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A Skeptical Look At The Concept of Terrorism

R. R. Baxter

A SKEPTICAL LOOK AT THE CONCEPT OF TERRORISM

R. R. BAXTER*

INTERNATIONAL LAW is that body of law which creates rights for me and duties for you. I fight wars of self-defence. You fight imperialistic wars of aggression. I am a patriotic soldier. You are a war criminal. I am a freedom fighter. You are a terrorist. It is in language of this character that we carry on rational discourse in these days. These are the conventional epithets of the contemporary epic.

We have cause to regret that a legal concept of "terrorism" was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose.

Out of the periods of relative quiescence in the Middle East conflict—I purposely avoid speaking of the hostilities which have of late been waged between regular, organized armed forces—has come a good deal of nonsense about the law of peace and the law of war. The situation affords a further illustration of the fact that hard cases make bad law. But we must make the best of matters and see what can be made of this notion of terrorism.

There has been a multiplicity of attempts to define this concept of "terrorism" in the United Nations and elsewhere, and I can only attempt a rough and ready definition which will not stand up under sustained scrutiny. The term may be defined as the deliberate killing, wounding, or deprivation of the liberty of innocent civilians for political purposes in time of armed conflict (but not incident to conflict), whether accomplished by members of regularly constituted armed forces or persons not recognized as belligerents.

If the law of war, as reflected in the Nuremberg Principles,[1] the Hague Regulations,[2] and the Geneva Conventions for the Protection of War Victims of 1949,[3] was to be applied to acts of terrorism, the results

* A.B., Brown University; L.L.B., Harvard Law School; Diploma of Int'l Law, Cambridge University; L.L.M., Georgetown University Law Center; Professor of Law, Harvard Law School; Guggenheim Fellow; Editor-in-Chief, American Journal of International Law; Member, Permanent Court of Arbitration; former consultant to Dept. of Defense, Dept. of State and the Naval War College.

[1] As approved by the General Assembly in G. A. Res. 95 (I), 1 (2d Part), U.N. GAOR 188, U.N. Doc. A/64 Add. 1 (1947), and codified by the International Law Commission in 1950, [1950] 2 Y.B. INT'L L. COMM'N 374, U.N. Doc. A/1316 (1950).

Annexed to Convention No. IV of The Hague respecting the Laws and Customs of War on Land, signed Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 BEVANS 631.

[3] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, dated at Geneva, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, dated at Geneva, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention

would be interesting. For if the perpetrators of acts of terrorism, as defined in this very general way, were to be recognized as acting on behalf of a State, their acts directed against civilians who take no part in the hostilities would constitute war crimes. They would be "grave breaches" of the Geneva Civilians Convention, for "grave breaches" comprise, amongst other crimes, "wilful killing, torture or inhuman treatment, . . . , wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer, or unlawful confinement of a protected person, . . ."[4] It would follow that there would be a universal duty to prosecute persons charged with such crimes, even on the part of the State that these individuals purported to serve.[5] Jurisdiction could be asserted on a universal basis because these offences are violations of international law itself. In short these acts of terrorism, if performed against civilians on behalf of a State, would be war crimes.

On the other hand, if the perpetrators were not acting on behalf of a State and were not members of the armed forces of the State or officials, employees, or agents of the State, then the acts of terrorism that they might carry out would be private warfare and thus be murder, pillage, assault, kidnaping, banditry, or some other offense under municipal law. The individuals would be guilty of common crimes. However, it would be strange if, by reason of these individuals' not serving a State, they were to be treated as being in a better position than they would be if they had acted on behalf of a State. Logic would dictate that acts of terrorism, even if committed by persons not purporting to act on behalf of a State, should be regarded as violations of international law and subject to universal jurisdiction like other war crimes.

In the actual practice of international organizations, and of States, terrorism has been treated in various forms.

Terrorism per se has been taken up in the United Nations General Assembly. There is an Ad Hoc Committee on International Terrorism, consisting of 35 members and established on the basis of a resolution of the General Assembly adopted in 1972.[6] The title of the resolution identified the needed measures and studies in the following terms:

> Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and

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Relative to the Treatment of Prisoners of War, dated at Geneva, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, dated at Geneva, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

[4] Art. 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 3.

