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AN APPROACH TO DECISION WITH REGARD TO TERRORISM

JORDAN J. PAUST*

TO PROFESSOR BAXTER's chagrin, the words "terror" and "terrorism" have been thrown about as well as words such as "criminal," and banditry." I believe that one of the problems that we should face at this time is the definitional approach. We should direct our inquiry to a definitional framework; because, this is exactly what has been the problem at the General Assembly of the United Nations, this "politicized throwing about" of conclusory words without any reference to context or a set of criteria for a shared definition of what the term means. The definitional approach that I would utilize is a broad approach to the parameters of terrorism. It does not distinguish between systematic acts or acts which are not systematic (*i.e.*, a terroristic process which is instigated by one single act). I do not think the word "systematic" is very useful. Nor does the definition contain words such as "innocent," upon which a broad type of moral or politicized difference of opinion can hinge. Instead it focuses on the terroristic process itself.

Terrorism is a species of coercion utilized to alter the freedom of choice of others. The terroristic process, or terrorism, involves the purposive use of violence or the threat of violence by precipitators against an instrumental target (or a victim) in order to communicate to a primary target (another set of targets), a threat of future violence so as to coerce that primary target into behavior or attitudes through intense fear, or intense anxiety, in connection with a demanded power outcome (or in connection with a political motivation). This last distinction, the political motivation, has already been referred to by some of the panelists. There is a need to distinguish between common crimes, as Professor Bassiouni mentioned, and ideological crimes, or ideological activities, which we want to focus upon. And then, as already brought out by some of the panelists, there are various types of claims that are being raised in the Mid-East context today. Claims made by participants in the Middle East struggle, or precipitators of terroristic processes, in attempts to justify their action as being in conformity with international law.

One type of claim has been found in the General United Nations' debates concerning aggressions and just war, or the "holy war." The claim coming out by some members of the community is that if you're fighting an aggressor, or if you're fighting a "holy war," or if you're fighting to regain occupied territory, that law should not restrain your particular movement. There should be absolutely no regulation of the terroristic

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processes brought into being by those who are seeking, in one instance, to recapture their occupied territory. Yet, the counterclaim is that the other person (the other side, the aggressor, the unjust or the occupier) is still bound by international law. Professor Baxter, I think, has summed this up very well. We cannot serve human dignity values or serve the rights of man by allowing contextual exceptions of this nature. Otherwise, there will be a very broad exclusion of an entire context of human confrontation (or an entire context of armed coercion), throwing out the law entirely in order to serve a particular value: the recapture of territory, or the efforts against an aggressor. This is especially significant today, when unfortunately, the United Nations body itself and other types of participants (in the authoritative role) are unable to agree upon a criterial definition of distinctions between aggression and non-aggressive coercion. How can we as lawyers look upon a contextual situation and decide that one party is the aggressor and one is not, when we don't have that type of consensus in the United Nations organization itself? As Professor Baxter intimated, we will be allowing each participant in the context to utilize terroristic strategy against each other in an escalation of inhumane conduct. This escalation of armed conflict will not serve the goals of human dignity and world public order which Professor Bassiouni mentioned.

Another type of claim that is arising out of the general attempts to gain definitional criteria at the United Nations or to regulate terroristic processes concerns self-determination struggles. Basically, Lebanon, Syria, and the Yemen Republic take an absolutist position on this. Their position is that if you're engaged in a self-determination struggle, whatever that is, you should not be bound by the law of war or other prohibitions of terroristic strategy. There are about 14 other states which take a similar position, but one which is not necessarily inconsistent with general norms of international law.¹

The second position is that efforts by the international community to regulate international terrorism should not prohibit self-determination per se. Self-determination, if it has a terroristic outcome (in a particular population or in the elite) should not be proscribed; rather, particular terrorist attacks within that process should be regulated by the law. This seems to me a more proper focus. In other words, the movement itself might be allowed under the UN charter if it is a proper self-determination process. However, a particular attack against a civilian village which induces terror in either the governmental elite, or the population itself would be proscribed under general norms of international law and whatever norms the General Assembly might prescribe later to prohibit terrorism.

Another attempt to exclude an entire context from legal regulation is the situation of "oppressors" versus "oppressed." This has not arisen

¹ See Paust, *Selected Terroristic Claims Arising from the Arab-Israeli Context*, 7 AKRON L. REV. 407-408 ns. 7, 8 (1974).

specifically in the General Assembly debate, nor in the efforts to upgrade the law of war which Professor Baxter has been engaged in at Geneva involving the two new protocols for the 1949 Geneva Conventions; yet, it permeates much of the "new left" literature (*e.g.*, Herbert Marcuse and Frantz Fanon who were involved in the Algerian struggle). Moreover, others have articulated a claim that if you are an "oppressed" person or group of persons fighting "the oppressors" you should be allowed to utilize any means or any strategies available to you, regardless of claims of proportionality, claims of necessity or deference to human rights, and other human dignity goals.² This I find equally unacceptable, and, besides that, philosophically one runs into this curious circular type of reasoning: if the oppressors are being oppressed by a terroristic coercive process and the oppressed oppress, then the prior oppressed become the new oppressors. You have this curious circularity that hasn't been thought through very well. Generally what we are attempting to proscribe here is intense coercive action against anyone. And ideological motivation should not itself justify an intense coercive action against others.

