Travel Bans and other Targeted Non-Physical Preventions of Terrorist Acts at the Interface of War and Peace

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Abstract

This paper examines preventive non-physical restraints on suspected terrorists and develops a framework for setting appropriate substantive and procedural limits on their future use. More particularly, it focuses on two notable examples – travel bans and asset freezes. Preventive restraints do not call into effect the same protections as restraints in response to conduct. In addition, non-physical restraints are often seen as a permissible alternative to imprisonment. However, preventive non-physical restraints imperil the freedom of the target in two ways. First of all, non-physical restraints may lead to what Martha Nussbaum has called (partial) imprisonment, because in some instances non-physical restraints can so thoroughly constrain an individual’s functioning that they are equivalent to de facto (partial) imprisonment. Second, the preventive nature of these kinds of targeted restraints affects the liberty of the targeted person by precluding him from taking steps to defeat the prediction that he will blow up a plane or finance terrorism and make the “right” moral choice.

This paper accepts the peacetime paradigm of crime and the preventive frame in which these non-physical restraints are used, but it argues for enhanced substantive and procedural safeguards. Seeing that preventive non-physical restraints can infringe on leading a free life, this paper argues that some preventive non-physical restraints require the same protection as their physical counterpart.

Key words: blacklist, terrorism, prevention, criminal law, war, travel ban, asset freeze, human rights

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