1990

Terrorism in National and International Law

Caleb M. Pilgrim

Follow this and additional works at: http://elibrary.law.psu.edu/psilr

Part of the International Law Commons, and the Military, War, and Peace Commons

Recommended Citation
Available at: http://elibrary.law.psu.edu/psilr/vol8/iss2/2

This Article is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.
Terrorism in National and International Law

Caleb M. Pilgrim*

I. In Defense of the Partisans: “Terrorism in National and International Law”

A. General Remarks

In analyzing this topic, one might justifiably ask at the outset “Why defend the partisans?” They have no need for such defense. They can and will always speak for themselves. As Camus once pointed out: “What these fighters . . . did do, they did in fact against men, and you know at what cost. They will do it again, no doubt, when any terror confronts them, whatever face it may assume, for terror has several faces.”

Terror, then, breeds resistance. Resistance, in turn, generates oppression. Terrorism, as we know it today, is often but a feature of armed resistance. It is in terms of human experience, as old and as varied as history itself, whether in the guise of irregular warfare, such as Fabius Cunctator harassing Hannibal’s superior forces from the rear, or in the form of the more recent Stalinist Purges and European fascism. Historically, it seems standard practice, from the French Revolution’s Reign of Terror, to the institution of slavery, to the slave revolts (the counterpart of slavery, as by Toussaint L’Ouverture, Dessalines Gabriel Prosser, Denmark Vesey, Nat Turner, and John Brown), to the resistance against Nazi Germany, and even today, in the struggle for self-determination and independence in South Africa by the African National Congress (ANC) and the Pan-African Congress (PAC). It is a practice common to the political individual, the group and the State alike.

Terrorism is a levelling influence in a situation of armed inequality. It is self-defense by means of intermediate technology in a

* Ph.D (Cantab.); J.D. (Yale); Adjunct Professor of Political Science, Southern Connecticut State University and Albertus Magnus College, New Haven, CT.
3. It is not quite a “phenomenon apart from the world’s experience”; 61 N.Y.U. L. REV. 654 n. 108 (1986). As indicated elsewhere: “The group whose name gives us our word for
situation devoid of military parity, while advanced technology remains among the prerogatives of Government. Internally, it is a function of north-south relations within the particular society lacking successful democracy. Externally, it reflects the gap between north and south, and the efforts by the dispossessed to overthrow those whom they consider their oppressors. For all this, it leaves us with a feeling of uneasiness. It strikes a note of despair in an age of uncertainty. It reminds us of a Greek tragedy, inspires in us both terror and pity, and underlines the transcendence of the tragic sense in life. It is sadly an integral part of the Zeitgeist of our times.

assassin arose in Persia about 900 years ago and later flourished in Syria. The Assassins recognized that a tiny group of men prepared to die during their attack could paralyze a larger foe and that the fear of such attacks could give them power beyond their size. During the Napoleonic wars, partisan forces pushed carts laden with explosives into the ranks of soldiers, causing significant damage. By the late nineteenth century, the telegraphic newspapers, and rising literacy led Russian anarchists to recognize the shock value of violence. They referred to the terrorist attacks as "propaganda by deed." L. Paul Bremer, III, Counterterrorism: Strategy and Tactics Department of State Bulletin, Vol. 88, No. 2130, January 1988, at 47.

Another writer, Fromkin, described terrorism as "political ju-jitsu." Just as the ju-jitsu master dodged his assailant's blow to throw the assailant, so the terrorist aimed to turn the power of the state against itself. Fromkin, The Strategy of Terrorism, CONTEMPORARY TERRORISM: SELECTED READINGS (Elliot & Gibson ed. 1978).

Radical action has sprung up in the poorest areas of India, particularly in Bihar and Andra Pradesh, areas where feudal landholding patterns and caste burdens are especially severe. The kidnapping and murders of policemen and supernumeraries of the rich landlords are mirrored by the official campaign to liquidate the "terrorists." See Kidnapping by Extremists Stir India, N.Y. Times, Jan. 3, 1988. See also, Tough Indian Security laws draw fire from civil rights groups, Christian Sci Mon, Sept. 8, 1987 at 14.

Our fears run the gamut from whether terrorists will eventually obtain nuclear weapons and trigger a holocaust to whether there will be a shortage of vegetables and fruit following a terrorist explosion in the proposed tunnel linking the U.K. and Europe. See Parker, "Letters," The Economist, Oct. 24, 1987, and Hall's reply, "Letters," The Economist, Nov. 21, 1987. Undoubtedly, terrorist activity has been both egregious and disturbing. But it is still a far cry from Murphy's exaggeration that:

The random nature of terrorist targeting and timing further increases public anxiety. No person or target is safe, and an attack may come at any time of the day or night. Many transnational business corporations have drastically increased their expenditures on security measures and ransom insurance. Air travellers are subjected to luggage screening and magnetometers, adding to the cost and time of travelling. Because of the threat of bombing, lockers have been removed from transportation terminals. Threats of bombing have also resulted in barricades at foreign ministries or legislative bodies. Embassies in some troubled areas of the world resemble fortresses, with the consequence that diplomacy is grievously impaired.

These costs could escalate considerably should terrorists continue to be willing to inflict great loss of life. Experts disagree on the ability of terrorists to use such methods of "technological terrorism" as nuclear material or chemical or biological weapons. But the technology is available, and the risk is therefore real. Murphy, Recent International Developments in Controlling International Terrorism, 4 CHINESE Y.B. INT'L L. & AFFAIRS 99 (1984).

But terrorist incidents have declined since 1982. In 1982 there were fifty-one reported incidents in the U.S. In 1987 there were seven reported incidents. Even as late as October 1988 none had been reported. In fact, by late 1987, L. Paul Bremer III, Ambassador-at-large for Counterterrorism, confidently asserted that:... in 1986, terrorism dropped 6%. So far in 1987, it is down another 10%. The decline would be greater but for Afghan-sponsored terrorism in Pakistan. Contrary to the impression many Americans have, terrorism in Europe dropped dramatically last year — over 33%. And in 1986, there were only two
Yet the Free Poles, the Free Czechs, the Free French and those who resisted during the Second World War have never been described as "terrorists." Their courage, never denied; their more spectacular successes, never demeaned as the mindless barbarities of some criminal fringe. Their heroism, has, in fact, been universally recognized. Nor have the Argentine generals or their Chilean counterparts ever been derided as "terrorists," notwithstanding their relentless butchery of legitimate opposition and democratic protests. On the contrary, it has been argued that the nature of these regimes, properly understood, is destined to yield democratic forms.\textsuperscript{6} Military dictatorships are the pathway to democracy. Ironically, however, almost all such experiments in Latin American democracy have been so far notoriously short-lived. They have all, with piteously few exceptions, died aborning.

The courtesy given the Free French, Free Poles and the like has, paradoxically, never been extended to contemporary movements engaged in sometimes no less heroic resistance against neo-fascist, authoritarian, totalitarian and even genocidal regimes. The semantics of terror have been at best selective, at worst, dishonest. This article seeks to restore something of the original and proper meaning of the terms "terrorists" and "terrorism" and to distinguish between phenomena elsewhere described as "retail" and "wholesale" terror.\textsuperscript{7} For it is the indisputable fact that in contemporary social and political thought, the terrorist signifies the individual embittered, the dissident, the uprooted and even the demented. At least, such is the official story. By peculiar historical travesty, the victim has become the accused, the innocent has become the guilty, the aggrieved has been branded the aggressor. To many, as to Alice's Humpty Dumpty, words, regrettably, mean what we choose them to mean.\textsuperscript{8}

Public figures, politicians, scholars and journalists, all acquiesced in a shift of meaning of terrorism which served the interests of government propaganda. Bizarre as it may seem, to seek to realize or to defend one's freedom led almost automatically in some circum-

\begin{itemize}
\item Horowitz, 3 THIRD WORLD QUARTERLY, 38-39.
\item "But tell me your name and your business" said Humpty!
\item "My name is Alice, but —"
\item "It's a stupid name enough!" Humpty Dumpty interrupted impatiently. "What does it mean?"
\item "Must a name mean something?" Alice asked doubtfully.
\item "Of course it must." Humpty said with a short laugh: "My name means the shape I am — and a good handsome shape it is, too. With a name like yours, you might be any shape, almost." L. Carroll, COMPLETE WORKS 192 (1973).
\end{itemize}
stances to being labelled a terrorist, a development strikingly at odds with tenets of the western philosophical tradition. Indeed, the cry of "terrorism" was often raised as a shield against accusations of widespread torture and human rights violations by the Latin American generals in particular.\footnote{9}

Terrorism as defined by the *Oxford English Dictionary* refers among other things to "a policy intended to strike with terror those against whom it is adopted; the employment of methods of intimidation; the fact of terrorizing or condition of being terrorized."\footnote{10} In modern use, the term usually referred to membership in a clandestine or expatriate organization aiming to coerce an established government by acts of violence against it or its subjects. *Webster's* defines it as "the use of terror and violence to intimidate, subjugate, etc," and "systematic use of terror as a means of coercion."\footnote{11} Until recently, however, corrupt usage largely omitted governments as agents of terror, even though governments were responsible for most acts of terrorism. Moreover, it did not matter whether the governing international law standard was that of the "civilized nation" or that of the "peace loving nation," for the architects of both standards used terror as an instrument of their statecraft when the situation dictated use of such an expedient.

However, popular and practical definitions generally focused on individuals and groups.\footnote{12} The PLO, the Red Brigades, the Baader Meinhof, the Red Army, and the Tupamaros invariably monopolized...
the headlines. As such, writings which took as their point of departure the individual as the master terrorist were off to a flying start. Yet, it was a false start. The starter's gun had misfired. The terms had been loaded with the wrong connotations. The situation easily originated because nothing raises the hackles like terrorism. Carlos, the Jackal, Black September, Abu Nidal and other legendary figures in the folklore of contemporary terrorism helped magnify the prevailing misconception. The focus on terrorist acts by individuals and groups served as a decoy, effectively distracting attention from other sources of terror, namely, the security forces of government.

In a sense, the 1950s and 1960s highlighted a different question: that of state terrorism. The activities of the French in Algeria and the United States in Vietnam support this proposition. This feature of terrorism, however, seems almost hidden by contemporary conventions, arising in the aftermath of the wave of terrorism, which took place in the 1970s and eventually led to near universal acceptance of "international terrorism" as a crime, however defined. As such, the Washington Convention stemmed from a desire on the part of the United States to prevent future assassinations of its representatives in Latin America; air piracy by the Palestinians led to the Hague and Montreal Conventions; public outrage at the terrorist activities of the Baader-Meinhof in the Federal Republic of Germany was the source of inspiration for the European Convention on the Suppression of Terrorism and the Dublin Agreement, as well as the 1979 United Nations Agreement.

Just as a victims rights movement demanded redress for victims at the domestic level, states injured by terrorism called for a response within the framework of public international law. The importance of the victims coincided with an apparent rise in the level of international consciousness, to the effect that terrorism became a

---

13. See, e.g., Y. Melman, The Master Terrorist: The True Story of Abu Nidal (1986). Recent work by Rivers, Netanyahu and others are more prescriptive in orientation, but lack both historical dimension and cogent intellectual analysis of the causes of terrorism.
“crime of international concern.” The Washington Convention thus referred in Article 2 to a “crime of international interest.” The Hostages Convention referred in its Preamble to “a delict gravely worrying to the international community.” The rule of law would cement cooperation among “peace-loving” states and those opposed to terrorism. Ideally, it would be invoked in the name of all. In reality, it would be for the protection of a few.

The conventions agreed in substance on the need to punish terrorism. At the same time, they ignored its causes and possible prevention. The idea of “prevention” adumbrated in the 1937 League of Nations text was absent from subsequent texts unless United Nations General Assembly resolutions made reference to it. Here, the emphasis was on “elimination,” as in General Assembly Resolution 40/61. Affirming the criminal character of terrorism allowed for common policy. It was a matter of principle to discredit an ill-defined activity, so that there could be no excuses. Assimilating terrorism with odious criminality facilitated this outcome, since domestic law retained this category. In this way, specific legislative proposals and extradition practices joined up with international condemnation of terrorism.

Terrorism thus took its place in the lexicon of contemporary “isms,” along with capitalism, imperialism, colonialism, marxism, and communism. The impressionism and ideology of the more conservative led them to maintain that terrorism was akin to nihilism, or an incorrigible feature of totalitarian communism. Reality, however, seemed to suggest otherwise. For terrorism is as much a feature of communist regimes as it is of capitalist regimes or of anarchists, communists and assorted revolutionaries of ill will and wicked disposition. It is, like democracy, an element in the make-up of regimes, whether of the left or the right. It can increase or decrease as circumstances demand. Maitre Verges is not entirely wrong when he suggests that Klaus Barbie’s work against resistance fighters in Lyon was similar to that of French soldiers fighting against Algerians during the war for Algerian independence in the 1950s. However, perpetration of war crimes, crimes against humanity, and use of terror whether by Germans in Occupied Europe, by Americans in Vietnam or by Russians in Afghanistan, have no value as precedent. None of

20. AGO, Recueil 1972-1 at 12.
21. See supra note 15 and accompanying text.
22. See infra p.8 & note 36.
25. Maitre Jacques Verges was chief counsel for Klaus Barbie at the latter’s trial in Lyon in 1987.
these gruesome adventures justifies or excuses the use of such methods. The torture and murder of members of a resistance movement are thus usually treated as war crimes. Clearly, genocide is a crime against humanity. How then did governments, in light of their sovereign butchery of legitimate protest and democratic opposition, come for so long to escape the pejorative description of “terrorist?” How did the pejorative connotations come about? What purpose did pejorative designation serve? What happened when yesterday’s terrorists seized the instruments of state and in some cases continued to perpetrate the most appalling atrocities?

Perhaps, the focus on acts of terrorism perpetrated by the individual or group was a function of two things: one, a measure of the readiness to accept the plea of sovereign immunity; and two, the compelling nature of arguments as to Executive privilege in the area of national security. Yet, it is still not clear that either of these represents justification adequate to confer on the State the aura of moral authority and superiority in circumstances where individual acts, qualitatively the same, are readily classifiable as “criminal” and treated accordingly.

