

"How to combat terrorism without infringing human rights."

David D. Knoll AM

The day before yesterday

Paris once again has been the target of a series of horrific acts of terrorism.

We see graphic photos of a homicide bombing which killed 44 and wounded over 230 people in Lebanon. Yet another example of the misguided war between Shia and Sunni extremists.

In Israel, terrorist attacks once again have become daily fare.

Our hearts go out to all the victims of terror and their families and friends everywhere.

What do these and other recent terrorist attacks have in common? Can terrorism be defeated without infringing human rights? Are these even the right questions?

The right to life

Let's start by recognising that acts of terrorism are directed against the essential human right to life, and to the right to live without fear of wanton murder, mayhem and harassment.ⁱⁱ When a democracy defends itself against terrorism, it may, and sometimes does, need to take action which it would not need to take against ordinary crimes. Those actions may temporarily infringe innocent people's human rights. How temporary and how much are legitimate issues for public debate.

Safeguards of due process and protections of liberty

Some of that debate is however quite misguided, because it views terrorism through the lens of the criminal law. And in the free world the criminal law has built in safeguards of due process and protections of liberty. How often have we heard that: "*It is better that 10 guilty men go free than one innocent man be wrongly convicted.*"ⁱⁱⁱ

But, do we ever hear that it is better than ten enemy soldiers go free than one innocent victim be saved?

Defending against terrorism is not the pursuit of ordinary crime. Rather it is defence against an enemy engaging in a modern form of warfare that does not fall within the framework of the Geneva Conventions. Defence against terrorism must be understood in that context. Prime Minister Turnbull yesterday appeared to recognise this essential difference when he said:

In France, and Australia, all around the world, we stand shoulder to shoulder with the people of France and with all free peoples in the battle against terrorism.

President Hollande of France said the attacks were "an act of war" committed by the Islamic State group's "terrorist army".

As for standing shoulder to shoulder, tonight's panel is so very Australian, together with distinguished media representatives are three persons of middle eastern extraction, a Christian, a Muslim and a Jew; a Deputy Commissioner of Police, a parliamentarian and outstanding educator, and a lawyer who from time to time advocates for refugees and victims of racial vilification.

We also must recognise that while terrorism has been utilised in conflicts as far afield from each other as Ireland and Sri Lanka, the focus today is on terrorist acts undertaken by extremists who **abuse** the name of Islam.

A mutation from Islam

The Economist back on 4 August 1994 published a survey entitled: "*Islam and the West.*" It asked the question: "*Are Muslims and the people of the West doomed to perpetual confrontation?*" It raised then the following explication:

In Europe, Bosnian Muslims have for more than two years been brutally harried by Serbs who are theoretically Christians. On the border between Europe and Asia, Christian Armenians have thumped Muslim Azeris, admittedly with rather more provocation, and Jews and Muslims still shoot each other in Palestine. Farther east, Muslims complain of the Indian army's brutality to them in Kashmir, and of Indian Hindus' destruction of the Ayodhya mosque in 1992. Such experiences tend to make Muslims think the world is against them. If it is, then they are against the world.

Such a broad generalisation is dangerous, but it is not unreasonable to acknowledge that from the time when Napoleon landed in Alexandria over two centuries ago the combination of Islam, power and success went into decline.

This sense of disempowerment has given rise to Fundamentalist Islam, also known in much Western political parlance as Islamism. This extreme, but increasingly popular, mutation from Islam reflects an ideology that rejects ambiguity and rejects peaceful coexistence with other value-systems, whether Christian, Jewish, Buddhist or Hindu, because such acceptance weakens the success of Islam. It promises a utopia for Muslims and a dystopia for everyone else.

These misguided Islamist movements are active in well over 60 countries ranging from Australia and Indonesia in the east to Morocco in the west, and even in Europe and North America. There are a wide variety of Islamist groups. Al-Qaida; Muslim Brotherhood branches, Hamas, and Hizballah are the best known.

It is necessary to recognise that despite espousing fundamentalist views, Islamists are nevertheless rational in analysing power relationships. Consequently, deterrence through the

threatened, and sometimes actual, exercise of overwhelming force can be effective. We are beginning to appreciate that reality.