Actually, if we examine the principle of self-determination, terrorism as a coercive process against others itself inhibits that principle of law. The self-determination policy generally refers to a full and free sharing of power by all persons in the particular social process, or the free participation in government by all persons with the free exchange of ideas by all persons. Necessarily, if one group is utilizing intense coercion to alter the freedom of choice of others, there is an inhibition of a self-determination process. There is not, in such a terror context, a full sharing of power, a free participation in government, nor, a full and free sharing of enlightenment. The next attempt [claim] is to exclude guerrilla warfare entirely from regulation. The idea has been that if you are an insurgent/guerrilla, you should be allowed to engage in whatever type of terroristic strategies (or other strategies) which serve your political purpose or your particular struggle. Again, as Professor Baxter has pointed out, this broad claim has been consistently denied by international scholars (at least those involved in the laws of war). Specifically, the feeling here is that we have certain policies to serve, *i.e.*, the human rights of all people, and, that the laws of war are obligations not to the particular participants against each other in the particular process, but are obligations of each participant in the armed conflict to mankind in general. This same thought applies to human rights law: these are universal norms and one cannot allow a degradation merely because of the unjust nature, the aggressive nature, the oppressed-oppressor nature, or the governmental character of those who are targets.

A second set of claims that has arisen out of Mid-East context relates to targets. The first type of claim is that terroristic strategies utilized

² *Id.* at 413 n.19 (M. Granston, ed., *PROPHETIC POLITICS*).

against combatants are proper; and, generally, I find no prescriptions in the international law of war or human rights law which prohibit terroristic attacks against combatants who are engaged in an armed conflict. For example, this could involve an attack on a military headquarters by a counter-military group in order to terrorize the military participants engaged in that headquarters. Of course, the second type of claim, attacks against non-combatants, would be prohibited already under the general norms of international law and norms of human rights.³ And in this context, an attack on a civilian population in order to coerce the military elite of a particular country into action in a certain manner would now be prohibited because of the nature of the instrumental target or the nature of the victims, the civilian population being non-combatants.

Intertwined, however, with this problem (the distinction between combatants and non-combatants) are problems of incidental terror.⁴ Incidental terror is found in the bombing of military headquarters which falls short, and thus, knocks out several civilian huts or structures nearby. What we are focusing on, necessarily, are the subjectives of the parties. It seems that we must focus on this. We cannot avoid questions of intent and questions of foreseeability; otherwise, we will be regulating all terror outcomes no matter what the motivation. Perhaps the community might want to do this, but I have not seen a trend in this direction so far.

A third group of target claims coming out of the Mid-East context relating to the above are attacks upon property. If you attack a power installation as an instrumental target, you might induce an intense fear or anxiety in the particular primary target (e.g., the civilian population, the counter military elite, etc.). Generally, if these targets are classified as military targets under the traditional norms of the laws of war, it would then be proper to attack them in an armed conflict setting. The problem that we face in the Middle-East context now is the "spillover" problem or the export of terrorism to other types of areas (other types of arenas). We might even consider claims of Arab cuts of oil to the United States a terroristic strategy, if the intent is to induce an intense fear and anxiety in the American population or the political elite of this country (who are desirous of keeping their jobs); and if the shortage of oil will produce such an intense feeling that this is a predicted outcome. Therefore, we could have a claim that this is a terroristic strategy utilized in the context of a Mid-East struggle and with a macro-political purpose in the world arena.⁵ That type of claim should be analyzed, as all others, with the comprehensive reference to policy and context. Who are the actual participants involved in the conflict? What are their actual prospectives?

³ *Id.* at 414-415 ns. 24, 26-30.

⁴ See also Paust, *The Nuclear Decision in World War II: Truman's Ending and Avoidance of War*, 8 INT'L LAW. 160, 170-171 (1974), and references cited.

⁵ See also Paust, Blaustein, *The Arab Oil Weapon—A Threat to International Peace*, 68 AM. J.I.L. (1974).

What is the situation of interaction? What resources are available to the precipitator of terrorism? What resources are available to the targets and other groups? What are the actual tactics utilized in a particular situation? What are the outcomes? Is there a terror outcome? Where are these outcomes to be found—in civilian populations or in military elites? Who are traditional military targets? Finally, what are the long term effects on shared policies of the international community such as the serving of peace, or the promotion of human dignity values commonly referred to as human rights?