In another vein, terrorism in the more recent individualist sense may be related to voluntarist tradition, the convention of the man of action whose activism represents a potent antidote to complacent mediocrity; a state of affairs different, even if in motivational terms alone, from government’s relations with the governed. To assert as much is to raise, albeit indirectly, the questions concerning the legitimacy and scope of the State’s rights and duties in relation to its nationals. The terrorist individually is but the child of despair. Governments for their part have no such alibi. Whereas the actions of terrorists are ultimately intended to revolutionize or overthrow the system, the actions of governments by and large are deliberate, calculated to preserve the status quo or even return things to the status quo ante. State sponsored terrorism is thus inherently reactionary. It would preserve for the oligarchs of today the benefits of yesterday. For the dissident groups which resort to terrorism, the objective is more often than not the redistribution of political power, a new order, a new day in the life of the miserably oppressed. For the victims come to sadness of sacrifice on the altar of competing ideologies.

Notably, the government still has in its armory many formidable weapons. It alone controls the armed forces and the police. Often, however, it is the armed forces which control both the government and the police. It alone has a de facto monopoly over fire

---

27. Pol Pot’s Cambodia provides an obvious example.
power. Yet, its resources are not confined to the quantum of arms and military expertise. For it can, as constant practice shows, ultimately take over even the media and use it for its own interests. All of this, potentially a monstrous state of affairs, represents a source of satisfaction for those who would employ terror and make others disappear, and a source of despair to those who endure it.

It is perhaps testimony to the strength of the media, and perhaps ironically to a cherished attachment to the First Amendment that some writers have been led to believe that publicity is the main, if not the sole goal of terrorists.\textsuperscript{28} One may believe that a society conditioned to believe in the First Amendment, freedom of information, a powerful press often referred to as the Fourth Estate — strong enough to bring down President Nixon as a result of the Watergate scandal and destroy the aspiration of Presidential hopefuls — would be induced to believe that terrorists are motivated solely by desire for self-advertisement. This, as demonstrated below, is simply false.

At least one writer, Hazelip,\textsuperscript{29} has, however, tried to determine the unity in the principles of terrorists, and their adherence to the same principles, through analysis of the statements of prominent terrorist leaders, ranging from Bakunin to Marighella. Those twelve principles are as follows:

\begin{enumerate}
  \item Violence is necessary to overthrow oppression.
  \item There is no limit to the extent of violence justified.
  \item Actions should clearly convey their purpose.
  \item Reprisal killings are counterproductive.
  \item Ruthlessness and extraordinary violence are essential to terrorist success.
  \item Government failures can be used to gain popular support.
  \item Terrorism exposes the repressive side of government.
  \item Terrorists aim to incapacitate government directly or indirectly.
  \item Secrecy is important to terrorist operations.
  \item Systematic planning and execution are critical to terrorist success.
  \item Small-scale, persistent attacks are most effective.
  \item Terrorists are dedicated to destruction for the sake of their cause.\textsuperscript{30}
\end{enumerate}

\textsuperscript{28} See note 88 infra.


\textsuperscript{30} Id.
These objectives are not all mutually compatible. Rationales will also differ. However, to summarize, it would seem that the methods chosen, the impact felt — these two factors above all — determine the identity of terrorists. As such, a police force, an army of occupation, or military and paramilitary forces, can by their chosen methods and by their impact, constitute a terrorist group or a group manned by terrorists pretending to act in the name of “law and order,” or even to uphold “democracy.”

Two basic paradigms have evolved from the study of terrorism. The first sees terrorism as a species of military war. It is premised on strategic deterrence. The objective is to neutralize the terrorists by unsettling the center of gravity of their organizations. Offensive war denies terrorists the advantages of: (1) surprise; (2) cohesion; (3) morale; (4) recruitment; and (5) readiness of capability. The terrorists who must concentrate on survival, upon becoming neutralized, cannot succeed with propaganda by deed.

The second paradigm sees terrorism as a crime, a problem of law enforcement. Apprehension and punishment represent the basic goals of law enforcement and the government’s policy on terrorism. A familiar response runs as follows:

Terrorists are criminals. They commit criminal actions like murder, kidnapping and arson, and countries have laws to punish criminals. So a major element of our strategy has been to delegitimize terrorists, to get society to see them for what they are — criminals — and to use democracy’s most potent tool, the rule of law, against them.\footnote{Bremer, supra note 3 at 48.}

It not clear what is meant here by the “rule of law.” According to Dicey’s formulation of the concept, it originally meant “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power” and “excluded the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.”\footnote{A. Dicey, Law of the Constitution 202 (10th ed. 1952), quoted in R. Heuston, Essays in Constitutional Law 34 (1964).} It follows \textit{ex hypothesi} that cases may arise in which the “existence of arbitrariness, of prerogative and wide discretionary authority on the part of the government” will sometimes cause the governed and those labelled “terrorists” to become on occasion \textit{de facto} champions of the rule of law.

It is not argued here that desirable ends always justify abominable means. Nor do we seek to promote here some terrorist’s charter. Instead, the argument is that terrorism in self-defense, or as self-help, or reprisal may sometimes be legitimate. But even as self-de-
fense or as reprisal, the terrorist response is more often than not possibly too feeble to meet threshold requirements of proportionality, compulsion and immediacy under national and international law. It is at best inchoate by nature. In most other circumstances, it will lack legitimacy. Success ultimately means, however, that yesterday's terrorists invariably become today's statesmen. Mr. Sadat, Mr. Begin33 and Mr. MacBride illustrate the fact that former terrorists are often the Nobel laureates of today. The annals of British imperialism are replete with examples of "terrorists" from Kenya, Israel, Egypt, Ireland, and elsewhere, who, initially detained at Her Majesty's pleasure because of their nationalist political activities, were invariably released to become the Heads of State or ambassadors of newly self-governing and independent nations. The better, perhaps more realist approach, therefore, seems to be that the attitude to terrorism is, at most, a function of our changing conceptions of what is morally acceptable.

Ronald Reagan's genius, though it may have abysmally misjudged the contras and labelled them "freedom fighters," nevertheless correctly perceived the downing of the South Korean civilian aircraft (the KAL) when it strayed into Soviet airspace as an example of "state terrorism." Branding a fellow Permanent Member of the Security Council as a terrorist held out the possibility that other governments, including that of the United States itself, when acting with similar insensitivity and disregard for humanitarian concerns, should be rightly judged as terrorist or terroristic in light of the universal horror deeply felt at such an appalling act.

B. The Problem Stated

A number of difficulties have attended attempts to reach a universally accepted legal definition of terrorism. First, most definitions have employed words such as "fear," "intimidation," "subjugation," "coercion," thereby proving themselves incapable of defining terrorism is a generic term, encompassing a multitude of acts involving

33. See A. SADAT, IN SEARCH OF IDENTITY: AN AUTOBIOGRAPHY (1979). Also, in the words of one observer,

Mr. Begin was the leader of the terrorist underground before the establishment of the state of Israel. He could be remembered for the Camp David peace treaty he signed with Egypt; but his reputation is stamped indelibly with the acts of violence he helped to initiate; the massacre by his underground colleagues of the Arab villagers of Dir Yassin; the blowing up of the King David Hotel and its occupants in 1946; the bombing of Iraq's nuclear reactor in 1981. As Prime Minister in 1982, he led Israel into Zionism's nemesis: the invasion of Lebanon and the massacre — by Christian Arabs but in areas the Israeli army claimed to control — of hundreds of Palestinian civilians at Sarba and Shatila.

The Fable of the Three Giants of Zion, THE ECONOMIST, August 29, 1987, at 81. The Holocaust had given Israel a moral blank cheque. The achievement of Mr. Begin an his successors may have been to squander this moral blank cheque so fortuitously provided.
terror and violence. Third, terrorism is only distinctive as method, a way of carrying out a criminal act by terror, violence, intimidation, a fact which often leads to confusion of the method with the infraction itself. Finally, repeated failure to reach an agreed definition demonstrates the difficult nature of international cooperation in general. Any international agreement in the fight against terrorism must, in a world community marked by heterogeneity and diversity of interests, inevitably offend the sensitivities of some states, hold out the prospect of infringing on their national sovereignty, and in domestic terms possibly even violate well-established civil rights.

Attempts at defining the concepts of terrorism and political asylum date back to the eighteenth century. It was, however, only during the 1830s that the principle of the non-extraditable political offense was finally expressed in legislation in Switzerland, Belgium, France, Britain and the United States, enshrining in the national law of these states the political offense exception to extradition.

In his course before the Hague Academy in 1925, Quintilliano Saldana introduced the category of the “international crime” and included in it, crimes against international law and against the rights of people, and crimes committed against Heads of Foreign States or their diplomatic representatives. Subsequently, some of the authors of the draft agreement on the prevention and repression of terrorism — completed by the League of Nations in 1937 — considered “terrorism” as a crime from the standpoint of international law, damaging to the heritage and birthright of the international community. Nonetheless, international agreement on a legal regime governing extradition for what were essentially political offenses proved difficult to attain.

The 1937 Convention, drafted after the assassinations of King Alexander of Yugoslavia and Dr. Dollfuss, the Austrian Chancellor, was eventually abandoned along with suggestions for an international criminal court. The Convention, like more recent attempts at reaching an international agreement on terrorism, floundered because of the inability of states to agree on a definition of a “political crime” and to determine what exactly constituted a “terrorist” act.

Since that time, the problem of defining “terrorism” has remained a major stumbling block in the way of reaching international agreement on terrorism. All attempts to agree on a definition have failed. In practice, it has proved impossible to separate terrorism

---


from the legitimate activities of national liberation movements. At the 41st session of the United Nations General Assembly, delegates again skirted the problem of definition. The result was a description of acts to be prohibited, without defining terrorism as such. An earlier exercise, the European Convention on the Suppression of Terrorism (1977), similarly made no attempt to define terrorism or the concept of the "political offense." The subject of the Convention, therefore, remained undefined. Evidently, the problem of defining terrorism was, and is not, solved by ignoring it as some insist. Rather, the peculiar absence of a definition left a psychological blackhole — a state of affairs congenial to connotation of mindlessness and irrationality which are the popular conceptions of terrorism.

This definitional problem is not simply a question of one man's terrorist being another's freedom fighter, like some trick effect in a hall of mirrors, our position depending on where we stand. Repeated failure to reach an agreed definition demonstrates the difficult nature of international cooperation in general, and in the fight against terrorism in particular. Any international agreement in a world community, marked by heterogeneity and diversity of interests, must inevitably offend the sensitivities of some states; hold out the prospect of infringing on their national sovereignty; and possibly violate established traditions of civil and political rights. For example, Italy curtailed civil liberties in attempting to stop the Red Brigades. Some proposals have often resulted in problems for civil liberties groups and many constituents oppose legislation based on their fears of a reduction in their rights against search and seizure, muzzling of the press, and problems involving due process or equal protection.

36. Article 1 of the European Convention on the Suppression of Terrorism provided that:

For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:

(a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
(b) an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;
(c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
(d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
(e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
(f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

Political discourse tends to blur differences. Notwithstanding this, an international double standard clearly exists with respect to terrorism. As such, the Afghan guerrillas viewed from Washington have been labelled "resisters;" in El Salvador, the guerrillas have been labelled "agents of subversion;" in Nicaragua, they are "freedom fighters," and in Reagan's words the "moral equivalent of the Founding Fathers."

A major problem with blanket terms such as "terrorist" and "terrorism" is that they alter the distinctions between political action and criminal offenses, and between neofascist and extremist groups and "legitimate" groups internationally recognized as striving for self-determination. Political motive has always been an element of terrorism, and many acts would appear at first sight eligible for the political offense exception. The task remains to distinguish between "freedom fighters" and "terrorists;" "revolutionaries" and "terrorists."

Many misconceptions, myths and illusions remain. Consequently, it has remained difficult to formulate a general rule as to what constitutes a "protected" act as opposed to an "extraditable" act. Perhaps, increased attention and studies as to how information is processed with regard to terrorism — its origins and causes; the intentions of its sponsors; the nature of terrorist activity and the effects of such acts — might illuminate executive decision and, in turn, facilitate legislation and adjudication in the area.

C. Historical Overview

It has been suggested that "(a)lthough terrorist tactics often have accompanied conventional and guerrilla warfare, today's international terrorism is a distant, significant, and new mode of armed conflict. Present-day terrorism is a derivative of twentieth century theories of guerrilla warfare for which Mao Zedong deserves the most credit." This argument misstatess the problem. First, many believe that publicity is a major goal of terrorists. Terrorist actions are often played out in urban settings, taking advantage of the media's penchant for the sensational and the dramatic. The rural guerrilla warfare advocated by Mao Zedong, therefore, has little in

---

40. Mao Zedung (also spelled Mao Tse-tung) (1893-1976) founder of the Chinese Communist Party and leader of the People's Republic of China for twenty-seven years. See also
common with contemporary urban terrorism. This does not mean, however, that guerrilla warfare has not on occasion used terror as an instrument of policy. Second, the above argument that today's terrorists are heirs to Maoist guerrilla theory, which is premised on some vague and ill-defined notion of illegal guerrilla warfare, rather than establishing the illegality of terrorists \textit{per se}, can perhaps ironically strengthen terrorist claims to legality, given the fact that guerrilla warfare was, and is generally recognized, as licit. As a final caveat, it is to be noted that attempts to distinguish between "terrorists" and "national liberation movement," "terrorists" and "guerrillas," and "guerrillas" and "regular armed forces" often in practice serve no useful purpose. For, while the objectives of the parties are not identical, their methodology and much of their essential activity remains the same. The purported distinctions are therefore in practical terms, distinctions without a difference; the discussion of "terrorists" and "terrorism" being not so much an independent variable as part of a wider question, the use of force, of political violence, and \textit{the appropriate means of regulating and restraining these acts}.

Assimilation of guerrilla and terrorist methodology has not helped attempts to regulate either terrorism or guerrilla warfare. A brief analysis of the history of the guerrilla in public international law will perhaps reveal that that history does not allow us to conclude that the guerrilla or terrorist always lacked legal status.

