

Khobar Towers, Five Years Later: Evaluating the Criminal Justice Approach to Counterterrorism

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Brief Analysis

Recent major acts of terrorism have challenged the law enforcement and foreign policy communities. Incidents such as the 1988 Lockerbie bombing, the 1993 World Trade Center bombing, the 1996 Khobar Towers bombing and the 1998 bombing of U.S. embassies in Kenya and Tanzania have each been handled using law enforcement as a means to avoid dealing with the security aspect of these different incidents. The United States has historically responded using both a national security/counterterrorism approach, as in the U.S. attack on Libya following the disco bombing in 1986, and a law enforcement/criminal justice approach, as in the World Trade Center bombing. Strong international support for the legal proscription of terrorism has produced new conventions on terrorist bombings, financing of terrorism, and nuclear terrorism.

Advantages of the Law Enforcement Approach

The law enforcement approach brings to bear a normative structure that transcends politics. It musters a multilateral chorus of condemnation, which is a source of soft power. Since governments find it difficult to neutralize terrorist groups by other means, law enforcement is a legitimate and politically congenial way of punishing at least the foot soldiers of terror by trial and imprisonment. In this manner, nations avoid holding them as prisoners of war, which would confer on the terrorist movements the legitimacy usually reserved for belligerent governments.

Although some may argue that the grand jury can only be used for criminal law convictions, the grand jury is also a powerful engine of investigation. With its subpoena power, the grand jury can require people to talk and produce evidence, or face contempt charges, while trial lawyers are uniquely competent in fact finding, sorting through details, and helping bring the truth to light.

Disadvantages of the Law Enforcement Approach

Although the law enforcement route may prove very useful, it is not without its disadvantages:

Time. It takes too long. The Lockerbie trial was held twelve years after the event, and it resulted in the conviction of two people involved in blowing up Pan Am Flight #103. In the case of the Khobar Towers bombing, the indictment was in part impelled by the statute of limitations, and it came five years after the event. Given the standard of proof required, it takes a long time to collect adequate information, and this means that the response to a terror attack will come long after the occurrence. If there is an ongoing security threat, then an indictment five years down the road does not provide deterrence or an adequate solution.

Disclosure of Information. Large amounts of sensitive information must be disclosed, and there is the concern that exculpatory information may reside in another agency's intelligence files. Those sources need to be thoroughly examined, shown to the judge and possibly to the defense. One must ask whether the benefit of the criminal conviction is worth the possible compromise of sources and methods.

Atmosphere. When dealing with ongoing security threats, the law enforcement route may potentially create a false

sense of security based on the premise of deterrence. Criminal law at the domestic level, with its felony convictions and death sentences, may deter a certain number of burglars or criminals within the United States, but it will probably not dissuade a young man recruited by Saudi Hizballah from committing an act of terror.

Corruption of the Law. The entry of politics can be corrosive to criminal law. In the Khobar indictment, one Lebanese and thirteen Saudi foot soldiers were indicted, but there was no indictment of the alleged Iranian handler, Brig. Gen. Ahmad Sharifi. There is not even a John Doe placeholder for him, and that may be for political reasons. This selectivity in who is held morally and legally culpable is not in accordance with the criminal justice ideal of even-handedness. Although it is quite possible that a sealed indictment of an Iranian official was made, at least a placeholder Iranian official ought to have been included in the public indictment in order to show the full range of architecture and enterprise, and to send a message to Iran that all is not forgiven.

Proof Beyond Reasonable Doubt. There is a certain inconsistency in the fact that one needs proof beyond a reasonable doubt to convict someone, and yet one does not need proof beyond a reasonable doubt in order to use lethal force. But the predicate necessary for incursions into liberty within a democratic society has always been different than the somewhat thinner predicate used to make national security decisions. One cannot ask for the same standards of proof in foreign policy as in criminal justice; once you juridicalize foreign policy, however, it's not surprising that people will demand consistency in the standards of proof. This is potentially restrictive.

Possible Changes to Criminal and International Law

Armed Reprisal. In international law there is currently little indulgence for armed reprisal. States no longer declare war, but they do declare self-defense. This reflects the sentiment among intellectuals and international lawyers that the only excuse for using force is to interdict an ongoing attack. The purpose of criminal law is to deter criminal acts and to neutralize those found guilty of criminal actions. The United States ought to remember that if it seeks not just to deter specific acts, but also to deter generally, then it is legitimate to engage in armed reprisal as part of a broader notion of self-defense.

State Responsibility. The law and foreign policy communities need to think about state responsibility for harboring terrorists. A state that harbors, aides, and finances terrorists should be held directly responsible for their activities. The trend in human rights law is in the direction of command responsibility-if a state fails to supervise and control people it puts in motion, then it is responsible for the misdeeds of those people.

Intelligence. The law enforcement approach does not obviate the need for intelligence. The intelligence community should therefore be strengthened, with special emphasis on bolstering its ability to recruit informants-who are so crucial in counterterrorism.

Weapons of Mass Destruction. The development of weapons of mass destruction with hostile intent should be considered a predicate for the use of disabling force.

Regime Incapacitation. Although Executive Order no. 12333 dictates that agents are prohibited from using lethal force against a leader on their own authority, in reality, matters are not so clear cut. As a matter of deterrence, the United States should reserve the right to use lethal force against a leader to incapacitate a regime.

Khobar Towers

Military reprisal for an act of terrorism does not preclude subsequent judicial action against the terrorists. If an order or action is manifestly unlawful, then even foot soldiers are responsible and not protected against criminal prosecution. The United States has the right to indict despite the fact that the Khobar attack took place on Saudi soil, since states have the right to remedy deaths abroad based on the claim of "passive personality" if their national is a perpetrator or a victim. Moreover, the United States is generally reluctant to yield prosecutorial jurisdiction to

foreign countries, especially where Washington fears that it will be implicated in potential violations of due process or human rights by another country.

This Special Policy Forum Report was prepared by Jacqueline Kaufman.

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