 2001, and Resolution 1373 of September 28, 2001. The first simply condemned the attacks and decided 'to remain seized of the matter' without making any other decision. The second affirmed the right of self-defence in its preamble, but did not sanction any use of force under Chapter VII of the UN Charter. In my view, the failure of international legality lies in the fact that the American military campaign began four weeks *after* the attacks of September 11, and continued for more than three months (at the time of writing), and yet the Security Council neither authorized, endorsed nor condemned any of these actions, let alone acted itself to preserve international peace and security, as required by the Charter.

Terrorism is a serious threat to human rights precisely because there is a powerful temptation to sacrifice principled commitment to the due process of law in the name of defending national security and public safety. The ultimate objective of terrorism, in all its forms and from whatever source it may come, is to diminish the humanity of its victims and to reduce them to its own level of barbarity. To respond to this challenge, each society needs to reflect on its own enlightened and humane best interests in the face of such grotesque behaviour. In particular, since direct retaliation will only feed into a downward spiral of mutual destruction, each society has to strive to understand and address the possible causes of what appears to be utterly senseless carnage, however alien and incomprehensible that may be to that society's own sense of rationality.

Failure to acknowledge and address the rationality of the terrorists is to deny their humanity, and thereby to forfeit any possibility of universality of human rights. This is why it is critically important to take into serious consideration the grievances articulated by terrorists, like the various pronouncements and international media interviews given by bin Laden before and after the attacks of September 11, without implying that such views justify or legitimize terrorism as a means of redress. Understanding the motivation of any terrorist is essential for a reasoned and sustainable response, and should not be seen as condoning the crime or blaming the victim. It is from this perspective that I insist that it is relevant, indeed necessary, to consider the relationship between the attacks of September 11 and US foreign policy. This perspective applies to US policy in relation to particular regions of the world – the Middle East, in this case – and to its subversive impact on international legality.

### Upholding International Legality for Human Rights

One of the consequences of the recent failure of international legality is that it precludes any meaningful discussion of the legal characterization of both the terrorist attacks of September 11 and the military retaliation by the United States and its allies since October 7. Instead of engaging in a hypothetical or speculative discussion of these issues, I prefer to focus here on clarifying what I mean by this failure of international legality, and its drastic implications for the universality of human rights. My point here can easily be appreciated from the old maxim, 'Justice must not only be done, but must also *be seen* to be done.' In this case, the apparently arbitrary, unfettered and unilateral power of the US to do what it pleases across the world is as damaging to the legitimacy and credibility of international law (and human rights) as an affirmation that it actually has the legal authority to do so.

However, it is also pertinent to ask, 'What is the alternative? How can the United States protect its own citizens and safeguard its sovereignty and territorial integrity, even its national dignity and pride as the world's sole superpower?' The answer is simply that the attacks were international crimes of the utmost seriousness that must be vigorously investigated in order to hold those responsible accountable under the law. From this perspective, and according to the available and verifiable facts, the legal issue between the US government and the Taliban government of Afghanistan immediately after the attacks should be characterized as an extradition matter, and pursued as such. This approach may have been unrealistic regarding the attacks of September 11, but it was never given a serious chance by the US, whose actions since October 7 make such an approach even less viable in similar cases in the future.

If there is the political will to treat the attacks as a matter for law enforcement, not military retaliation, I believe that there are enough normative and institutional resources to begin the process of criminal accountability under international law. Available models include *ad hoc* international tribunals established by the UN Security Council and tribunals established as a result of negotiations between concerned states, as happened in the case of the bombing of the Pan Am flight over Lockerbie in Scotland. In fact, during the first week of October, a few days prior to the commencement of the American military campaign, Iran made an offer via the British Foreign Secretary to use the mediation of the Organization of the International Islamic Conference (which was to meet the following week in Bahrain) to agree



on a forum whereby suspects in the September 11 attacks could be brought to trial based on the evidence. The Taliban regime made a similar offer for mediation by the International Islamic Conference and the UN. The United States rejected both offers and demanded the immediate and unconditional surrender of Osama bin Laden and al-Qaeda leaders, exclusively on the grounds of its own assertion of their responsibility for the attacks, without allowing for any independent and impartial verification of the evidence. According to some press reports at the time, the United States showed the evidence it had against Osama bin Laden and his associates to its NATO allies, some of whom felt that it would not stand in a court of law – but even if they all found the evidence sufficient for a conviction, that would still not be good enough from the viewpoint of due process of law.

