

ROUTLEDGE NEW DIPLOMACY STUDIES

International Law, New Diplomacy and Counterterrorism

An interdisciplinary study of legitimacy

Steven J. Barela

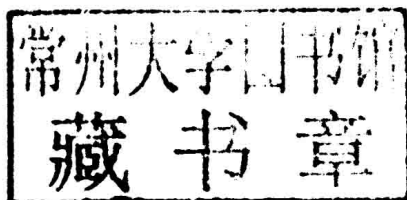
ROUTLEDGE



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International Law, New Diplomacy and Counterterrorism

This interdisciplinary book explores how terrorism is meant to target a government's legitimacy, and advocates for sounder defensive measures when countering international attacks.

The dramatic increase in global cooperation throughout the twentieth century—between international organisations and their state missions of diplomats, foreign officers, international civil servants, intelligence officers, military personnel, police investigators, judges, legislators, and financial regulators—has had a bearing on the shape and content of the domestic political order. The rules that govern all of these interactions, and the diplomats engaged to monitor and advocate for compliance, have undergone a mushrooming development following the conclusion of each world war. This dramatic growth is arguably the most significant change the international structure has experienced since the inception of the state-based system ushered in with the Peace of Westphalia in 1648.

International Law, New Diplomacy and Counterterrorism explores the impact of this growth on domestic legitimacy through the integration of two disciplines: international law and political philosophy. Focusing particularly on the cross-border counterterrorism actions launched by the United States, the author investigates how civil societies have often turned to the standards of international law to understand and judge the legitimacy of their government's counterterrorism policies reaching across international borders. The book concludes that those who craft counterterrorism policies must be attentive to defending the target of legitimacy by being wholly mindful of the realms of legality, morality, and efficacy when exercising force.

This book will be of much interest to students of international law, diplomacy, counterterrorism, political philosophy, security studies, and IR.

Steven J. Barela is an Assistant Professor at the Global Studies, Institute and a member of the Law Faculty at the University of Geneva, Switzerland.

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International Law, New Diplomacy and Counterterrorism

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To Margaret and her piano

Preface

From flight attendant to academia

In 2001, I was working as a flight attendant for United Airlines. The night before the attacks of September 11, I had just returned home to Denver (via SFO) after working an international flight from London. My wife, who was also a flight attendant, dragged me out of bed that Tuesday morning, speaking animatedly about airplanes and tall buildings. Since the events were beyond explanation, she insisted that I shake off the jet lag and see what was happening for myself. Since that moment I have been unable to divert my attention from those attacks and what they spawned.

The events of that morning had an enormous impact upon my country and upon my life, and I reacted to them by pivoting to study terrorism and counterterrorism all the way up to the doctoral level. My intention in this preface is to briefly trace the path I have followed to the publication of this book, which in itself provides a rough outline of my understanding of the anatomy of global terrorism today.

When I was a new flight attendant, I was based out of Newark, New Jersey, and had thus worked with some of the crew who were the victims of the box-cutters even before the planes had become deadly projectile weapons. I count myself enormously fortunate not to have lost any loved ones that day, having both family and friends in the industry. Since two out of four of the hijacked planes belonged to United Airlines, my company took a particularly big hit in the depressed economy that followed, and the job of flight attendant changed considerably as cuts in both the workforce and in pay ensued.

As a result, I decided to return to university while still working. Studying the phenomenon of terrorism and my country's reaction to it understandably drew my interest in the International Studies program in which I enrolled at Denver University. It was through my studies there that I came to regard the disciplines of international law and political philosophy as being best suited for illuminating the central issues. To further pursue the marriage of these two branches of learning, I left my job as a flight attendant to accept a position as a doctoral assistant at the University of Geneva.

After nearly a decade of living in Geneva, I have come to call this city my home, and there is no doubt that its people, history, and the

celebrated "Spirit of Geneva" have had a direct impact upon my work. The fact that it is a prominent home for international law and public diplomacy contributed greatly, with the city serving as the European offices of the United Nations, housing the seat of the UN High Commissioner of Human Rights, and the long-established home of the International Committee of the Red Cross. In addition to this, long before the city became host to international organizations, Geneva had been eloquently and properly described by eighteenth-century English visitor George Keate as a place where one would find "Scenes of Academic Silence, where Philosophy is more studied than the Sword" (as cited in Roberts 2006: 54).

It is in this setting that I have researched and studied the attacks of 9/11 and the "war on terror" to complete my doctoral work. In order to accomplish what I felt was necessary to suitably address this subject, I simultaneously completed an LL.M. degree in the laws of war and human rights. This provided me with the background and training to analyze the applicable norms and codified laws governing cross-border violence, detention, the use of force, and ill-treatment. Integrating this field with political philosophy led me to conceptualize the legitimacy of a government as a target in asymmetrical conflict.

It is well known that individuals choosing the dastardly tactic of targeting noncombatants are much weaker than their government adversary, and so they clearly wish to upend the conventional battlefield. To do so they pursue a *strategy of provocation* in order to goad a government into doing injury to itself that could never be achieved by non-state actors: that is, jeopardizing its own legitimacy.