[5] *See* Baxter, *The Municipal and International Law Basis of Jurisdiction over War Crimes*, 28 BRIT. Y.B. INT'L L. REV. 382 (1951), reprinted in 2 M. C. BASSIOUNI and V. NANDA (eds.), A TREATISE ON INTERNATIONAL CRIMINAL LAW 65 (1973).

[6] G. A. Res. 3034 (XXVII), 27 U.N. GAOR, Supp. 30, at 119, U.N. Doc. A./8730 (1973).

> study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes.

This resolution quite plainly contained something for everyone.

The Ad Hoc Committee on International Terrorism met in the full dignity of its 35 members last summer[7] and, like many good United Nations Committees, it found it necessary to work through other subordinate entities, in this case committees of the whole. There was a Sub-Committee of the Whole on the Definition of International Terrorism, a Sub-Committee of the Whole on the Underlying Causes of International Terrorism, and a Sub-Committee of the Whole on the Measures for the Prevention of International Terrorism. The three Sub-Committees of the Whole and the Committee itself labored mightily and were unable to reach any conclusion. The waters had been very much muddied by the introduction of the concept of State terrorism. According to Algeria,[8] this notion of State terrorism was variously connected with colonial domination, foreign occupation of territory, racial discrimination and *apartheid,* foreign intervention, foreign exploitation of natural resources, systematic destruction of flora and fauna, and any war in violation of the United Nations Charter. The suggestion was that deprivation was at the root of depravity.[9]

The two main trends were summed up in the report that the Committee submitted to the General Assembly for its guidance. The first trend was that measures should essentially be directed against acts of international terrorism which are occurring with increasing frequency and taking a toll of innocent human lives. According to the second trend, the measures should be directed against the situations which give rise to acts of terrorism. And according to yet a third group of delegations, it was necessary to borrow from both views and to combine both types of measures.

It is at this point impossible to predict what may come out of the General Assembly, which is to take up this topic next week. There is certainly a widespread impression amongst certain states represented in the United Nations that if there has been some sort of serious violation of international law, it is legitimate for individuals to swing out at any human beings who may happen to be in the way at the time.

In the field of air law, the question of terrorism arises in the form of hijacking and other acts of interference with aircraft. The two treaties

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[7] Report of the Ad Hoc Committee on Terrorism, 28 GAOR, Supp. No. 28, U.N. Doc. A/9028 (1973).

[8] Suggestion submitted by Algeria, *Id.* at 23.

[9] *Id.* at 17.

on the subject, the Hague[10] and Montreal Conventions,[11] have not been accepted by an exceptionally large group of states. In the summer of 1973 there was a meeting in Rome on sanctions which would give effect to the conventions on hijacking interference with aircraft. It was hoped that it might be possible to impose an obligation to take action against those states which refuse to prosecute individuals who are involved in acts of hijacking and interference with aircraft. This turned out to be a diplomatic disaster area with no relief program. No proposals emerged from this conference, at which most of the time was spent in considering what should be on the conference agenda and how it might go about its business. This did not leave very much time for the business at hand. There was a large number of states represented at the meeting which had no national airlines and therefore did not really face the problem of hijacking and other acts directed against aircraft. There was a substantial measure of objection from Arab and African countries to any such measures, and the Socialist Bloc objected to the whole idea of international sanctions imposed by other than the Security Council. The European states were concerned lest they irritate the oil-producing states at a time when the need for oil was greater than the need for measures resembling sanctions to be taken against those states which give asylum or protection to hijackers.

Diplomats have also been the targets for terrorist violence. There is now a draft convention on this subject, drafted by the International Law Commission,[12] under consideration by the General Assembly.