The difficulties largely stem from the fact that modern conflicts often have an asymmetric character; for example, a more powerful belligerent invades a foreign country with the latter supported by segments of its population decides to resist by organizing guerrilla forces (Vietnam, Afghanistan). In practice, only one of the parties to the conflict uses guerrillas, although in recent times regular armies have tended to deploy small, mobile units which employ similar tactics. Asymmetry makes it difficult to regulate such conflict given that the rules purporting to govern international war have often emphasized the principle of reciprocity. The problem of asymmetry must, therefore, be taken into account when considering the subject of terrorism when applied to movements for national liberation and popular resistance, just as it must be taken into account in considering the laws of war.

From the humanitarian standpoint, it is also important to know the legal rules to be applied to guerrillas, terrorists and members of resistance movement. Since the legal status of armed forces conforming to existing law is different from that of the civilian population, interpretation often poses the following dilemma: must one ac-
cord to persons participating in armed resistance — the status of prisoners of war after their capture — or are they merely to be subjected to the rigors of the existing criminal law and face, as a general rule, the possibility of capital punishment as “rebels” or “brigands” in wartime.

History is instructive in two respects. First, the Hague Regulations of 1899 and 1907 and the Conventions of 1949 are not the only source of law on the legal status of guerrillas and resistance movements. The Preamble of the Fourth Hague Convention provided that where specific cases escaped the pertinent provision “the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.”41 It is therefore important to determine the relevant customs, as well as the legal and humanitarian principles which emerged from international practice and jurisprudence. Second, it is important to trace the evolution of relevant law and practice while taking into account the evolution of military technology, the gap between legal theory and the practice of war, and the politics of war during the different historical periods.

1. Guerrilla Warfare Before the Hague Codification.—Terrorism and guerrilla warfare, rural or urban, can occur in a variety of circumstances. These range from the individual bombing, to intermittent attacks by small units, followed by their immediate retreat, to regular hostilities involving the use of heavy weaponry. Armed resistance takes place at different times and at different levels. For example, during an invasion when guerrilla movements are formed in occupied territories and operate at the front with the intention of penetrating the enemy’s defenses after arrangement of a ceasefire, or even after peace has been concluded or annexation declared. Sometimes, such movements have emerged as a response to colonial conditions.

During the seventeenth and eighteenth centuries, the laws and customs of war sanctioned the use of guerrillas in war. Small irregular units loosely connected with the regular army command usually helped to determine the final outcome. Guerrilla warfare was not exceptional. In the Middle Ages, monarchs customarily authorized individuals to seize enemy booty during war on land or at sea. (The English “hero,” Sir Francis Drake, was understandably considered a “pirate” by his Spanish adversaries).

The practice of war in centuries past, especially during the six-

41. Melanges, supra note 39, at 56.
teenth century, was certainly far from satisfactory from the humanitarian standpoint. However, it made no distinction between belligerents and regular forces, and customs were not so rigid as to preclude the use of guerrilla forces as a legal means of conducting warfare. It sufficed that it was public war and that the belligerents were authorized by competent authority. Vattel formulated the principle according to which the subjects of a belligerent nation were the enemies of the subjects of the other nations. A war should be public, but the subjects could reasonably presume the will of their sovereign and consequently act on his tacit command. After Vattel, the general rule prohibited the killing of enemies who had ceased to resist. There was only one exception: wanton crimes against the law of nations. Nevertheless, Vattel states the contrary practice concerning peasant revolts. Some held that the order of the guerrilla leader was sufficient to render his forces legitimate participants in guerrilla warfare. Still others were of the view that the subject, who even without the sovereign’s authorization, fought in defense of the nation or in self-defense, could not be treated more harshly than regular combatants.

Similar opinions as to the legal status of guerrilla forces prevailed at the time of the Napoleonic Wars. In 1813, King Frederick William III of Prussia issued an ordinance recommending that the members of the landsturm not carry any distinguishing mark or uniform so that they would not be easily recognized by the enemy. Opinions were divided between various schools: those who held that the right to wage war could be delegated by the sovereign to corporations and even to individuals and that these had to be treated in accordance with the laws of war irrespective of number; those who held that guerrilla forces taking part in hostilities could only be legitimized by order of the sovereign; and those who required that the guerrillas be furnished with a written order by their commander-in-chief and that they act in conformity with the laws of war.

Only at the time of the Holy Alliance did there develop a tendency to discriminate against guerrilla forces. The governments of the Great Powers, intent on stifling democratic revolutions, maintained that only members of the regular armies had the rights of legitimate belligerents. The so-called Metternich doctrine held that

42. E. Vattel, Le droit des gens, III, V.S. 70, cited in Melanges, supra note 39, at 56.
43. Id. at 56.
44. Id. at 57.
45. Id.
46. Home Guard or militia.
47. Melanges, supra note 39, at 57.
48. Id. at 57.
49. Id. at 58.
the Greek insurgents were rebels and, therefore, ineligible for the same rights as the other belligerents.  

Nineteenth century United States practice in this area was not consistent. During the Mexican-American War, the United States condemned Mexican guerrillas to death, but justified this in terms of the atrocities which the guerrillas had allegedly committed. At the time of the Mexican Civil War, Prince Maximilian was court martialed and condemned to death for having ordered the execution of all rebels in 1865 and causing the death of many insurgents. In the Franco-Prussian war, the Prussians sought to deprive the armed resistance movements of any status as legitimate combatants. The Prussian commander did not, however, consider it politic to simply refuse to grant the status of legitimate belligerent to irregular forces and to act so blatantly in contravention of the customs of war. A declaration was made concerning French snipers who were required to produce proof of authorization. Generally speaking, those who had been captured were unable to do so. Several died as a result. Moreover, Prussian troops terrorized the civilian population suspected of aiding the snipers. They surrounded the villages, removed the population, shot the suspects and burned the villages.

Even at this time, however, the guerrillas still retained rights as legitimate belligerents. Accordingly, the Red Cross Convention of 1864 made no distinction between belligerents, providing in Article 6, that wounded or sick soldiers should be cared for, irrespective of nationality. However, towards the end of the nineteenth century, under the influence of the Great Powers, efforts to limit the rights of guerrillas increased.

Efforts to codify the laws of war went hand in hand with efforts to secure the privileged legal status of regular armies. At the Brussels Conference in 1874, the delegates representing the small states and those representing the Great Powers with powerful land armies clearly differed on the principles involved. On the one hand, the former held that recognition of mass uprisings should only be subject to one condition, observation of the laws and customs of war. On the other hand, the latter claimed that only regular armies were entitled to recognition as legitimate belligerents. They claimed that extension of these rights to the civilian population would lead to anarchy, to a war by all against all and to barbarism. They believed that the draft declaration had made the maximum possible concessions in extending protection of the laws of war to militias, to volunteer corps meeting the four conditions subsequently listed in Article 1 of the 1907 Hague Convention, and to the population spontaneously taking

50. Id.
up arms as the enemy approached.

The delegates of the small states found these concessions inadequate, and demanded that the entire civilian population in occupied territories be accorded the rights of belligerents, and not solely at the time of invasion. The Belgian delegate remarked that the citizens who took up arms to defend their country and who could be shot on the spot, could believe, with justification, that their government, in signing the convention, had signed their death warrants. The delegate from the Netherlands demanded express recognition of the right to insurrection.\textsuperscript{51}

The subject was again discussed at the first Hague Conference in 1899 in the context of a draft based on the Brussels Declaration. The British delegate, Sir John Ardagh, proposed an addition of a clause to the draft which emphasized that “nothing in this chapter must be considered as tending to diminish or suppress the right which belongs to the population of a country to fulfill its duty of opposing the invaders by all lawful means of the most patriotic resistance.”\textsuperscript{52} The Russian delegate, Martens, explained that the goal of the Conference was not to limit the right of self-defense nor to place obstacles in the way of patriotism, but to create a legal basis for participants in combat and to protect the life and property of the unarmed population.\textsuperscript{53} The Swiss delegate, Colonel Kunzli, supported the British proposal and sought improvement in the usages of war as well as protection of the population engaged in a \textit{levee en masse} to defend its soil. In his intervention, Kunzli asked the Conference not to punish patriotism, not to adopt rigorous measures against the people who rose up \textit{en masse} to defend their soil. Recalling the glorious independence struggle of the Netherlands, as well as the uprisings in the course of Swiss history, Kunzli pointed out that not only men in their prime, but older men as well as women and children took part in combat. He ended by saying that the Conference might consider this an excess of patriotism, but they were excesses which rejoiced the heart and which could happen again. The Swiss Government therefore could not subscribe to a convention which would submit one part of the population to martial law and to the councils of war; patriotism was a virtue to be cultivated and not suppressed.\textsuperscript{54}

The delegates of the other small states declared that they would not agree to any limits on the national defense. The Belgian delegate, Bernaert, defended the interests of small states, which in the

\textsuperscript{51} Id. at 61.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
nature of things could not be invaders, but were exposed to being invaded. He opposed any imposition which would cast the inhabitants of occupied territories in the role of simple spectators. He asserted that the first duty of the citizen was to defend his country. Belgium owed the first pages of its history to the fulfillment of this duty. To a country, the right to self-defense was absolute, and was not only a right, but a duty; even an imperative duty. According to Bernaert, small countries, especially, needed to be able to complete their national defense by utilizing all of their resources. It would be impossible to tell the citizens not to get involved in struggles in which their country's fate was at stake. The Belgian delegate claimed that he would have preferred to maintain the situation which then existed rather than face the perilous uncertainty which would result from the provisions put forward.55

The German delegate, Colonel Schwarzhoff, adopted a totally different position. He was firmly opposed to any proposal tending to recognize a right of popular resistance on the part of occupied territories, and since one spoke so much about humanity, it was time to recall that the soldiers too, were men, and had the right to be treated with humanity. The soldiers, who, worn out by fatigue after long marches or after combat, came to rest in a village, had to be sure that the peaceful inhabitants were not suddenly transformed into ferocious enemies. Schwarzhoff was of the opinion that even the provision in Article 2 was superfluous, considering the fact that Article 1 only subordinated recognition as a belligerent to conditions which were very easy to meet; yet, he nevertheless voted for this article in a spirit of conciliation. However, his concessions stopped with those who urged absolute liberty in the area of national defense.56

The French and Russian delegates undertook efforts to reach a compromise. Martens emphasized that, even though it was not a matter of questioning the sacred right of the population to self-defense, in order to reduce the evils and calamities caused by war, it was necessary that the defense forces be organized and disciplined. Martens' interpretation was adopted in the proces verbal and in the Preamble. Finally, the Preamble was adopted with express mention of Articles 1 and 2 of the regulation.

The travaux preparatoires thus shed some light on the significance of the Preamble to the Fourth Hague Convention. There is no justification for interpreting Articles 1 and 2 of the Hague Regulations so that persons not included in the provision of these articles are not protected by the law of nations; for in accordance with the principle contained in the Preamble to the Fourth Hague Conven-

55. Id. at 62.
56. Id.
tion, they "remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience." These usages, such as those emerging from the practices and doctrines of the seventeenth, eighteenth and nineteenth centuries, did not discriminate against the guerrillas among belligerents.

In the twentieth century, resistance movements have proved to be an important means of conducting warfare. They remain vitally important in the national defense of many small states. Guerrillas played an important role in the Boer War, in colonial wars, and in the First, and, above all, the Second World War in Yugoslavia, Poland, the USSR, France, Greece, Indonesia, Cuba, Algeria, and recently in Vietnam, emphasized in practical terms the rebirth of this kind of warfare.

The scope of guerrilla activity was for the first time expressly recognized in the Peace Treaty with Italy. In its Preamble, the Contracting Parties took into consideration that after the said Armistice, the Italian armed forces, those of the government as well as those of the resistance, had taken an active part in the war against Germany.

2. Between the Hague Regulations and the Geneva Conventions of 1949.—During this period, the atrocities committed against guerrillas and the population suspected of such behavior reached dimensions never before known to history. In the course of the Boer War, English troops burned the farms of proprietors whom they suspected of participating in guerrilla warfare. During the First World War execution of guerrillas and the burning of villages whose population was suspected of aiding the guerrillas was standard practice among the German forces. During the Second World War, the methods of combating guerrilla warfare became even more cruel. The practice of the German troops was as follows: the guerrillas were not considered as belligerents but as bandits. This meant that in the event of capture they were put to death, often after having been tortured. It was only when the Germans wished to ensure protection of German soldiers who had fallen into the hands of the guerrillas that they recognized the guerrillas as legitimate combatants.

The German authorities justified their practice in the following terms:

(i) the guerrillas as a movement did not observe the laws

---

57. Id. at 63-64.
58. Id. at 64.
59. Id.
and customs of war and the German authorities were free to treat each member of the movement as an illegitimate belligerent; and

(ii) the guerrillas were not fighting in the name of the government recognized by Germany.

The appeal by the International Committee of the Red Cross, on August 17, 1944, addressed the governments of the belligerent states on the subject of acts of war committed by and against formations of combatants which the adversary did not recognize as a belligerent or who were considered guerrillas. The Committee required that

the fundamental principles of international law and humanity must be equally applied when in the course of war, situations arise which are not explicitly mentioned in international conventions and that all combatants, irrespective of whatever authority they may claim, must in as much as they are in conformity with laws and customs of war, and especially since they have at their head a responsible person, and carry a distinct sign or mark and their arms openly — benefit from the guarantees reserved for prisoners of war, if they fall into the hands of the adversary."