More than a decade after 9/11 it is not difficult to see the overreaction that was provoked. By engaging in counterterrorism policies that run into problems of legality, morality, and efficacy, a government falls into the legitimacy trap laid by its foes. As we now know, this is a bipartisan mistake that can be made by both Republican and Democratic administrations.

Once we understand that the actions of government in response to terrorist acts are often directly related to the legitimate exercise of authority, and consequently central to the conflict, the need for more thoughtful counterterrorism policies becomes imperative.

Much of the past decade of my life has been spent contemplating, investigating, and conceptualizing the pertinent questions in the hope that we can better develop a counterterrorism policy that reduces the damage we do to ourselves. This work is my response to the attacks of that fateful day in 2001, and it is meant to help us understand and defend the target of legitimacy.

Steven J. Barela
Geneva, June 2013

Acknowledgments

As noted in the Preface, this book represents the final destination of a long academic road through various disciplines to arrive at a Ph.D. in law at the University of Geneva. Without a doubt, there has been one person who must stand out in these acknowledgments due to his extremely deft hand at guiding me through this not so obvious interdisciplinary path: Alexis Keller. In addition to his more bureaucratic expertise (a skill never derided by anyone who has navigated the elaborate halls of academia), Alexis Keller also opened my eyes, right at the pivotal moment in the development of my theory, to the work of Guglielmo Ferrero, who sits at the center of this study of legitimacy. If only for these two significant contributions (there are countless more), he sits atop this long list.

Next, a heartfelt extension of gratitude goes to the co-director of my doctoral thesis, Maya Hertig. She stepped in to help ensure the rigor of my legal argumentation and scholarship, not to mention assisting me in avoiding pitfalls in one of my most challenging chapters. Additionally, I had the very good fortune of assisting in the "University Forum 2005–8: Democracy and Terrorism" project when I first arrived at the University of Geneva. In particular, it was the remarkable work of the international lawyers involved in this forum that inspired me to pursue an LL.M. degree. The clarity and thoroughness of this discipline shone through brightly in this project; thus, sincere appreciation must be expressed to these scholars. This leads me to the Geneva Academy of International Humanitarian Law and Human Rights. My experience there was so positive and foundational that I cannot leave out any of the outstanding professors who all merit tribute: Paola Gaeta, Marco Sassòli, Louise Doswald-Beck, Robert Kolb, and Andrew Clapham. In addition, I would like to express my sincere gratitude to two jury members who helped strengthen this interdisciplinary work with their insightful comments and questions: US law professor David Cole of Georgetown Law, and professor of legal philosophy François Ost of Saint-Louis University, Brussels.

Before coming to Geneva, the genesis of this project goes back to my work at the University of Denver, Graduate School of International Studies (now the Korbel School). Although every single course I followed there

provided a valuable piece of the intellectual formation that lead me down this path, I would be remiss not to mention two names in particular. The first is former Dean Tom Farer, who was the original international lawyer who piqued my interest in and fascination with the discipline. In addition to this early awakening, Tom Farer monitored my route through all of the studies I undertook in Geneva and was always available for encouragement or counsel. Finally, this brings me to Alan Gilbert. During my time in the program I enrolled in every course offered by Alan. This is an indication of both his keen intellect as well as his ability to connect with students during some of the most difficult to comprehend political times. Most importantly, it was his course on Theories of Non-Violence that initiated the philosophical stirrings that undergird this book.

Abbreviations

ABA	American Bar Association
AP-I	Additional Protocol I to the Geneva Conventions
AP-II	Additional Protocol II to the Geneva Conventions
AUMF	Authorization to Use Military Force
CAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CBW	Chemical and Biological Weapons
CIA	Central Intelligence Agency
CSRT	Combatant Status Review Tribunals
DOD	US Department of Defense
DTA	Detainee Treatment Act of 2005
ECtHR	European Court of Human Rights
EITs	Enhanced Interrogation Techniques
FLN	Front de Libération Nationale
FBI	Federal Bureau of Investigation
GCs	Geneva Conventions
GSS	General Security Service (Israel)
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal to Ex-Yugoslavia
MCA	Military Commissions Act
NAFTA	North American Free Trade Agreement
NSS	National Security Strategy
OLC	Office of Legal Counsel
OPR	Office of Professional Responsibility
PCIJ	Permanent Court of International Justice
POW	Prisoner of War

SERE	Survival, Evasion, Resistance, and Escape
UCMJ	Uniform Code of Military Justice
UNSC	United Nations Security Council
UNSCOM	UN Special Commission

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Contents: overview

<i>Preface: from flight attendant to academia</i>	xiii
<i>Acknowledgments</i>	xv
<i>List of abbreviations</i>	xvii

Introduction: the Genii of the City	1
--	---

1 Conceptualizing legitimacy as a target	12
2 International counterterrorism and a legitimacy deficit	56
3 Through the lens of legality: detention without judicial review	102
4 Through the lens of morality: just war and public diplomacy	148
5 Through the lens of efficacy: torture on suspicion	194