A third type of claim that we find in the Middle East context can be classified generally here as propaganda. The need to disseminate information is exemplified by claims that have been made by certain Arab groups that the Palestinians, lacking basic resources, have to attack targets in other countries in order to make others pay attention to them. This type of claim is made seriously. The Director of the Arab Information Center in Chicago stated, for example, that the Palestinian commandos commit terroristic acts against non-combatants and others "to earn an ear or two for their plight. They are the forgotten people, and the more the world forgets about them the more desperate their actions become."⁶ This is the type of claim that's being made to the community. A claim that, in order to publicize the propriety of their particular ideology or their political movement, they should be allowed to terrorize certain targets. We would have to analyze this type of claim with reference to a comprehensive understanding of the context and policies involved. There is some validity to the Palestinian claim that they are forgotten people, and that the world should focus upon their needs. Their basic needs have not been met in this situation, but, that still does not answer the questions. To simplistically approach the question in these terms does not serve human rights and peace in the long run.

A fourth type of claim that has already been mentioned concerns reprisals, or counter-terror. This claim is generally made by the Israeli government itself. They maintain that in order to attack or counter the support of terroristic activities by other states, reprisals are justified. In the context of a continuing inefficacy of the United Nations structure, along with a lack of a consensus on the part of the international community, the Israeli claim amounts to this: we are alone; we have to do this for self-help and self-defense reprisal action to stop violations of the law. On this, I would recommend to the audience a very good law review article in the *American Journal of International Law*, by Professor Derek Bowett.⁷ Professor Bowett goes through many of the incidents of reprisal action by Arabs and others and offers a very good legal analysis

⁶ See *Selected Terroristic Claims Arising from the Arab-Israeli Context*, *supra* n.1 at 405, n.36.

⁷ Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J.I.L. 1 (1972).

of the types of conditioning factors that are involved in a more comprehensive analytical inquiry.

The fifth type of claim that comes up involves exported terror. This includes the events of Munich, Athens and the coercion of the Austrian government through attacks upon a non-combatant group being transported through the Austrian borders. The policy questions involved here concern geographic limitations upon violence along with the effort to control violence. Professor Baxter mentioned questions of guilt involving complicity and other types of norms of international law concerning human rights. These include the Austrians, emigrating Soviet Jews, and others involved in the process. What I would like to leave you with is not a conclusion of my own, as to the propriety or impropriety of certain terroristic acts upon the part of the Israelis or upon the Arabs, but to stress the need to focus upon the broad context, a need to understand the types of legal policies that are at stake in the case of a particular claim, and the need to be more comprehensive, rational and realistic in your decisional approach, rather than to simplistically respond on the basis of ideology or polemics.

DISCUSSION

The question put to Mr. Paust concerned the failure of Arab states to ratify air hijacking conventions and their alleged tolerance of terrorist activity as indicated by that non-ratification.

I would hate to answer that question because I don't really have a factual basis to support my answers. I am not aware of the policy reasoning of the Arab governments. I should like to add that Egypt has claimed that in article III context (conflict not of an international nature) that terroristic strategy should be prohibited no matter who is engaging in it. This is true even if the context is one of a self-determination struggle or a war of national liberation. I think this very claim, by the way, was made at Geneva; but it was not made in connection with the general U.N. debate. I think this is very indicative of some of the governmental positions of the Arab nations. They did not necessarily support an all or nothing approach to the self-determination process taking place that you can utilize any type of strategy.

Secondly, I would like to disagree with Professor Bassiouni, that you cannot accept the state of facts as they are. I believe you must focus on the state of facts. One should focus on the fact of the state of Israel, if you want to serve policies such as a minimum public order and the suppression of armed violence which has occurred throughout the world. If we want to realistically and rationally approach these policies within a proper context, we have to recognize that Israel does exist as a power; and whether we call her a state or a belligerency, she does exist, and I believe that we have to recognize that type of fact. To simplistically justify all types of terroristic strategies against Israelis on such an ideological

split, whether the state of Israel exists or not, I do not feel will realistically serve the goals of human dignity and world public order.

I understand the last question from the audience to ask whether the Israelis have engaged in terroristic acts. I don't know if that's the proper interpretation (on my part); but yes, there have been terroristic attacks and assassinations of a terroristic nature in Beirut against Palestinian group elites and other assassinations by Jewish groups. Perhaps you are unaware of the fact that Israel is directly involved in Europe and other places around the world, and yes, this is not a one-sided type of problem. Finally, with reference to Professor Bassiouni's statements, I agree that the Palestinians have been denied certain basic human rights as a group by an inept type of action on the part of the United Nations, or perhaps just an apathetic type of approach by the United Nations or states of the world. However, this does not simplistically justify all types of terroristic attacks upon non-combatants in a contradistinction to a fundamental norm in the laws of war and a fundamental human right in general human rights law. To allow such a deprivation simply because a group of people has not been "heard" would seem unrealistic and unresponsive to all legal policies involved.⁸ I like the approach of Professor Bassiouni, in having an international television network and a free exchange of ideas as an alternative to terror. I think those are the types of realistic alternatives that we should be focusing upon, and we should push the United Nations to instigate this as much as we can, because this will allow a greater sharing of ideas and, hopefully, curtail terrorism.

⁸ See *Selected Terroristic Claims Arising from the Arab-Israeli Context*, *supra* n.1 at 405, n.29.