According to one writer, Dedijer, "the occupation forces in conformity with Hitler’s decision on the subjugation of Yugoslavia considered every act of armed resistance against the occupying forces as an act of rebellion, as a war crime. The members of the partisan units were not given the status of belligerents and accordingly, the captured or wounded partisans were, usually, executed on the spot. As a consequence of the growth of the partisan movement and in order to protect their own soldiers who were captured the commanders of the occupying units began to change their attitude towards the members of the partisan movement." There developed a system of repression in the regions where the partisans operated. Villages were burned and civilians were killed. A popular tactic was to seize a number of hostages and shoot them whenever partisans had either killed or wounded a German soldier. Thus, there revived in the twentieth century the barbaric old practice of seizing hostages and killing them, a practice already rigorously criticized by the time of the Middle Ages and all but abandoned in modern times — the prohibition against the seizure and killing of hostages being partly considered the result of Article 50 of the Hague Regulations prescribing all collective punishment directed against the civilian popu-

60. Id. at 64-65, n.2.
lation because of individual acts — to the point where inclusion of express prohibition in the Hague Regulations were thought to be superfluous. By the dawn of the century, use of hostages was considered illegitimate and almost entirely abandoned, so that Oppenheim was confident enough to declare that the seizure and killing of hostages “has totally disappeared and will hardly be revived.”63

Such practices during World War II were not so much the result of cruelty and arbitrariness on the part of individual commanders as the result of orders given by the German High Command. Thus, the ordinance by Marshal Keitel on July 23, 1941 declared that, considering the size of the occupied territories in the East, the armed forces deployed to secure this area would only be sufficient if all resistance was punished, not so much with a view to bringing the guilty to justice, but with a view to creating such terror by the armed forces that it would be possible to extinguish from among the population any will to resist. The commanders were to find the means to maintain order by using draconian measures.64 In this spirit, Keitel’s ordinance of September 16, 1941 (NOKW-258, Pros. Ex 53) provided inter alia that 100 prisoners should be shot as a reprisal for each German soldier killed and fifty killed for each German soldier wounded. In the words of one expert, “after 1914 . . . a new retrogressive movement set in which reached its present climax in the terrible conduct of the Second World War, threatening a new advance to barbarism. We have arrived where we started in the sixteenth century, at the threat of a total, lawless war.”65

In terms of the legal status of guerrillas, international law lacked unanimity at the turn of the century. Oppenheim thus remarked that “guerrilla war is not real war . . . in strict law the victor need no longer treat the guerrilla bands as a belligerent power and their captured members as soldiers,” but he continued, “it is however, advisable that he should do so, so long as they are under responsible commanders and observe the laws and usages of war.”66 The literature of international law touching guerrilla warfare was remarkable for the diversity of views expressed. Some believed that although refusal to accord the guerrilla rights as belligerents violated the general principles and the customs of war, this refusal often resulted from the exigencies of war.67 Others held that the guerrilla

63. Id. at 66, n.2.
64. Id. at 66, n.3.
65. Id. at 66, n.4.
66. Id. at 66, n.3.
67. Id. at 66, n.4.
was useless in modern warfare. Still again, others, more optimistic, expressed the view that the factual situation led automatically to the application of the laws of war to the guerrillas if the insurrection had reached considerable dimensions; each party, if it desired to transform hostilities into legitimate war created "suo vigore a condition in which the rules of warfare become operative."  

In interpreting Articles 1 and 2 of the Hague Regulations some, however, would have applied the rule of interpretation that that which was not expressly prohibited was permitted. The classes of persons not included in the provision of the above Articles, not being legitimate belligerents, were, therefore, not protected by the law. Any existing obligations were strictly moral and not legal. This interpretation ignored the Martens clause which had placed the inhabitants "under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples." It also ignored the fact that in 1899 the Martens clause was the price paid to obtain the consent of the small states participant in the Hague Conference to Articles 1 and 2.

This narrower interpretation influenced sitting tribunals. In the Hostages Case (Wilhelm List and other German soldiers), the United States military tribunal sitting at Nuremberg stated that certain units of partisans in Yugoslavia and Greece, though designated in a manner corresponding to a military organization and subordinated to a centralized military command structure, "had no common uniforms" and "generally wore civilian clothes, although parts of German, Italian, and Serbian uniforms were used to the extent they could be obtained." The tribunal further stated that "the Soviet star was generally worn as an insignia," but "(t)he evidence (could) not sustain a finding that it was such that it could be seen at a distance. Neither did they carry their weapons openly except when it was to their advantage to do so." On the basis of these findings, the Tribunal concluded that captured members of these unlawful groups were not entitled to be treated as prisoners of war. It was, therefore, impossible to charge the accused with having killed "such members of the resistance forces; they being franc-tireurs."  

3. After 1949.—The Geneva Conventions of 1949 ostensibly helped the legal situation of guerrillas and resistance movements. As such, members of organized resistance movements were sometimes

68. Id. See also, Graeber, The Development of the Law of Belligerent Occupation, 1863-1914, 87-88 (1949).
69. H. Lauterpacht, Recognition in International Law 245 (1947).
assimilated with volunteer units provided that they fulfilled the conditions of Article 1 of the Hague Regulation (Article 4 of the Third Convention). These conditions required that the Contracting Parties renounce all measures to cause physical suffering or extermination of the population of the occupied territories (Article 32 of the 4th Convention), that the seizure of hostages as well as collective punishment be expressly forbidden (Articles 33 and 34), and that the provisions of the convention had considerably limited the number of cases in which capital punishment could be imposed by tribunals (Articles 64-70). These certainly constituted an improvement in the legal status of the population suspected of aiding the guerrillas, which until then, was often subjected to atrocities by the occupying power.

Nevertheless, the legal status of guerrillas and armed resistance movements after 1949 still remained unsatisfactory. Its defects and inadequacies became more evident as a result of the interpretations given after 1949 to the individual provisions as well as political and military developments in the post-war years. Accordingly to Baxter, the 1949 Conventions “instead of clarifying the status of these individuals, (spies, guerrillas and saboteurs), destroyed what little certainty existed in the law . . . the Conventions are at their weakest in delineating the various categories of persons who benefit from the protection of each.”

Doctrinally, the argument that whatever was not expressly prohibited was permitted, continued to prevail, with the result being that the fate of guerrillas and members of resistance movements was often left to the arbitrariness of the occupying power when the former fell into their hands. Opinion here remained virtually the same as before the conclusion of the Geneva Conventions. Legal protection was reserved to persons who met the conditions envisaged in Article 1 of the Regulations, or at best they were to be treated in accordance with principles of humanity. C.G. Fenwick, in describing the Warsaw uprising of 1944, observed that “the status of the forces of resistance would have been difficult to determine even if the invader had had concern for the legality of his acts” and “the irony of the ‘laws of war’ ” was illustrated here as in other phases of the war where the judgment of individual commanders determined what was lawful and unlawful.

Practice during the Second World War and during the wars of national liberation in Africa and Asia in the post war years demonstrated the vitality of resistance and guerrilla movements. The resur-

gence and vitality of these proved that guerrilla warfare was not an anachronism. By the middle of the twentieth century, war had become more and more mobile, extending the theater of war and considerably increasing the prospect of guerrilla warfare. This was largely the result of developments such as the emergence of highly efficient super-powers and state police in the face of which most individuals and groups appeared vulnerable. Developments in technology, aviation and the mobility of regular armies also made it possible for these groups to concentrate enormous firepower against fortified targets.

These military factors led to the emergence of similarities between regular armies and guerrilla forces, such as the use of small airborne units and special forces. Even the clandestine nature of guerrilla warfare for which the guerrillas had been reproached found a ready parallel in the camouflage of modern armies. Logically, it became more and more difficult to deny the character of legitimate belligerent to the guerrillas, and maintain at the same time that the small units of the regular army who acted in a similar fashion were entitled to a privileged legal status.

The military importance of guerrilla warfare today is generally recognized. It has been described as "the effective weapon of the weaker adversary," as dangerous for the Great Powers as for small states, "an extremely cheap weapon, at least — monetarily." According to Baxter:

resistance activities were an important instrument in the defeat of the Axis during the Second World War and it is hardly possible to name an armed conflict which has taken place since the conclusion of those hostilities in which guerrillas have not played an important and often a decisive role. Only rigid legal formalism could lead to characterization of the resistance conducted against Germany, Italy and Japan as a violation of International Law. Patriotism, nationalism, allegiance to some sort of political authority have replaced the desire for loot, which has traditionally been attributed to the guerrilla, in motivating civilians to take part in warfare, and sabotage by private persons may be expected to continue on a widespread basis in future warfare as they have in the past.75

Perhaps public international law offered for a time the most obstinate resistance to recognizing the military importance of guerrilla activities, thereby, justifying discrimination against this form of warfare. It was, however, illusory to hold that discriminatory legal provi-

73. Cf. supra note 71.
75. Baxter, supra note 71, at 344.
sions could discourage an oppressed population in any occupied terri-
tory from participating in a resistance struggle waged by guerrillas, so long as they were determined to take part in that struggle. The political and military factors which determined the forms of resist-
tance and the scope of individuals participating in hostilities were far too powerful to be stymied by a legal norm discouraging the population from participating in a resistance movement. In 1955, for in-
stance, the British authorities in Kenya executed 219 natives for Mau Mau murders and 508 for other terrorist offenses. Yet, in spite of these and other “successful” military operations, by 1960, Kenya was on the road to independence. International law, refur-
bished and reinvigorated by the newer forces at work in the interna-
tional arena, (newly independent Third World states, internationally recognized national liberation movements such as the PLO, SWAPO, and ANC) today, arguably, has a duty to preserve whatever legal constraints exist to thwart what, in effect, often amounts to military aggression.

On one hand, guerrilla movements have generally shown scrupulous adherence to the laws of war so as to demonstrate the military character of their organization. On the other hand, much guerrilla warfare is of an inhuman character. The situation is partly the result of a vicious circle. While the party opposing the guerrillas often justified its own atrocities with reference to the atrocities perpetrated by guerrillas who were denied the status of legitimate belligerents, the guerrillas considered laws of war, which imposed obli-
gations on only one of the parties, manifestly unjust.

In the past, regulations which distinguished between belligerents whose position was deemed to be established under the law and those who “remained under the safeguard of the principles of the law of nations, such as resulted from the usages established between civi-
lized nations,” helped to aggravate the vicious circle and make wars more and more bloody, regardless of whether the atrocities were committed against “criminals” and non-legitimate belligerents, or whether they were committed as reprisals. This situation, commonplace during the Cuban uprising against the Spaniards during the last century, and in much of this century, have to some extent been modified by more recent legal development.

Detailed examination of the 1977 Geneva Protocol necessarily falls outside the scope of this article. It is worth noting, however, that Article 1(4) extends the 1949 Geneva Convention to include

76. See Britannia Book of the Year 203½, 756 (1956).
77. *Melanges*, supra note 39, at 73.
78. International Committee of the Red Cross, Protocols Additional to the Geneva Con-
“armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter... and the Declaration on Friendly Relations.”

Article 96(3) also allows the representative of a people engaged in such an armed struggle against a state party to the Protocol to undertake to apply the 1949 Convention and Protocol 1 by way of unilateral declaration. In addition, Article 44 of Protocol 1 attempted to afford legal recognition to certain types of guerrilla activity by modifying the requirements of wearing distinctive emblems and carrying arms openly. In this way, it further extended the category of “lawful belligerent.” It is, therefore, possible that some activities described as “terrorist” are probably now protected by the 1949 Convention and Protocol 1.

On the other hand, Protocol 1 also provides that “mercenaries” shall not have the right to be considered as lawful combatants or prisoners of war, although a capturing state may choose to accord such status to captured mercenaries who, in any case, remain under the protection of the fundamental guarantees, applicable to all persons, as set forth in Article 75 of Protocol 1. It is plausible to maintain that acts of terrorism by mercenaries, as defined under Protocol 1, are, notwithstanding “fundamental guarantees,” not legally protected acts, even if colored by political motivation.

D. Terrorism and Contemporary Practice

Typically, a typology of terrorist actors on the international stage would include:

(i) Those groups motivated by nationalism, and fighting to achieve national self-determination, e.g., the Basques (ETA), the Catalans, the PLO (Black September, Abu Nidal et al), the IRA (the Provos), the Corsican, Moluccan, Tamil and Karen separatists. Notably, both separatist groups and groups fighting to overthrow colonial rule are motivated by political and cultural nationalism and ultimately seek to achieve national self-determination. Therefore, they can form part of a single category.

(ii) Those motivated by other ideology such as anarchism, communism and so on, for example, the Japanese Red Army, the Red Brigades, and Baader Meinhof.

(iii) Those motivated by religion, e.g., the Moslem Brotherhood and Islamic Jihad. Sometimes these groups will merge with the state
as in the case of Iran.

(iv) Radical regimes such as Syria, Iran, Iraq and Libya.\textsuperscript{83}

(v) Secular regimes, such as Chile and Argentina under junta governments, and inherently terroristic and genocidal regimes such as the deposed Pol Pot regime of Kampuchea.

At the political level, a policy of terrorism seems to offer a number of possible tactical advantages:

i) it achieves greater publicity for the particular cause;\textsuperscript{84}

ii) it demonstrates the vulnerability of the existing government and the ineptness of its security forces;

iii) it can trigger widespread repression by the government’s armed forces, resulting in alienation of the population and dimin-

\textsuperscript{83} Some of these theocratic regimes are reminiscent of times past. Today’s slaughter of the Bahais by the Iranian regime is probably no different from earlier expressions of religious persecution, e.g., the thirteenth century extermination of the Albigenses through the influence of Pope Innocent III and the Inquisition. It has been argued that in Islam, the seven Hudud (severe) crimes are adultery, defamation, alcoholism, theft, brigandage, apostasy, and rebellion/corruption of Islam. While prosecution and punishment for these crimes is mandatory under the Koran, prosecution for international terrorism or murder is not. Note, \textit{Insuring Against Abuse of Diplomatic Immunity}, 38 STAN. L. REV. 1517 (1986). The logic of this approach could be to have devout Moslems acquiesce in or even ultimately to sponsor the perpetration of terrorist acts.

\textsuperscript{84} Murphy, \textit{Recent International Developments in Controlling Terrorism}, 4 CHINESE Y.B. INT’L L. AND AFFAIRS 98-99 (1984) states that:

Since the primary goal of terrorists is publicity, and their actions are designed to reach this goal, the general public is much more conscious of terrorist activities than of other less spectacular crimes. Local media report major terrorist incidents throughout the world, and this serves to increase public anxiety, even in those countries which are free from terrorist attack.