The problem of terrorism also arises in the law of war. Various states have been putting forward the view that there is a particular type of international armed conflict which must be characterized as a "war of national liberation."[13] As well as I can understand this concept, a "war of national liberation" is either a war conducted against an illegal colonial regime, as in Namibia, Guinea-Bissau, Rhodesia, or Mozambique—essentially an African problem—or, on the other hand, a war conducted by a state against what is alleged to be an illegal occupation of its territory by another state, which brings to mind the situation in the Middle East. I can understand the first of these two usages of the term, but I cannot understand the second. It is a fundamental assumption of the law of war (the *ius in bello*) that in an international armed conflict the opposing belligerents are on a basis of equality. If the law is tilted

[10] Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192.

[11] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal, Sept. 23, 1971, T.I.A.S. No. 7570.

[12] Subsequently adopted as the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, G. A. Res. 3166, Dec. 14, 1973, U.N. Doc. A./Res./3166 (1973).

[13] *See* Abi-Saab, *Wars of National Liberation and the Law of War*, 1972 ANNALES D'ETUDES INTERNATIONALES 93, for a particularly incisive view of the subject.

in the direction of those who fight lawfully, a subjective appraisal of the situation leads each belligerent to conclude that it has the privileges which flow from lawful resort to the use of force, while its adversary is under the burdens imposed upon a state that goes to war in violation of law. And therein lies the route to barbarism, because, as I reminded you at the outset, *I* always act lawfully and *you* always act unlawfully. The basic purpose of the law of war has been the protection of human rights, and one cannot protect those human rights if individuals are not treated on a footing of equality without regard to the legality of the initiation of the conflict. It surely cannot be seriously maintained that armed forces or civilians of a state that is the victim of aggression may violate the law of war by attacking civilians of the adversary or civilians from third countries. That is, to put it bluntly, uncivilized. The question of reprisals is a complicated one, and I do not mean to dwell upon it here, except to remark that the Geneva Conventions of 1949 prohibit reprisals against protected persons, who include certain categories of civilians.[14] And the new draft protocols on the subject of internal and international armed conflicts which have been drafted by the International Committee of the Red Cross expressly forbid methods of warfare intended to spread terror amongst the civilian population.[15]

This is a very quick survey of what the state of the law is and of where movement or inertia may be expected. My conclusions are prosaic:

1. Banditry is still banditry, and war crimes are still war crimes.

2. It is well either to keep away from criminals acting for political motives or to be under armed protection. Actually, hijacking has been brought under some degree of control, not by treaties, not by international law, but by the presence of armed guards.

3. Treaties, being based upon the consent of the parties, can accomplish little in the face of opposition from Arab or African states. Other countries, especially in Europe, have, it would seem, been brought into line with these developing countries through oil blackmail.

4. We must nevertheless take what measures we can. We must be mindful of the sound advice of a Canadian court, "If you cannot resist an impulse in any other way, we will hang a rope in front of your eyes and perhaps that will help."[16]

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[14] Art. 46 of the Geneva Wounded and Sick Convention; Art. 47 of the Geneva Wounded, Sick, and Shipwrecked Convention; Art. 13 of the Geneva Prisoners of War Convention; Art. 33 of the Geneva Civilians Convention, *supra* note 3.

[15] Draft Additional Protocol to Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Art. 26, ¶ 1, and Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, Art. 46, ¶ 1, in I.C.R.C., Draft Additional Protocols to the Geneva Conventions of August 12, 1949, at 40, 16 (Geneva, June 1973).

[16] Rex v. Creighton, 14 Can. Crim. Cas. 349, 350 (1908).

5. Above all, we should not allow talk about wars of national liberation and the events in the Middle East to distort our vision. Indiscriminate violence, whether by way of war crimes, attacks on diplomats, seizure of aircraft, or the killing of civilians in third states, is and remains unlawful.

There is perhaps more to be feared in bad law on this subject than there is to be hoped for in good law.

DISCUSSION

The question put to Professor Baxter concerned the belligerent standing of Palestinian liberation fighters and dealt, in particular, with their position upon hypothesizing possession of sophisticated weapons of war.

I will respond to this question in terms of the law that is binding on all of the participants in this conflict and nearly 130 other countries, that is, the Geneva Conventions of 1949. I will then go on to some of the proposals that have been made about the new law.