A lesson from the Talmud

There is a pertinent passage in the Talmud, which, colloquially translated, is as follows: "*Whoever is kind to the cruel will end up being cruel to the kind.*"^{iv}

In the context of the wave of hijackings perpetrated by Palestinian terrorists from 1968 – 1974, one can easily see that the massacre at the Munich Olympics was far from a unique and unexpected event. Not only did the German authorities, despite warnings, refuse to provide a special security detail to the Israeli Olympic team, not long after the massacre, the then Chancellor, Willy Brandt, negotiated a process pursuant to which the Palestinian terrorists could be released.^v

In 1974, the Palestinians moved on from aircraft. Kindergarten buses, airline offices, passenger terminals, schools and pizza parlours became the targets. This terrorism led to the head of the terrorist organisation receiving an invitation to speak at the United Nations General Assembly, where his organisation was granted observer status. In 1982, Pope John Paul II welcomed Yasser Arafat to the Vatican. He welcomed him again six years later. On each occasion, the welcome was extended just a few months after a massacre at a synagogue. The first, in 1982, was a massacre at the Vienna synagogue. The second in Istanbul in 1986.

When Yasser Arafat in July 2000 walked away from the Camp David peace talks, refusing an offer that even included the sharing of Jerusalem as a Palestinian capital, promotion of suicide or homicide bombings escalated.

But because, commencing in the 1970s, most nations in the West appeased terrorism, terrorism appeared to work. Arafat knew it was there to be encouraged.

Islamism belatedly adopts the Palestinian cause

Islamists learned from these successes. By reason of the successes they adopted a Palestinian cause that originally was not their own. It was not their own if only because before Hamas became the most powerful political force among the Palestinians, the Palestinian leadership was largely secular. But it was publicly adopted, and it spread.

As early as April 2002, Sheikh Muhammed Sayyed Tantawi, the leading Islamic scholar at Al-Azhar University in Cairo – yes, the very university chosen by President Obama for his historic address in the first year of his presidency– declared that "*martyrdom operations*" were the "*highest form of*

jihad operations", and that homicide attacks were "an Islamic commandment until the people of Palestine regain their land". Tantawi's example has been followed on countless occasions. His was not a call for peace. It was public support for Arafat's refusal to make peace at Camp David, and a purported theological call for continuing violence against Israeli civilians.

Jews matter too

Western media however turned a blind eye to this message and largely missed this successful incitement of ongoing violence against Jewish targets around the world; even after the attack in January 2015 on the Hyper Cache kosher grocery store in Paris. The attack in the offices of Charlie Hebdo continues to rate mention, but the attack on the Jewish target undertaken at the same time, has all but disappeared off the media landscape. We must not forget the names of Yoav Hattab, 22, Philippe Braham, Yohan Cohen, 22 and François-Michel Saada, 64, so cruelly murdered in the kosher grocery store that day. We remember them; they had names; they had families, and we do so because their lives mattered.

Why Terrorism works

There are many peoples on this planet, such as the Rwandans, Darfurians, the South Sudanese, ordinary North Koreans and those oppressed by Latin American dictators, who are very much in need of public empathy. The Bahais, who are persecuted in Iran, receive little attention. The Western media does not reward them. Indeed, the world hardly listens to them. They are not terrorists. We seem to have forgotten that Gandhi succeeded by non-violent means. The Tamil Tigers failed. The contrast should be brought home.

Terrorism works, because it is rewarded very publicly. It will be reduced and ultimately eliminated when the green lights go red, when its perpetrators cease to attract international support and when Islamists acting rationally see that terrorism cannot succeed.

Does Australian domestic law assist or hinder?

Last year, the Australian Parliament enacted the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth)* to enable the prosecution of those who fight with terrorist organisations overseas. Next there came a bill to revoke citizenship of dual nationals who might be terrorists. Legislative response is not new. Between 2001 and 2007 the Australian Government enacted 48 anti-terror laws. Have the anti-terror laws had an impact on the freedoms of ordinary, law abiding Australians?

Here are two examples in respect of which we might give a different answer depending on whether our lens is that of the ordinary criminal law or that of enabling Australia to defend an asymmetrical war.

- Section 35P of the *Australian Security Intelligence Organisation Act (1979) (Cth)* prohibits journalists from reporting on "Special Intelligence Operations", even where this would reveal that ASIO officers were involved in substantial wrongdoing or unlawful conduct during the course of an operation. The journalist commits the offence if he or she aware of a "substantial risk" that the information relates to Special Intelligence Operations. Mere carelessness is not however sufficient to expose the journalist to conviction.

It is legitimate to ask whether the "reckless disregard" test strikes the right balance? Is the right question to ask whether reporting of a criminal act ought to be permitted? Or is the right question to ask whether reporting in a newspaper the actions of intelligence officers would enable the enemy to prepare its response?