This statement reflects Murphy’s basic ignorance of terrorist’s goal’s. His is at best intuitive surrealism. For if “the primary goal of terrorists” were publicity, this would be better served by a policy emphasizing (i) infiltration — “entryism” — of media institutions, aiming at their ultimate control, (ii) the establishment of independent news organs with the financial backing of so-called “terrorist” state sympathizers, e.g., oil rich Libya, Iraq and Iran; (iii) systematic analysis, explanation and propagation of the causes which generate terrorist activity; arguably, the latter would provide the prior conditioning and the psychological climate necessary for a less jaundiced approach when the occasional outrage is perpetrated.

Others write in a similar vein:

[T]he absence of any well-defined long-term political or military aims that characterizes the Tupamaros is shared by many a Latin American terrorist group, as well as by such groups as the German Baader Meinhof Gang and the Italian Brigatte Rosse, which have as their main goal the disruption of society rather than the defeat of the established government’s military. All such groups operate only in the immediate present — today is far more important, significant, and symbolic than tomorrow.

Radu, \textit{Terrorism and Insurgency in Latin America}, 28 ORBIS 29 (1984). According to this view, the sole concern of terrorists is the immediate bestseller, to “make it” on a rather grotesque and macabre hit parade. But contrary to Murphy and Radu, terrorism is not simply contemporary art for art’s sake. Rather, the primary goal of many so-called terrorist groups has had to do with self-determination, national independence and sovereignty. This is cathechistic as far as concerns contemporary terrorism. The search for publicity is in these instances only incidental. Murphy confuses shadow with substance; Radu either ignores or is unaware of a substantial body of literature detailing the objectives of terrorists (“terrorist” manifests being no more vague than those of parties in government or opposition). Like war, in Clausewitz’s celebrated dictum, terrorism being essentially a continuation of political intercourse with the addition of other means. K. CLAUSEWITZ, \textit{ON WAR} 605 (1970).
ished support for the government, thereby facilitating its eventual overthrow; and

iv) it can feed and maintain a myth of the fearless warrior, thereby, inspiring further resistance; e.g., the Afghans against the British and the Soviets and the Vietnamese successively against the French, the United States and more recently China.

On the other hand, a policy of terrorism confronts three major risks:

(i) Terrorists invariably run the risk of being caught out and destroyed. How great is such a risk? How does one measure it? These are empirical questions for the practitioner and his opponent.

(ii) Terrorists, by the very nature of their deeds, always run the risk of losing popular support. Such support is indispensable if terrorism is to help one succeed in achieving one’s ultimate objectives, such as self-determination, and the transformation of society. The terrorist is in danger of striking at a civilian target, yet expecting civilian support. To engage in terrorism in this scenario is to squander scarce political capital. It can easily stimulate a maelstrom of enmity and hostility when either deliberately or mistakenly directed against civilian targets. IRA bombings of pubs in Britain, the annual Christmas bombings against department stores and restaurants, the assassination of revered figures such as the elderly Lord Mountbatten only serve to alienate the target population. There is no evidence that through the use of these methods terrorists have ever caused governments to withdraw. Indeed, British forces still remain in Northern Ireland. Neither Basques nor Catalans have achieved autonomy. Other powerful forces, such as the Catholic Church, have expressed their revulsion at the methods chosen by terrorists. Terrorist measures, at most, call into question the credibility of government. The government must act to save face and responds accordingly.

(iii) The terrorist by inaction runs the risk of betraying his weakness, indecisiveness, lack of leadership, even a paralysis of the will to act with the attendant demoralization of his followers, not unlike Pablo, the guerrilla leader in Hemingway’s *For Whom the Bell Tolls*.

Terrorist methods can encompass mock executions, Russian roulette, threats to relatives, solitary confinement, isolation, and sensory deprivations leading to disorientation (e.g., because of subjection to constant harsh lighting, sleep deprivation, etc). These psychological ploys are sometimes combined with more robust physical treatment. Torture, in its various forms, is used to buttress psychological warfare waged against the individual. In Chile, under the Pinochet re-
gime, psychiatrists working with victims of the dictatorship discovered that the repression in Chile was expressly designed to cause psychological damage to vast sectors of the population. The psychiatrists found that the complaints more frequently repeated by the thousands of patients they saw were for depression, anxiety, insomnia, nightmares, diminution of intellectual powers, impotence, distortions in family and other emotional relationships, loss of memory, frigidity, and apathy.

As a general proposition, we can conclude that all activities which cause such effects violate individual human rights and are prima facie evidence of the use of terror. Terrorism, it would seem, is a function of political commitment and lack of feasible alternatives (the negotiating process has failed and democracy is unavailing). In psychological terms, it can mark the transformation from impotence on the part of the oppressed or the colonized to self-respect and independence. On the other hand, the destabilization of Jamaica and of Chile provide vivid examples of what has been sometimes labelled "psycho-terror," and can signal the creation of a climate of political turmoil which can ultimately cause a drain on necessary foreign investments. At best, terrorism is seemingly the fruit of political alienation and subjugation. However, by themselves, the results of terrorism — the death of innocents and ensuing despair — are fruits which wither on the vine. By themselves, the ideals of terrorists rarely come to fruition. Almost invariably they come to naught. Terrorism is, therefore, more often than not an exercise in futility. It is at best faute de mieux, the continuation of war by other means. Even if in the short term it can secure cheap publicity (this, however, is all too easily offset by the cost of alienation), the loss of support can be prohibitive for a movement already lacking widespread support.

In economic terms, the effect of terrorism is often to disrupt the government's development plans (e.g., the activities of a Savimbi in Angola, and a RENAMO in Mozambique). In such circumstances, the government will intensify its anti-terrorist responses, the guerrillas will fortify their defenses, and the expatriate business manager

85. See F. Fanon, The Wretched of the Earth 73 (1966). See also, Black Skin White Masks (C. Markmann trans. 1967), and A Dying Colonialism, (H. Chevalier trans. 1967).
86. As one observer remarks with respect to Baader Meinhof "the group accomplished almost nothing with its bombs, sub-machine guns and raids during 1970-72. But the leaders' beliefs, imprisonment, trial and above all their deaths, have had a lasting influence on the German left." Livingston, Violence is the only way, N.Y. Times Book Rev., Jan. 3, 1989; S. Aust, The Baader Meinhof Group: The Inside Story of a Phenomenon (trans. A. Boll 1987). On the other hand, to take another example, since 1968, more than 2,600 people have died in political violence in Northern Ireland. In 1987, ninety-three people were killed, with the I.R.A. claiming responsibility for sixty of the deaths. N.Y. Times, January 7, 1988 A.6.
will beef up his personal security with the aim of thwarting kidnap-
ping, extortion and even assassination. Private industry will continue
to spend billions of dollars annually to defend against terrorism,
costs which are passed onto the consumer. In short, the only result is
diminution of services. These anti-terrorist measures, while effective
in the short term, too often fail to take into account the basic objec-
tive conditions which give rise to terrorism in the first place, and can
be ultimately only partially successful.

Perhaps, detailed application of risk analysis in the study of ter-
rorism and the responses to it, might yield some useful results. So far
this has not been done; but such a study classifying the risks involved
according to degree (high risks, medium risks, low risks, minimum
risks, etc. — discounting other factors, and relating the foregoing to
the nature and type of political activity), might help with under-
standing the problem.87

1. Terrorism and National Self-Determination.—In his article
entitled “The Legalization of Terror,”88 L.C. Green criticized the
principle of self-determination as the possible source of acts of ter-
rorism. Green’s arguments against self-determination appear inade-
quate for a number of reasons. First, his study was unnecessarily
limited to United Nations practice in respect to self-determination,
thus, ignoring much of the relevant state practice. Second, it is not
clear why the principle of self-determination should be ineligible for
what Green termed “canonization.” On the contrary, it is today al-
most universally accepted that the principle of self-determination has
the status of *jus cogens*, a peremptory norm of international law.
Arguably, it is difficult to see why state sovereignty should still re-
tain this status of “canonization” despite manifest erosion of respect
for the principle. Third, the overall result of Green’s approach would
be, consciously or unconsciously, to strip colonized peoples of any
defense against aggression. Green’s most striking failure was to dis-
tinguish between “attack” and “defense.” His reference to “diplom-
atic double talk” sheds little or no light on the subject.89

Terrorism is arguably justified where the colonial, occupying, or
foreign power persistently engages in acts of repression in flagrant
violation of the rights of native inhabitants. In short, terrorism may
well be legitimate in the pursuit of national self-determination, for
terrorism in these circumstances amounts to no more than a response
to every day aggression and an act of self-defense or reprisal; the
former sanctioned under international law, the latter sanctioned by

---

88. *Alexander, Carlton & Wilkinson, Terrorism: Theory and Practice*, 175
     (1979).
89. *Id.* at 187.
state practice. As such, the PAIGC, FRELIMO, MPLA and the rest were, arguably, legitimately entitled to avail themselves to "terrorism" in seeking to repel the terror routinely visited upon them by the Portuguese colonialists. So too, the ANC described by Reagan as "terrorist," is entitled to resort to terrorism when resisting unlawful violence by the South African authorities. In fact, what these forces engage in is really counter-terrorism. And, we engage in a misnomer when we label it "terrorism" per se. Given the premium the international community attaches to the right of self-determination, the fact that self-determination is a legal principle, thrusts us into a situation of self help in the enforcement of legal rights, and attempts to prevent further violation of international law.

Moreover, it might well be objected that in this instance, given the history of United States collaboration with the criminal apartheid South African regime — a fact repeatedly denounced in the General Assembly's resolutions — the United States Government may well lack the moral authority necessary to censor actions undertaken by the ANC, the PAC, and others to achieve the right to self-determination. Condemnation of ANC "terrorism" per se, could thus be dismissed as hypocritical and self-serving.

It is sometimes urged that terrorists originally had good motives and sound objectives. This is no longer the case. What does one make of such nostalgia? Does the argument withstand scrutiny? Irrespective of good intentions, is the terrorist entitled to act as judge, jury and executioner? What permits him in a society allegedly adherent to the "rule of law" and to "due process" to assume one moment the judge's robes, then the next, to set them aside to seize the executioner's axe or the hangman's noose? On the face of it, nothing legitimates such behavior. However, what if contrary to our prevail-

90. The term "counterterrorism" in State Department usage is largely functional. It is synonymous with intelligence gathering to thwart terrorist activity. Such usage, however, arbitrarily omits equally significant political, military and even economic responses aimed at countering terrorism. To define "counterterrorism" in such terms is therefore inadequate. This sort of activity could more accurately be described as "political surveillance" or "surveillance of political and paramilitary groups," even "counterintelligence." The latter includes information gathered to protect against espionage or other form of clandestine intelligence activity, sabotage, or assassinations, even when conducted on behalf of foreign powers, organizations, or persons, and international terrorism. DOD Procedures, app. A, sec. 5; also Exec. Order No. 12,333, at sec. 3.4(a).

Such intelligence is generally used for (1) prevention, e.g., in 1983, the FBI used such information to intercept pro-Khomeni students who planned to bomb a theatre filled with students sympathetic to the Shah; (2) prosecution of terrorists, e.g., Fawaz Yunis. Arguably, this reflects the supremacy of the rule of law and recognition of the criminality of terrorism; (3) crisis management, e.g., the hostages detained in Beirut. Timely and accurate information will often determine success in combatting physical acts of terrorism.

ing assumptions, it is questionable whether these societies are in fact genuinely and substantively adhering to the rule of law and due process, and the quality of justice is somewhat strained? Is he then, in the absence of protection by the law, entitled to resort to self-help in violation of existing law? Examples which spring to mind include the Jews in the ghettos of Central and Eastern Europe, Yugoslav and other partisans, and even Arabs on the West Bank. Experience seems to counsel that so long as the objective conditions of injustice persist, the search for justice invariably continues. People will often employ whatever means are thought necessary to remedy the injustices they suffer. Justice done, terrorism, which appeared initially as a quixotic undertaking by the incurably romantic, becomes at best ersatz, irrelevant, totally lacking in intellectual and moral justification, and more important, popular support.

As Weisel suggests:

We find many examples in the tales told about all revolutionary movements, in the histories of every struggle for national independence. Heroes and martyrs became the pride of their people by fighting with a weapon in their hand or a prayer on their lips. In a thousand different ways, each proclaimed that freedom alone gives meaning to life of an individual or a people — for a people — that is, for a social, ethnic or religious group — the problem and its solution are both simple. When a people loses its freedom, it had a right, a duty to employ every possible means to win it back. The same is true of the individual — with one difference: An individual's resistance can be expressed in more than one way."

2. Terrorism and Self-Defense  

a. Municipal law.—The municipal law of self-defense generally permits the use of such force as appears reasonably necessary to defend against the threat of unlawful and immediate violence. For a claim of self-defense to succeed, the proponent must establish four elements:

(i) A reasonable belief that the force used was necessary for his protection, i.e., a belief which a reasonable person in similar circumstances would have formed. Under the traditional common law view, while an honest and reasonable belief sufficed, the defense was still available even if it turned out that the belief was wrong and there was, in fact, no actual need to use force in self-defense.92

(ii) A reasonable belief that the threatened harm was imminent, i.e., that it would be inflicted immediately if the party

claiming self-defense did not act in self-defense. This also re-
quired consideration of whether the alleged aggressor appeared
willing and able to injure the defendant.94

(iii) The threatened harm was unlawful. This raised the
question of whether the initial aggressor in an affray could claim
the defense at all.

(iv) That the force which the defendant used was reasona-
bile, i.e., proportionate or no more than appeared necessary
under the circumstances to protect against the threatened
harm.95

A prohibition against the use of “deadly force,” i.e., force used
with intent to cause death or serious bodily injury or known by its
user to create a substantial risk of death or serious bodily injury —
limited the right to self-defense. [Model Penal Code 3.11(2).] This
prohibition is not absolute, however. Courts often followed the prece-
dent established in Beard v. United States96 that deadly force should
only be used if one reasonably believed that he was about to be sub-
jected by another person to possible death or great bodily injury, and
that deadly force was necessary to prevent the harm.