Conclusion: jeopardizing legitimacy and drones	251
---	-----

<i>Bibliography</i>	265
<i>Index</i>	284

Contents: detailed

<i>Preface: from flight attendant to academia</i>	xiii
<i>Acknowledgments</i>	xv
<i>List of abbreviations</i>	xvii

Introduction: the Genii of the City	1
--	---

1 Conceptualizing legitimacy as a target	12
I Introduction	12
II Political violence and legitimacy: social science and philosophy	17
a Sociologist Max Weber	19
b Philosopher Jürgen Habermas	21
III Erosion of power relations: social scientist David Beetham	24
IV Coerced obedience and action in concert: political theorist Hannah Arendt	27
V An uncoerced pull toward compliance: international jurist Thomas Franck	30
VI Legitimacy as a target: historian Guglielmo Ferrero	31
VII Exposing the Genii of the City: legal philosophers Ost and Kerchove	36
a Formal validity: legality	40
b Axiological validity: morality	42
c Empirical validity: efficacy	44
VIII An intersection of laws and morals: legal philosopher H. L. A. Hart	49
IX Overlap and application	54
X Conclusion	55

2	International counterterrorism and a legitimacy deficit	56
	<i>I Introduction: destruction, not construction, of legitimacy</i>	56
	<i>II Terrorism as tactic and strategy</i>	59
	<i>a Terrorism as tactic</i>	61
	<i>b Terrorism as strategy: revenge, renown, and reaction</i>	63
	<i>III International law as the framework</i>	72
	<i>a Detention through the lens of legality</i>	76
	<i>b War-making through the lens of morality</i>	81
	<i>c Interrogation through the lens of efficacy</i>	84
	<i>IV A legitimacy deficit and causality</i>	88
	<i>a New diplomacy and domestic civil society</i>	91
	<i>b Pertinent judicial decisions</i>	93
	<i>c Further civil dissent</i>	94
	<i>d Military dissent</i>	95
	<i>e Causality</i>	98
	<i>V Conclusion</i>	100
3	Through the lens of legality: detention without judicial review	102
	<i>I Introduction</i>	102
	<i>II The US and international law</i>	107
	<i>a Transnational judicial dialogue and the US Supreme Court</i>	107
	<i>b International norms: a framework for dialogue</i>	111
	<i>III The Rasul decision: stimulating the dialogue</i>	113
	<i>a A realignment of precedent</i>	114
	<i>b Human rights norms and the Ahrens dissent</i>	117
	<i>IV The onset of dialogue and the Hamdan decision</i>	120
	<i>a The Geneva Conventions as part of the UCMJ</i>	122
	<i>b The Application of Common Article 3</i>	124
	<i>c Common Article 3 and the military commissions</i>	126
	<i>V The continuation of dialogue and the Boumediene decision</i>	128
	<i>a The Military Commissions Act of 2006</i>	128
	<i>b The constitutional right to habeas corpus</i>	130
	<i>c Deficiencies of the DTA and the Unconstitutionality of MCA, §7</i>	134
	<i>VI Further exchange on detention under Obama, but without moderated dialogue</i>	136
	<i>a Detention without judicial review beyond Guantánamo</i>	138
	<i>b "Meaningful review"</i>	140
	<i>c NDAA 2012</i>	141
	<i>d The closing of Guantánamo?</i>	143

VII Conclusion: detention and diplomatic implications	144
4 Through the lens of morality: just war and public diplomacy	148
I Introduction	149
II Anticipatory attacks and the just war doctrine	153
a The classic doctrine	155
b Transition to the modern era: a telling bifurcation over “just feare”	158
i The humanist tradition and holy war	159
ii The scholastic tradition and a secular doctrine	163
c The dawn of international law	165
d Following the lineage: Pufendorf, Vattel, and Kant	169
III The Bush Doctrine: preemptive or preventive war?	172
IV Last resort and a moment for deliberation	176
V Right authority and the UNSC	182
a Chapter VII and Iraq	185
b Humanitarian intervention in Iraq	189
VI Conclusion: diplomatic implications, and the Obama Doctrine	191
5 Through the lens of efficacy: torture on suspicion	194
I Introduction	194
II Legality: the torture memos	200
a The Bradbury memos	202
b Pushback from the legislature and the judiciary	204
c A flawed attempt at efficacy for legality	205
III Efficacy: six high-profile suspects	211
IV Ibn al-Shaykh al-Libi: casus belli	213
V Abu Zubaydah: the pivotal moment in torture policy	215
a The clash between the FBI and the CIA	216
b Authorizing further ill-treatment and torture on suspicion	220
c The apex of the waterboard and its eighty-third application	222
d Erroneous suspicions	226
VI The “dirty bombers”: the insidious nature of torture	229
a José Padilla	230
b Binyam Mohamed al Habashi	231
VII Mohammed al Qahtani: destroying the endgame	236
VIII Kahlid Shaykh Mohammed: correct suspicions and efficacy	239