It may be true that the institutional capacity and practical efficacy of the international legal order are insufficient for these purposes, but this claim is not available to the United States simply because it never gave international legality a chance to work in this case. Moreover, the only way to remedy the weakness or inadequacies of international legal processes is to invest in the development of the system over time. The point is clearly illustrated in the legal history of the United States itself. When organized crime unleashed a streak of violence, intimidation and corruption in the 1920s that seriously threatened public safety and undermined the administration of justice in many parts of the country, the US government persisted in its commitment to the rule of law and gradually built a credible domestic judicial system without compromising on due process. Without similar determination and perseverance, the time will never come when the rule of law replaces self-help and vigilante justice in international relations.

The problem here is that the United States is committed only to the protection of the civil liberties of its own citizens, with little regard for the human rights of other people elsewhere in the world. This can be seen in the treatment of non-citizens within the US since September 11, including the military directive of President Bush authorizing the trial of foreign nationals, and including lawful permanent residents of the US itself, suspected of terrorism before military tribunals, with no due process protection.<sup>9</sup> In this light, and given its strong opposition to efforts to establish the International Criminal Court, one may wonder whether the United States' rush to military action was not part of a deliberate policy to subvert any possibility of international criminal accountability for the terrorists attacks of September 11.

In the final analysis, however, since it was so clear that the United States was unwilling to give due process of international law a chance, why did the Security Council fail to intervene to uphold the mandate of the Charter of the United Nations itself for the peaceful settlement of disputes? Why did the Security Council fail, in the two resolutions it passed on the matter prior to October 7, either to expressly authorize the use of force by the United States and clearly define the scope and objectives of its military operations, or to call for the establishment of a UN force for the purpose? The apparent answer to these and related questions is that the members of the Council itself, especially the five permanent members, have conspired to paralyse and marginalize the UN system for their own political interests. It is relevant to recall here, I believe, that none of the major actors in that subversion of international legality come to this with clean hands. While a host of countries, including the United States and Russia, have used terrorist methods or sponsored terrorists for decades, others have either done so in the recent past or have their own peculiar political reasons for failing to challenge those who do.

### Notes

1. This chapter is based on a paper I presented at an International Meeting on Global Trends and Human Rights – Before and After September 11, organized by the International Council on Human Rights Policy, Geneva, January 10–12, 2002.
2. Al-Kaya al-Harasiy, *Ahkam al-Qur'an* (The Precepts of the Qur'an) (Beirut: al-Muktabah al-ilmia, 1983), vol. 1, pp. 78–89.
3. Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon and Schuster, 1996).
4. Wilfred Madelung, *The Succession of Muhammad: A Study of the Early Caliphate* (Cambridge: Cambridge University Press, 1997), chapter 4.
5. Abdullahi Ahmed An-Na'im, 'Islamic Ambivalence to Political Violence: Islamic Law and International Terrorism', *German Yearbook of International Law*, vol. 31 (1988), pp. 307–36.
6. Muhammad Hamidullah, *The Muslim Conduct of State* (Lahore: Sh. M. Ashraf, 1966), pp. 305–9.
7. Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation* (Syracuse, NY: Syracuse University Press, 1990).
8. Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001), pp. 337–42.
9. Aryeh Neier, 'The Military Tribunals on Trial', *New York Review of Books*, vol. XLIX, no. 2 (February 14, 2001), pp. 11–15.