In a related vein, many jurisdictions following Brown v. United
States97 no longer require the defendant to retreat before using
deadly force. However, several states still adhere to the common law
rule, holding the defendant to a duty to retreat before using deadly
force. The Model Penal Code similarly requires the defendant to re-
treat, surrender possession of that which is demanded by another as-
serting a claim of right to it, or comply with a demand to abstain
from any action he or she has no duty to take, if this could be done
with complete safety. [Model Penal Code 3.04(2)(b)(ii).]

Generally, the initial aggressor in an altercation forfeits his
right to assert self-defense. Rowe v. United States.98 The rationale is
that the victim, in defending himself against the aggressor, is ordina-
ryly using lawful force, and the defendant can only use self-defense
in response to threats of unlawful harm. However, there are situa-
tions in which the initial aggressor may regain the right to claim to
have acted in self-defense. If the victim responds to the aggressor’s
use of nondeadly force with deadly force, the aggressor can use
whatever force appears reasonably necessary, including deadly force
to repel the attack. The rationale here is that since the law does not
allow nondeadly force to be met with deadly force, the victim has
threatened unlawful harm. The aggressor may also regain his right

94. People v. Williams, 205 N.E.2d 749 (Ill. 1965).
96. 158 U.S. 550 (1895).
97. 256 U.S. 335 (1921).
98. 164 U.S. 546 (1896).
to claim to have acted in self-defense by withdrawing from the altercation. Ordinarily, the defendant must actually notify his adversary of the desire to desist, but following Rowe v. United States\textsuperscript{99} some jurisdictions hold that even an unsuccessful effort to do so, if reasonable, will suffice.

It is intriguing to imagine the consequences of applying these principles to many contemporary domestic conflicts. These conflicts are regulated by domestic law, but it is submitted that these situations are often not entirely unambiguous, and neutral and rigorous application of the foregoing principles might conceivably have unforeseen results. Imagine a hypothetical Haitian peasant who, for the first time, seeks to exercise the right to vote, sees his compatriots similarly seeking to vote being shot down by the TonTon Macoutes in cold blood. The peasant fears for his life and for the lives of others not yet killed. His claim to act in self-defense, or in defense of the others seems a colorable one. This hypothetical is easily extended to El Salvador, Guatemala, Honduras and other situations similarly blighted by death squads or dictatorship.

\textit{b. International law.}—After the First and Second World Wars, public international law increased its efforts to outlaw the use of force. An exception is still made for self-defense, although its extent remains controversial. In contrast with the situation under municipal law, there is little agreement at the international level as to the circumstances in which the right of self-defense may be exercised. Article 51 of the United Nations Charter provides the legal basis for NATO, the Warsaw Pact and similar alliances. Literally, the words “if an armed attack occurs” in Article 51, would require that an armed attack must have occurred before force can be used in self-defense. Under this view, there is no right of anticipatory self-defense against an imminent attack.

On the other hand, a state can conceivably be the object of an attack before the attack actually occurs. The French text uses the words “dans le cas ou un membre ... est l’objet d’une agression armee.”\textsuperscript{100} Such a member state would, on the latter reading, be entitled to act in self-defense. Advocates of a right of anticipatory self-defense further claim that Article 51 does not limit the circumstances in which self-defense may be exercised.

Israel’s actions against the PLO, its incursions into the Lebanon as well as the bombing of the Iraqi nuclear reactor, United States actions against Libya, South African raids into Angola probably fall

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} “In the case where a member ... is the object of an armed attack.” (author’s translations).
under the rubric of anticipatory self-defense. These governments reject the argument that the word "if," as used in Article 51 means "if" literally. The sovereign state is considered entitled to use force in defense of a range of interests even when there is neither an actual armed attack nor imminent danger of one. However, United Nations General Assembly Resolution 3314 (XXIX), offers a broad definition of the term "aggression," and declares that "no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression."

As one observer remarks:

the question whether an attack is imminent is inevitably a question of opinion and degree, and any rule founded on such a criterion is bound to be subjective and capable of abuse. To confine self-defense to cases where an armed attack has actually occurred, on the other hand, has the merit of precision; the occurrence of an armed attack is a question of fact which is usually capable of objective verification.

It has also been argued that attacks on a state's nationals resident abroad do not entitle the state to use force in order to defend its nationals. Nor does self-defense include the right of armed reprisals. If terrorists enter one state from another, the first state may use force to arrest or expel the terrorists, but having done so, it is not entitled to retaliate by attacking the other state. The Security Council has, thus, frequently condemned Israel for carrying out armed reprisals against her neighbors. Finally, force used in self-defense must be proportional to that of the armed attack. Failing this, minor incidents could be the pretext for starting total war.

In terms of scope, Article 51 speaks of "individual or collective

102. Article 51 provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

See M. Akehurst, Modern Introduction to International Law 245-47 (5th ed. 1984) for criticism of the arguments relating to anticipatory self-defense as relates to Article 51 [hereinafter M. Akehurst]

103. I. Brownlie, International Law and the Use of Force by States 289-301 (1963). See also Sofaer supra note 39 at 921:

These communications, following Qaddafi's long history of support for terrorism, and his threats against U.S. citizens, established overwhelmingly that Libya was responsible for the attack. In addition, the President was faced with strong evidence of some 30 possible impending Libyan attacks on U.S. facilities and personnel throughout the world. The April 14 strikes were to deter these and other planned attacks. Id.
self-defence.” According to one view, a right of collective self-defense is merely a combination of individual rights of self-defense. States may exercise collectively a right which any of them might have exercised individually. It is puzzling to see why, if the argument holds for states, the same should not apply to individuals or groups. As a corollary, “terrorists” or guerrillas fighting against an occupying power may legally defend since each could have legally exercised a right of individual self-defense in the same circumstances.

A claim of self-defense by so-called “terrorists” can nevertheless pose a number of problems. In a “colonial situation,” for instance, the colonized, the party urging self-defense will often claim to have been subjected to a long history of abuse, “une aggression de tous les jours,” if you will. This provides the basis for a defense against accusations of having engaged in “terrorist” acts. In such situations, however, the “terrorists” may have attacked their victims after a particular period or episode of abuse has ended, or they may have acted despite the fact that there was no prospect of immediate physical harm. Self-defense strictly speaking may therefore not apply. In contrast, they may even have had the option of leaving rather than attacking the victim (a rare event in the colonial situation), thus, rendering the use of force unreasonable.

The reasonableness of this defense must, therefore, be evaluated from the standpoint of the oppressed people, their specific experiences, their psychology, and the disadvantaged position that they have occupied. In light of these factors, “terrorism” may not be an unreasonable response to a history of abuse. To draw an unhappy parallel between the conduct of a “terrorist” in a colonial situation, and that of a battered spouse in the domestic setting is not to engage in mere emotional rhetoric, but to focus on the inequities of situations which are probably not intrinsically different in qualitative terms.

II. The Response to Terror: The Inadequacy of the Framework

A. National Responses

Terrorism is in theory and practice a two-edged sword, as it is in the propaganda war between the superpowers. Yonah Alexander, in arguing that terrorism is likely to increase both at home and abroad, adduced among others the following reasons:

(1) International connections amongst states, especially between the Soviet Union and the Third World greatly facilitate...
terrorist activities.

(2) Terrorist groups are continually able to exploit conditions of social unrest, including East-West issues, such as deployment of Euromissiles.

(3) Ninety percent of terrorist groups in the world are Marxist and pro-Marxists sympathies (which the Soviet Union and its surrogates support) have increasingly grown the world over.\(^{106}\)

On the other hand, S. Losev, a Soviet writer, points out that:

the aggression against Grenada has clearly shown the true worth of the expatiations by the U.S. leaders upon "human rights" and "the freedom of nations" and upon their "commitment" to democracy. Having committed heinous crimes in that small country the U.S. Administration has exposed itself before the whole world as chief sponsor of the policy of international terrorism. By ordering the landing of U.S. marines in Grenada, the U.S. President trampled upon his grandiloquent declarations about law and morals and equated the actions of his Administration with terrorism and U.S. foreign policy with brigandage.\(^{107}\)

In practical terms, the responses of states to terrorism have typically included legislation, adjudication, and reprisals. Space does not allow for detailed exposition on the status of anti-terrorist legislation in national law. Suffice it to say that a number of states have enacted legislation purporting to prohibit terrorism. Such legislation has sometimes included provisions for the imposition of sanctions, e.g., United States against Libya, United States against Iran, and Japan against North Korea.

\(^{106}\) Alexander, *The Spiraling Price of Modern Terrorism*, 51 Am. Jewish Cong. Monthly 22-23 (1984). It is probably little more than a smear to describe the Greenham Common Women, the Campaign for Nuclear Disarmament and those who protest deployment of Euromissiles as involved with terrorism. Many of those protesters in fact practice nonviolence.

\(^{107}\) See Losev, *International Brigandise and Terrorism — Weapons of U.S. Imperialism*, Int'l Affairs 12-19 (1984). See also Sovetov, *Peace Built of Strength — A Doctrine of International Terrorism*, Int'l Affairs (Moscow) II 52-62 (1984); and Larin, *CIA — A Vehicle of International Brigandise and Terrorism* Int'l Affairs (Moscow) 6, 78-80 (1984). The several plots to assassinate Fidel Castro, are from the Cuban and Soviet, standpoints, obvious examples of state sponsored "terrorism." Given the prohibition against assassination of foreign Heads of State, these acts arguably qualify as "terrorist" acts. See Alleged Assassination plots involving foreign leaders: An interim report of the select committee to study governmental operations with respect to intelligence activities. United States Senate together with additional supplemental and separate views: 94th Congress, First Session, 1976. E.O. 12,333 — 1975 prohibits assassinations of foreign heads of state. On the other hand, under the laws of war military men are always subject to attack. In 1804-1805, Lt. Obanon led expeditions into Libya against the Barbary pirates. In 1916, General Willoughby led a U.S. expedition into Mexico to capture or kill Pancho Villa. In November 1941, there were Scottish attempts to murder Rommel. Similarly, the U.S. attempted to murder Yamamoto. So too, the U.S. Bolivian expedition which succeeded in killing Guevara in 1968. The Israeli attack on Abu Jihad on April 16, 1988 should also be considered. Some might therefore argue that Castro was a viable target and these attempts should not be classified as attempts at assassination.
In terms of adjudication, courts have exercised jurisdiction where terrorists have been caught or brought within the national jurisdiction, such as the recent conviction of the El Rukn by a Federal District Court in Chicago on charges of conspiring to commit terrorist acts in the United States on behalf of Libya in exchange for $2.5 million dollars; and the extradition proceedings in the United States District Court in Brooklyn in which Israel is asking the United States to extradite Mahmoud el-Abed Ahmad, a suspected member of the Abu Nidal terrorist organization, to stand trial for an attack on an Israeli bus in which the driver was killed and three passengers wounded. In other instances, courts have convicted and sentenced terrorists in absentia. For example, on February 18, 1988, an Italian court sentenced Abu Nidal in absentia to life imprisonment for his role in the Rome Airport massacre in 1985. Admittedly, the latter judicial exercises have had little immediate practical effect.

However, the law has undoubtedly had some limited overall success in combatting terrorism; in 1986 the hijackers of the Achille Lauro were tried and convicted in Italy; in 1987, George Abdalla was tried and convicted in Paris for the murder of Lt. Col. Charles Ray; the Tunisian authorities also arrested the Paris cafe bomber; the Venezuelan authorities arrested the Italian bomber of the Bologna Railway Station; and in October 1988, the Sudan sentenced a number of terrorists to death, and a Maltese judge sentenced hijackers of an Egyptian airline to twenty-five years imprisonment.

In terms of reprisals, a striking example is the United States bombing of Libya. Israel and South Africa have also engaged in reprisals against activities which they consider “terrorist.” Yet these states are themselves considered “terrorist” by their adversaries. It is worth recalling the words of Sir Humphrey Waldock more than three decades ago, “armed reprisals to obtain satisfaction for an injury or any armed intervention as an instrument of national policy otherwise than for self-defence is illegal under the (U.N.) charter. Another bombardment of Corfu would be a grave breach of the Charter.”

There is finally, a fourth approach, that of the political compromise; this is an approach few openly advocate because of its repercussions, but pursued in secret by policy makers in some states. Attempts at buying cooperation from terrorists via the provisions of...
safe-haven, protection, money, or arms have not worked because: terrorists act when they want to, and there has been a proliferation of terrorist groups. The results have been that the compromisers have usually, at some point, moved into the camp of the anti-terrorists.

In sum, states have undertaken several measures to thwart international terrorism. Most notable among these have been:

(i) enactment of legislation providing for arrest and detention of suspected terrorists;
(ii) sanctions, including a ban on exports of arms and other military equipment, and steps to prevent diversion of such material;
(iii) break in diplomatic relations;
(iv) reduction of the size of diplomatic and consular missions;
(v) expulsion of those suspected of terrorist offenses and complicity in these;
(vi) tightened visa restrictions;
(vii) increased cooperation between police, intelligence and security forces, resulting in the exchange of relevant information, intelligence and technical know-how;
(viii) judicial cooperation, as between the U.K. and the Republic of Ireland resulting from the Joint Law Enforcement Commission permitting courts in both countries to try offenders on several serious charges wherever apprehended; and
(ix) creation of special security forces; e.g., in the U.K., the Special Air Services (SAS); in West Germany, the German Border Patrol Group 9 (GSG 9); in Holland, the Marine Special Aid Unit (BBE); in Italy, the Nucleo Operativo Centrale di Sicurezza (NOCS).

In several instances, states have refused to consider the causes of terrorism. At the European summit in 1986, George Schultz, then the United States Secretary of State, opposed consideration of the causes of terrorism. Schultz’s approach is essentially the approach of Cyclops. The military solution is the only solution. Perhaps high drama, the headlines, and histrionics commend such a facile approach, but ultimately it accomplishes nothing. It would reduce us all to spectators, a chorus, if you will, to a meaningless spiral of violence in occupied and strife torn territories, a remorseless play in which the victims of some only make victims of others. The upshot would be that here a terrorist is killed, but another takes his place, almost as if in response to Guevara’s musing:

whenever death may surprise us it will be welcome, provided that this, our battle cry, reach some receptive ear, that another hand be extended to take up our weapons, and that other men come forward to intone our funeral dirge with the
staccato of machine guns and new cries of battle and victory.\footnote{112}

There a Dean Mitrione\footnote{112} is kidnapped and executed; but immediately, a new ambassador of United States imperialism takes his place. Over yonder, the crack of someone's skull as some tyrant's truncheon falls on some innocent head.