The requirement for treatment as a regular belligerent, qualified for the status of a prisoner of war upon capture, is, under Article 4 of the Geneva Prisoners of War Convention, that one be a member of the armed forces of a Party to the conflict or a member of "other militias or . . . other volunteer corps, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied," provided such militias or volunteer corps fulfill four conditions.[17] One of these four conditions is that the members of such organizations must conduct their operations in accordance with the laws and customs of war. What this means is that members of a resistance movement which systematically attacks civilians who are immune from attack are not themselves entitled to prisoner of war treatment upon capture. There must therefore be general compliance with the law of war before individual members of such organized resistance movements may be recognized as belligerents entitled to prisoner of war treatment upon capture. Any individual who belongs to an organized resistance movement or to the regular armed forces, whether they be those of the United States, Egypt, or Israel, and who commits a war crime in deliberately mounting an unjustified attack upon civilians may simply be tried as a war criminal, because he has violated the law of war.

If members of the Palestine resistance movement or a resistance movement belonging to a party to the conflict, such as Egypt, were to be equipped with aircraft and were deliberately to bombard the civilian population, I would again have to reply that this would be a violation of the law of war.

Let me turn now to the law of the future. Two protocols to the

[17] Convention Relative to the Treatment of Prisoners of War, Art. 4A(2), *supra* note 3.

Geneva Conventions of 1949 have been drafted by the International Committee of the Red Cross on the basis of the work of two Conferences of Government Experts, in which experts from over 90 states participated. The I.C.R.C. requested, as you may have read in the *New York Times*,[18] that the parties to the present conflict in the Middle East, comply with these protocols, even though they are not yet in force. Iraq and Syria said that they would comply, and Egypt said that it would do so also on condition that Israel do likewise.[19] To my knowledge, there has been no response by Israel to date.

One of these two protocols, that applicable to international armed conflicts, defines attacks as all acts of violence committed against the adversary whether in defense or offence.[20] The civilian population is defined as comprising all persons who are civilians.[21] Article 46 then provides that the civilian population as such shall not be made the object of attack. In particular, methods intended to spread terror amongst the civilian population are prohibited. Civilians are to enjoy the protection afforded by this article except to the extent that they take a direct part in hostilities.[22] This strikes me as a sufficient answer to the point made by Professor Bassiouni, who has suggested that a wider category of civilians should be regarded as proper objects of attack. Exactly the opposite line was taken by the Conference, by the International Committee of the Red Cross, and apparently by Egypt, Syria, and Iraq in agreeing to be bound by the new law, not yet in force.

I have done the best I can to describe in a neutral way what the governing law is. You may say that the existing law is nonsense, but this is the law and you and I and everyone must respect it.

SUMMATION

I have asked for the floor in order to read a sentence from the early Winston Churchill. He wrote in 1914, before the events of the First World War, that the wars of people will be far more terrible than the war of kings. In days when wars were fought by kings for prestige or for the acquisition of territory or in order to enhance their power, the rules of warfare were perhaps more easily applied. Now wars are ideological and involve the totality of populations. We have in our own time witnessed the intense feelings experienced by peoples at war—by Palestinians, by Israelis, by those who are sympathetic to the Palestinian cause, or by those who support the cause of Israel. The nature of the problem has become much more complex with the passage of time. Those of us who are Americans and who have recently gone through the ordeal of war ourselves—

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18 Oct. 12, 1973, at 18, col. 3.

19 55 REVUE INTERNATIONALE DE LA CROIX-ROUGE 667 (1973).

20 Art. 44, ¶1, of the International Protocol, *supra* note 15.

21 *Id.*, art. 45.

22 *Id.*, art. 46, ¶ 2.

a chastening experience for all of us—should perhaps have a certain sense of sympathy and concern about the emotions to which the conflict between Israel and the Arab States has given rise. Our function should be to do our best to exercise any calming influence that we can in order to bring about a resolution of the conflict on the basis of justice and of law.