- Under subsection 101.6 of *Criminal Code Act 1995 (Cth)*, acts to prepare a terrorist act are criminal even if no terrorist act eventuates. The Gilbert and Tobin Law Centre criticises this law in the following terms: "*even talking about whether it is permissible under Islam to engage in a terrorist act may be enough for a person to find themselves charged with, and then convicted of, the s 101.6 offence.*"^{vi} They refer to a case in which two men sought a Fatwa from a Sheikh in Somalia, who refused it. But that was not the sole preparatory act for which these two and others were convicted and sentenced to 18 years in prison.^{vii} The men had engaged in extensive planning of a terrorist attack on the Holsworthy Army Barracks which the Court found was "*to advance the cause of Islam by violence.*"^{viii} The degree of police restraint before intervening was notable. The effectiveness and timing of the police response was outstanding. But we are entitled to debate whether the law against "preparatory acts" is cast too widely.

The Australia Government is taking care to strike the right balance, and has proven itself ready to revise and fine tune anti-terror laws as appropriate. That is as it should be in a free and democratic nation.

Yet alongside that process, there is another absolutely essential element necessary for sound public policy. Given that we are currently engaged in asymmetrical war against Islamist purveyors of terror, we have to engage with genuine leaders of Islamic communities. A majority of Australian Muslims are just like other Australians wishing to leave in peace and harmony in a free Australia. Our engagement of Australian Muslims must be undertaken in a positive, rather than a derogatory,

way. It must enhance and not undermine the robust multiculturalism that underpins Australia's social cohesion. Prime Minister Turnbull appears to have understood that.^{ix}

Fighting Islamists does not, and must not, involve fighting Islam.

Intercepting Islamist terrorism does not, and must not, involve fanning the flames of xenophobia towards Islam and Muslims generally.

Remember that terrorism mostly kills ordinary Muslims, who are far and away the most numerous victims at the hands of their own brethren. Whilst there plainly is trouble **within** the Islamic world, it is too easy, even though **false**, to argue that the trouble **is** Islam.

If we are indeed to preserve our values, as already observed, we have to recognise that we must strike an appropriate balance between preserving our security and preserving our liberty. We have to exercise our democratic right to argue about, debate and thoughtfully construct the appropriate balance. In that debate, broad, unsupportable generalisations and vilification of people on the basis of their faith, whether Islam, Judaism or any other faith is utterly unacceptable. Co-extensively, we must recognise that that anti-terror laws are laws for a wartime and not for peacetime, and must be assessed accordingly. The mutants from Islam who are redeemable must be redeemed. Those that are beyond redemption must be firmly dealt with for the sake of our essential human right to life, and to the right to live without fear of wanton murder, mayhem and harassment.

An essential mishnaic teaching

Let me finally quote from a lecture given by former Chief Rabbi Sir Jonathan Sacks in May 2001:

"... too much of human history has been written in the blood of human victims who – because they were not like 'them', who didn't live like 'them', they didn't share 'their' faith – who were regarded by 'them' as the infidels. They were regarded as the unredeemed, the sub-human. That is why the single most important statement in the rabbinic tradition is that famous mishnaic teaching that when a human being makes coins in the mould they all come out the same. God makes every human being his image and they all come out different. That is why each life, each culture, is a universe."

Surely, that is something worth preserving, and even fighting for.

Endnotes

- i These comments were prepared for the occasion of the B'nai Brith Human Rights Address, 15 November 2015.
- ii These are rights drawn from the Universal Declaration proclaimed by the United Nations General Assembly in Paris on 10 December 1948 should suffice.
- Preamble: Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,*
- ...
- Article 3: Everyone has the right to life, liberty and security of person.*
- ...
- Article 20: (1) Everyone has the right to freedom of peaceful assembly and association.*
- iii A formulation sourced in comments by William Blackstone in the eighteenth century.
- iv Qohelet Raba, 7:16: סוף שנעשה אכזרי במקום רחמן - Kol mi shena`asa rahaman bimqom akhzari Sof shena`asa akhzari bimqom rahaman. I am indebted to my colleague at the Sydney Bar, Mark Friedgut for drawing this passage to my attention.
- v See: Simon Reeve: "*One Day in September*" New York – Arcade books 2000 pages 59, 158, 228, 236, 238.
- vi Submission to COAG Review of Counter-Terrorism Legislation 21 September 2012.
- vii R v Fattal [2011] VSC 681; see also: Lodhi v R, (2007) 179 A Crim R 470.
- viii R v Fattal [2011] VSC 681at [29].
- ix Tanveer Ahmed: *Malcolm's Muslim makeover*, The Spectator, 17 October 2015