The position of the French Government in this matter, unlike that of the United States, was that France would have liked the United Nations to have reached a definition of acts of international terrorism, and to have agreed to carry out a political study of the causes of such acts. France's position was that the study of the causes of terrorism, and, consequently, of the necessary measures to prevent this, would not have ruled out condemnation and repression of terrorist actions in accordance with national legislation. In this vein, Francois Mitterand is reported as saying on August 17, 1982, "what counts is the determination to roll back terrorism wherever it lurks, to extirpate it by the roots."\footnote{114} The Schultz approach by contrast is but a paradigm of historical shortsightedness and analytical ineptitude.

In some respects, we may compare the Diplock Courts of Northern Ireland with the Israeli Military Courts in the West Bank where Arab lawyers have boycotted trials and Palestinians have charged the army with arbitrarily applying its own laws. Both have been almost universally condemned by those who advocate the rule of law. With reference to the Israeli Military Courts, in both the deportation and administrative detention procedures, the evidence against the accused person may be declared secret. Defense lawyers charge that this provision makes their job impossible. Under the military occupation regulations in the West Bank and the Gaza, the security officials determine which cases go to military courts.

In effect, these are court-martials applied to civilians. The law adjudicated in a military court derives both from local law, which depending on the circumstances, may be either Israeli or Jordanian, and from the special security regulations ordered by the military authorities. The court can be run by either one judge or a three-judge panel. The judges and prosecutors are serving military officers. There is no appeal.\footnote{115}

Several criticisms have been made of the Israeli military courts. Suffice it to say that in addition to the above, the gist of these criti-

cisms and recommendations have been as follows:
(1) these courts should curb administrative detentions;
(2) they should order improved prison facilities;
(3) they should, alternatively, release prisoners on reasonable bail;
(4) they should give lawyers and defendants sufficient time to prepare for trial;
(5) they should conduct trials in an impartial manner;
(6) they should administer fair and reasonable punishment proportionate to the act or acts of each defendant; and
(7) they should eventually disband and transfer jurisdiction to civilian courts with trained judges and juries made up of the defendant's peers.

Israel, arguably, has some authority to restore order in the occupied territories. However, in this respect, it may well have used more force than is reasonably necessary and acted in violation of international human rights law. Proof of this was the fact that by February 1988 the use of live ammunition by Israeli military forces had resulted in the deaths of more than fifty Palestinians. The subsequent shift in policy from use of live ammunition to beatings, summary corporal punishment, and eventual uncontrolled excesses, such as the live-burials of Palestinians, all fall below accepted international human rights standards. A policy of breaking arms to prevent them from throwing stones — with the Palestinians today, ironically, cast in the role of David confronting Goliath — is at once evidence of excessive force and constitutes a violation of Palestinian human rights.

Although it might be argued that the current situation in the Middle East is just short of undeclared war, a number of counterarguments can also be made. First, it might be objected that Israel, as the initial aggressor and occupying power, cannot avail itself to the claim of acting in self-defense. Second, Palestinian protests in the occupied territories do not appear to have so threatened the loss of life as to have justified repeated use of deadly force. Third, as a subject people legally entitled to resist alien subjugation and domination, their acts do not appear to have been either unlawful, unreasonable or excessive.

B. National Legislation

In the United States, Congress enacted the Omnibus Diplomatic Security and Antiterrorism Act of 1986. This Act extended the extraterritorial jurisdiction of the United States to foreign nationals involved in acts which injured United States citizens. An amended Title 18 of the United States Code conferred jurisdiction
on United States courts in cases where foreign nationals were prosecuted for involvement in acts of international terrorism, such as attempting to kill, killing, assaulting, or making a violent attack upon an American national. The legislation authorized the prosecution of any terrorist found within United States territory, regardless of the location of his offense. For jurisdiction, the Act only required that the accused allegedly commit an act of terrorism against an American national. The Act might, however, be criticized as too broad and too vague.\(^1\) What, for instance, would be the legal position where an illegal arms dealer, a United States national who is violating the United States and international arms embargo and sanctions against South Africa, is apprehended and executed by the ANC "terrorists," or the position of pilots engaged in overflying Nicaragua, assisting contra operations and even mining Nicaraguan harbors contrary to Congressional legislation?

Technical gaps in the law may have protected terrorists in the 1960s and 1970s. United States laws were arguably inadequate with respect to crimes committed outside the United States. Subsequently, attempts were made to fill the gaps. Administrations came to embrace the idea of fighting terrorism through the rule of law. International conventions required states to "extradite or prosecute" (as per The Hague Convention on aircraft hijacking; the Montreal Convention on aircraft sabotage; the Hostages Convention; the Diplomats Convention; the Convention on Nuclear Materials). Failure to extradite or prosecute was a breach of a state's international obligations under the conventions.

The United States took part in drafting these conventions, and also in recent developments in 1988, such as the Maritime Navigation Convention in Rome in March 1988 which resulted from the Achille Lauro incident; the Protocol to the Montreal Convention; and the Rome and Vienna massacres which had taken place in airports, not aboard aircraft. A trend towards elimination of the Political Offence Exception also emerged (e.g., United States — United Kingdom extradition agreement). The parties involved believed that this would strengthen the state's capability in fighting international terrorism.

In domestic terms, House Bill 2776 (Berman-Hyde)\(^1\) aimed to prohibit export of arms to countries that support terrorism. It involved reexamination of legislation designating countries sponsoring


\(^1\) Introduced by Representatives Howard Berman of California and Henry Hyde of Illinois.
terrorism. Under the Bill: (1) the country must have repeatedly supported terrorism; (2) the country must have harbored terrorists or hijackers; and (3) reports to Congress would be increased. In March 1988, the Bill passed with two-thirds votes in the House, but died in committee and did not reach the hearing stage in the Senate. The Bill had run out of time, although it satisfied the Executive and Congress. Failure to pass the Bill resulted from, among other things, the absence of definition, a situation congenial to those who favor insertion of a laundry list of offenses into the law in lieu of some rigorous definition. It is perhaps novel, Congressional reliance on the law to resolve international terrorism and the new cooperation between the Executive and Congress in this area.

The United Kingdom Prevention of Terrorism (Temporary Provisions) Act 1984 granted to the Executive broad powers of arrest, detention and exclusion. It proscribed the IRA and the INLA, made contributions to acts of terrorism and withholding information about acts of terrorism criminal offenses and gave the police powers to carry out security checks on travellers. Opposition politicians criticized the legislation as having made substantial inroads into civil liberties an achieving little, since 95% of those detained under the Act were found innocent of any offenses and the government failed to demonstrate that the other 5% would not have been caught without this legislation on the statute books. It has also been argued that in eroding basic civil liberties, the Act handed, free of charge, a victory to those whose objective it was to destroy them.118 By December 1987, it had been decided that police antiterrorist checks at air and sea ports and police powers to arrest and detain suspected terrorists should be the foundation of a new permanent Act when the PTA expired in March 1989. Detention of suspected terrorists would, however, be made subject to similar safeguards which apply at present to people detained under the ordinary criminal law on suspicion of having committed particular offenses.119

The Repression of Terrorism Act in France provides for the centralization of the examination procedure, the extension of the period during which a suspect may be held before being presented to an examining magistrate, more flexible conditions governing the search of premises, and the possibility of encouraging the cooperation of so-called “reformed characters.” In addition, the restoration of stricter visa requirements as of October 1986 and the assistance of the armed forces in controlling the frontiers were intended to keep a more satisfactory check on entries into French territory and to “cre-

ate an extra factor of uncertainty and deterrence for terrorists.”

By April 1987, the French Government had also moved to ratify the European Convention on the Suppression of Terrorism and the Dublin Agreement with the necessary reservations with respect to the traditional right to asylum and the principle prohibiting retroactive application of the criminal law.

Moreover, the Council of Ministers approved an amendment of the Code of Penal Procedure relative to apprehension and adjudication of certain offenses committed abroad bringing French penal law into line with the provisions of the European Convention and the Dublin Agreement. The legislation envisaged that the French courts henceforth would have jurisdiction over crimes committed abroad when the authors of such acts and their accomplices were found in France, and in cases where these crimes constituted acts of terrorism within the meaning of the European Convention and not giving rise to extradition notwithstanding a request for extradition by a State Party to the Convention or the Agreement.

The basis for international cooperation in the fight against international terrorism is simply that there is no alternative. Examples of international cooperation include: (1) high-level meetings (meetings of foreign ministers and heads of state); (2) regular meetings of the European Trevi group; and (3) ad hoc law enforcement meetings between United States and other officials to share information, track and locate terrorists. These exercises form part of an expanding legal net to allow states to act against terrorist overseas.

In addition to legislating, states have entered into a number of bilateral agreements concerning, for example, the hijacking of aircraft. These bilateral agreements seek to deter international terrorism. These agreements omit the “extradite or prosecute” formula common in the multilateral conventions, but require the State Parties to extradite the alleged offender if found, so that the offender may be prosecuted in the state in which the offense was allegedly committed. However, the obligation to extradite still remains subject to the political offense exception in most domestic legal systems and pragmatic political considerations. It is worth recalling that in the Achille Lauro incident, Egypt violated the agreement and provided transport for the terrorists; Italy allowed the leader Abu Abbas to escape. A logical conclusion is that states will continue to ignore international law if it does not suit their purposes.

---

120. Speech by French Prime Minister Jacques Chirac before the National Assembly on October 8, 1986.
122. Id.
C. International Responses

1. Global Conventions.—The assassination of Louis Barthou and the King of Yugoslavia at Marseilles led to the adoption by the League of Nations in 1937 of the first two conventions on the subject of terrorism. One convention dealt specifically with terrorism. The other dealt with the establishment of an international criminal court. In some respects, little seems to have changed in the intervening years.


Furthermore, the Convention on the Prohibition of the Development, Product and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction applies controls on weapons of potential use to terrorists. Also, the Convention on the Physical Protection of Nuclear Material (Convention on Nuclear Material) prevents parties from exporting or importing, or authorizing the export or import of nuclear materials used for peaceful purposes, unless they give assurances that such material will be protected at prescribed levels during international transport. The latter also provides for international cooperation in the recovery and protection of stolen nuclear material, and requires states to make certain serious offenses punishable, and that states extradite or prosecute offenders.

The U.N. Convention Against the Taking of Hostages seeks to

---

124. See supra note 16 and accompanying text.
125. See supra note 17 and accompanying text.
127. See supra note 20 and accompanying text.
ensure that international acts of hostage-taking will be covered either by the convention itself or by one of the applicable conventions on the law of armed conflict. Hostage-taking is a "grave breach" of the 1949 Geneva Convention Relative to The Protection of Civilian Persons in Times of War. The Hostages Convention may, arguably, have also qualified the thesis that acts of terrorism are permissible if committed as part of a war of national liberation.

These conventions seek to establish a framework for international cooperation to prevent and punish international terrorism. Accordingly, the New York Convention, for instance, requires parties to cooperate in preventing attacks on diplomats, to prepare for attacks on diplomats within or outside their territories, to exchange information, and to coordinate administrative measures against such attacks. States parties are to exchange information concerning the circumstances of the crime, and the alleged offender's identity and whereabouts. The state party where the alleged offender is found is obliged to take measures to ensure his presence for purposes of extradition or prosecution, and to inform interested states and international organizations of the measures taken. Parties are also to cooperate in assisting criminal proceedings brought for attacks on internationally protected persons, including supplying all relevant evidence at their disposal.

These conventions require a state party that apprehends an alleged offender in its territory to either extradite him or submit his case to its authorities for prosecution. A legal basis for extradition is provided either by the convention, or through incorporation of the offenses mentioned in the convention into existing or future extradition treaties between the parties. To varying degrees, the conventions also obligate the parties to take the important practical step of attempting to apprehend the accused offender and hold him in custody.

These provisions mainly seek to ensure that the accused is prosecuted. The obligation to submit the accused for prosecution is thus expressly mandated by the conventions. In general, however, states are not obliged to try the accused or to punish him, but to submit the case for consideration by the appropriate prosecuting authority. A judicial system which faces the threat of terror — for example, in Columbia or one in a society in which the Executive is all powerful — confronts the perils of possible intervention in the prosecution or trial. Such intervention may ultimately prevent either the prosecution or even the extradition of the accused. On the other hand, it is

130. See Murphy, supra note 84, at 102.
132. Id. at art. 6.
133. Id. at art. 10.
conceivable since Alabama Claims that states may be held responsible for acts originating within their territory. The 1917 United States-Mexican operation, some Israeli attacks on the PLO, and the United States bombing of Libya may well have been premised on this argument.

Yet, even if the criminal justice system is relatively free of corruption, it may still prove difficult to obtain the necessary evidence on which to base a prosecution when the alleged offense was committed abroad. This obstacle can be removed by cooperation among the law enforcement agencies and the judiciary of friendly states. However, while the conventions create an obligation to cooperate, in the case of unfriendly states, or states with different legal systems, such as common law versus civil law systems, this obligation may still remain largely unfulfilled.

Such global conventions are not wholly ineffective in deterring international terrorism. Much of the decline in aircraft hijacking since the conclusion of the I.C.A.O. Conventions has probably been due in part to the enhanced security techniques required by those conventions. Hijackers have been prosecuted either in the states where they have been found or in states to which they have been extradited. It is unclear, however, whether these prosecutions can be attributed to the terms of the I.C.A.O. Conventions. Expulsion and deportation have both been utilized to return hijackers. The extraditions which have occurred appear to have been effected pursuant to bilateral treaties rather than to multilateral conventions. Prosecutions for terrorist attacks on diplomats have also taken place, in some cases under legislation enacted to implement a state's obligations under the United Nations Convention of Internationally Protected Persons.

These global conventions generally contain dispute settlement provisions which allow for binding arbitration or adjudication, although, in some cases, parties are allowed to “opt out” by virtue of reservations made at the time of ratification. The United States partly relied on such a provision in the United Nations Convention on Internationally Protected Persons as the basis for its action against Iran before the International Court of Justice. None of these conventions contains provisions for economic or other sanctions against states that offer safe haven or other assistance to terrorists. Efforts in September 1973 to conclude an independent enforcement convention for the I.C.A.O. Conventions at the Rome Security Conference and at the I.C.A.O. Extraordinary Assembly were unsuccessful. Other efforts to conclude an international sanctions convention
met a similar fate. To date, only the Bonn Declaration, a non-binding instrument, has been adopted.

The international community has thus responded to the problem of terrorism in a number of ways. The U.N. General Assembly in Resolution 40/61 unequivocally condemned all acts, methods and practices of terrorism wherever and by whomever committed. This broad condemnation followed earlier international agreements such as the conventions discussed above. After 1985, action was also taken in furtherance of the recommendations of the fortieth General Assembly, beginning with the adoption of Security Council Resolution 579. Progress was also made in the International Maritime Organization on the problem of terrorism aboard or against ships and in the International Civil Aviation Organization on a new instrument concerning acts of violence at airports. The increase in the number of States parties to the existing conventions and efforts by the International Civil Aviation Organization to promote acceptance of and strict compliance with the existing conventions were also in furtherance of the recommendation contained in Resolution 40/61.

It is worth noting that United Nations resolutions routinely proclaim that some acts are so heinous that nothing justifies them. First, these assertions never specify which particular acts are referred to. Therefore, in terms of prospective penal legislation, a future defendant would arguably not know what exactly he was charged with. Second, the resolutions leave unanswered the question of what are the victims of similar "unjustifiable," "heinous" acts to do in the absence of effective legal mechanisms capable of punishing such behavior.

International society still remains divided among states with opposing interests. Above all, three factors help to explain the development of international terrorism. First, international frontiers offer terrorists eventual refuge. Second, international tension furnishes terrorists with many causes to embrace. Finally, the extraordinary development of international trade, traffic, communications and exchanges offers terrorists an inexhaustible list of targets. The international community therefore had to react. It responded by concluding half a dozen conventions, all in force.

The international response to terrorism has been based on the realization that it is necessary to reduce terrorism in all of its forms. These agreements have often been reached under the pressure of events. The law concerning terrorism has developed more from the desire of states to defend themselves than from any well-considered

134. See infra note 141.
135. See supra note 24.
or well-defined strategy. It seems that states have mainly paid lip-service to the ideal of cooperation against terrorism rather than to vigorously pursue the legal control of terrorism. Formation of the law relating to terrorism reflects its empiricism. The rule never precedes criminal behavior, never anticipates it, and is hardly ever concerned with the existence of other legal instruments in force, and their possible relevance. It has been limited to condemning terrorism and the elaboration of conventions keep pace with terrorist activity.

The international response has thus been above all defensive, *ad hoc* and presupposes a public international order which never evidenced uniform state practice. Yet, if the responses have been legal, the basic questions have remained political. Terrorists threaten domestic public order and the national security of states reluctant to share their exclusive jurisdiction in these matters. International terrorists know this and play adroitly on these differences. The situation is, in terms of domestic law, relatively simple. However, at the international level the situation becomes more complex since it is often possible to identify divergent interests among the states and parties involved at each stage. The intervention of international law is therefore indispensable even if only to reconcile divergent interests.

The need to condemn terrorism allowed states to conclude treaties criminalizing terrorism. But to condemn is not to conquer. To agree that something is anathema is not in any way to guarantee that its punishment is effective. Most attempts at regulation have so far excluded consideration of the causes and the prevention of terrorist acts. In this light, the use of law and the inadequacy of the existing sanctions against terrorism are better understood. It is necessary to note that the international community has reacted against terrorism in a legalistic framework, as evidenced by the adoption of the various conventions. Enforcement, however, has not reduced the threat of terrorism, and the ineffectiveness of the legal framework for handling terrorism has been quite clear.

2. Regional Conventions.—There are three major regional conventions: the European Convention on the Suppression of Terrorism (The European Convention),\(^\text{137}\) The Agreement on the Application of the European Convention on the Suppression of Terrorism (The Dublin Agreement),\(^\text{138}\) and The Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crimes Against Persons and Related Extortion that are of International Significance (The OAS Convention).\(^\text{139}\) These

\(^\text{137. See supra note 17 and accompanying text.}\)
\(^\text{138. See supra note 18 and accompanying text.}\)
\(^\text{139. The Convention to Prevent and Punish the Acts of Terrorism Taking the forms of}\)
Conventions also seek to ensure that terrorists will be either extradited or prosecuted.

The OAS Convention has been largely superseded in scope, coverage and importance by the United Nations Convention on Internationally Protected Persons. That the European Convention and the Dublin Agreement do not attempt to define terrorism is itself evidence of the fact that the problem of definition has remained the main stumbling block facing the international community. Instead, they list offenses — such as those under the I.C.A.O. Convention and the United Nations Convention on Internationally Protected Persons, as well as kidnapping, hostage-taking, and the use of certain lethal weapons — in an effort to exclude them from the political offense exception in the extradition treaties between the states parties.

The European Convention sets out to make it easier to extradite those accused of "terrorist" offenses to the country in which the offenses were allegedly committed. In this respect, it challenged a well-established practice of granting asylum and protecting refugees. However, while Article I of the Convention purported to eliminate the listed offenses from the political offenses exception, Article 13 permitted a state party to make reservations to Article I:

Provided that it undertakes to take into due consideration, when evaluating the character of the offense, any particularly serious aspects of the offense including: (a) that it created a collective danger to the life, physical integrity or liberty of persons, or (b) that it affected persons foreign to the motives behind it; or (c) cruel or vicious means have been used in the commission of the offense.

The Dublin Agreement attempts to tighten the application of the European Convention's extradite or prosecute formula in two ways. First, under the Agreement,140 member states of the community accept the proposition that extradition proceedings between two member states of the Community apply in full (i.e., without reservations) even if one or both of the states are not parties to it, or if one or both have made the political offense reservation. Second, the Agreement seeks to restrict still further the effect of such reservations between member states of the Community. Reservations made to the European Convention therefore will not apply in extradition

---

140. The Dublin Agreement, supra note 18 at arts. 1-3.
proceedings between European Community member states, unless a further declaration is made to this effect. Also, parties to the Dublin Agreement that are not parties to the European Convention are required to indicate by declaration if they wish to retain the political offense exception in extradition proceedings between Community member states.

None of the multilateral antiterrorist conventions provide for economic or other sanctions against states which offer safe haven or other assistance to terrorists. Efforts to include an independent enforcement convention have failed.

3. Bonn Declaration.—As a partial substitute for a sanctions convention, the Heads of State and Government of the Seven Summit Countries (Canada, United States, Great Britain, West Germany, France, Italy and Japan) meeting in July 1978 in Bonn, issued the so-called Bonn Declaration. This Declaration represented a political commitment. The signatories agreed to halt bilateral air traffic with countries which refuse to extradite or prosecute hijackers or refuse to return aircraft, passengers and crew. Follow-up efforts succeeded in obtaining widespread support for the Declaration and in inducing additional countries to become parties to the I.C.A.O. Conventions.

So far, the Declaration has been invoked on one occasion. On December 1, 1982, the United Kingdom, the Federal Republic of Germany, and France implemented the Bonn Declaration and terminated all air traffic with Afghanistan. Some controversy remains as to whether the Bonn Declaration can be implemented consistently with the obligations of the Summit Countries and other states under the International Air Service Transit Agreement, the Convention on International Civil Aviation, and bilateral aviation agreements. Moreover, given the history of sanctions, their application is unlikely to succeed in deterring terrorism.

The issue of terrorism has been regularly discussed at the Summit Conferences of the Industrialized Countries. It was discussed at the Bonn and Ottawa Summits in 1978 and 1981. Recrudescence of terrorist acts led to further discussions on the subject at the Tokyo Summit in 1986. These summits have normally achieved little more than a ritualistic condemnation mingled with pledges of consultation and cooperation with regard to terrorism. Such consultations appear generally to have left each country, on the basis of its own responsibilities, in full control of its foreign policy options and actions.

As of December 6, 1986, the European Economic Community

agreed that the common fight against terrorism and those who supported terrorist acts should be governed by the following principles:

— no concessions made to terrorists or to those who support them.

— solidarity between the member nations in their efforts to prevent terrorism, and in their efforts to bring terrorists before the courts.

— action devised in answer to terrorist attacks on the territory of a member state and to evidence of foreign participation in those attacks.

The government leaders confirmed the decisions made by the twelve representatives in answer to evidence of support given by certain states to terrorism. The government leaders congratulated themselves on the intention of the French, Greek, and Irish governments to ratify the European agreement on the suppression of terrorism.

In terms of practical measures to be taken by the ministers concerned, the EEC asked the ministers of the interior to agree on the following:

— the extradition system

— the measures taken in the fight against the theft and falsification of passports

— the examination of the role of the possible coordination and harmonization of the Visa system in the strengthening of inspection on borders of EEC countries.

— the intensification of cooperation in the measures aimed at the prevention of illegal immigration.

III. Conclusion

Efforts at regulating terrorism so far illustrate one central fact: the lack of balance between our conception of terrorism as applied by the individual practitioner and our conception of terrorism as practiced by government officials. The balance seems weighted in favor of governments even in those pathological cases where the patients had been rather unceremoniously treated for their allergies to dictatorship. Government in some cases control, in others influence, the sources of information concerned with national security. Stigmatization of sometime legitimate resistance — labelling it as “terrorist” — deprived such protests of legitimacy and protection. The people in power, the governments of the day, then had a free hand to deal with domestic opposition as they wished.

Yet, in a sense, these internal wars — in Haiti, in El Salvador, in Guatemala, in South Africa and elsewhere — are perhaps analogous to the blood-letting so commonplace in medieval physiology.
The artifices of Moliere's day, they were considered a painful, if not evil necessity, curative of ill humor and ultimately restorative of the body's constitution. It is no doubt scant satisfaction to be murdered by terrorists, either of the left or of the right, but to the partisans who today protest and die at the hands of the security forces and their death squads in Haiti, El Salvador and elsewhere, there will perhaps come some day the recognition of having paid the ultimate price in having rendered the constitutions of their bodies politic, more just, more equitable, more balanced and more fair. Their martyrdom, no less than that of those patriots who fell during the War for American Independence, will in the final analysis have been a witness of bitter necessity, spurring political change, enhancing wider political participation, enlarging the democratic process, ultimately restorative of good health to the central American and Caribbean bodies politic. These "terrorists," "brigands," "mobs," "protestors," "freedom fighters," will ultimately be absolved by history. They will be recognized for what they were — foot soldiers in the march for democracy.

In the face of palpable injustice, the "terrorist" then, is Everyman; he is in a literary sense like Musset's *doppelganger*, "un étranger vetu de noir, qui me ressemblait comme un frère." Like Calvino's Cloven Viscount, he is, the dissident within us all, a man at war with himself, a political Jekyll and Hyde. For all that, he is a natural in a Hobbesian state of nature; his appeal to arms but a passionate, if ill-conceived cry of the heart.

Terrorism, then, is nothing more than old wine in new bottles. Perhaps we fear that terrorists might gain control of nuclear weapons, or come to possess equally devastating chemical or bacteriological weapons, causing additional imponderables to further complicate an already uncertain military and political balance, and creating untold risks for civilian populations everywhere. But, states which some consider "terrorist," such as South Africa and Israel, already possess nuclear capability. Iran and Iraq, among other "terrorist" states, already possess and have employed chemical weapons. Terror-

---

142. Musset, "La Nuit de Decembre," Oeuvres Completes 153 (1963), literally "a stranger dressed in black who resembled me like a brother" (author's translation).
143. See I. CALVINO, THE CLOVEN VISCOUNT, (tran. A. Colquhoun 1962). A practical example — Dr. Rasmi Awad, a Jordanian, a respected Madrid physician, practiced medicine for years in Madrid where he lived with his family in a fashionable neighborhood. But, leading his double life, he also organized Abu Nidal attacks throughout Western Europe. By the time his agents actually set off their bombs, he would be back in Madrid attending to his patients.
ism then, and the threat of it, is nothing new. Circumstances have changed — the obvious example being nuclear weapons — but terror as a feature of state policy and of groups contesting government edict and control seems to have remained a constant in national and international life. Novelty, if it exists, lies only in the circumstances in which terrorism is exercised and the methods which terrorists would employ.

As Meron Benevisti pointed out with regard to the tragedy of Palestine:

the lessons . . . have not been learned neither by Israelis nor by Palestinians. But soon there will be a repeated performance, and the civil war will explode in yet another cycle of violence. The curtail is thus raised on a new act of the old tragedy. Unlike earlier acts, it is supported almost exclusively by the two tragic heroes. All supporting actors have withdrawn. The two heroes conduct a dialogue of horrifying deeds. The tired audience prays that the tragedy is close to its catharsis, but the actors insist on prolonging the agony. Not all scores have been settled. Darkness envelops the strife torn landscape of the Holy Land. The shadows of rage and fear are deepening.145

Terrorism remains the bete noire of conservatives everywhere.146 It is perhaps the easiest of targets, a source of cheap political capital for the forces of law and order. For all that, conventional responses in political, military, economic and legal terms have to date proven woefully inadequate. No one individual response has proven adequate by itself. There are no easy quick-fix solutions, military or otherwise. What has been labelled the “scourge of terrorism” can only be allayed by comprehensive solutions which address the underlying political and socio-economic inequities which give rise to terrorism in the first place. For terrorism is but another act in the drama of political development. It may well be that at a later day, we shall look back on it in a spirit akin to that with which we now regard the Alien and Sedition legislation of the late eighteenth century; legislation which deeply stirred the passions of the day, but subsided quickly thereafter without discernible impact on subsequent history. If these wars of national liberation with their acts of “terrorism” are, as has been argued in this article, like the bloodlettings of Moliere’s day, then the comprehensive approach espoused here is in the nature

of a prophylactic, a preventative medicine preferable to the present *ad hoc*, reactive approach which treats the recurring symptom instead of the disease.