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THE MODERN BLOOD FEUD: THOUGHTS ON THE PHILOSOPHY OF TERRORISM

CHRISTOPHER L. BLAKESLEY*

All that most maddens and torments; all that stirs up the lees of things; all truth with malice in it; all that cracks the sinews and cakes the brain; all the subtle demonisms of life and thought; all evil to crazy Ahab, were visibly personified, and made practically assailable in *Moby Dick*. He piled upon the whale's white hump the sum of all the general rage and hate felt by his whole race from Adam down; and then, as if his chest had been a mortar, he burst his hot heart's shell upon it. H. MELVILLE, *MOBY DICK* 160 (Hayford & Parker eds. 1967).

I. INTRODUCTION

Herman Melville brilliantly lets us feel, through Captain Ahab, the sensation of destructive rage, hatred and violence. Sadly, Melville's insight penetrates to the core of society, perhaps of each of us, in today's omnipresent terroristic melodrama. We have all suffered moments of vicarious terror and rage over the past few years as we watched news accounts of terrorist incidents, such as the downing of Pan Am Flight 103

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over Lockerbie, Scotland. The melodrama of terrorism has penetrated each of our lives. We see it and feel the rage nearly on a daily basis. Innocent children, women and men aboard Pan Am Flight 103 were used as fodder in some "war" or other. Perhaps the pusillanimous carnage was in retaliation for the slaughter of innocent children, women and men aboard the Iranian Air Bus, blown out of the sky by American forces last year.¹ Or perhaps it was committed by those interested in thwarting prospects of peace in the Middle East.

Terroristic outrage is sickeningly common. Chemical warfare has recently been reinstated against combatants and noncombatants alike. Evidence indicates that on or about March 23, 1988, the Iraqi Air Force bombed villages in Kurdistan, spreading mustard and possibly nerve gas over villagers, dropping them in their panicked tracks, many holding their babies to their breasts.² Iraq has accused Iran of using similar weapons.³ Libya is said to have nearly completed construction of a chemical weap-

¹ Was United States Captain Will Rogers of the warship VII Vincennes, which shot down the Airbus, or were his superiors informed, or were they grossly negligent not to have been informed, that "bellicose rhetoric is not a good indication of actual intent in the Middle East?" Rubin, *Payment Precedents in the Gulf Affair*, Christian Sci. Monitor, July 21, 1988, at 13. Did they know that Iran had very good military reasons for not attacking a United States war vessel by air, and that Iran, indeed, had carefully avoided doing so? Were they aware that it was actually Iraq that had attacked United States ships in this manner; that it was in Iraq's interest, not Iran's, to provoke the United States? Professor Alfred Rubin notes some of these deficiencies in the United States explanation of the slaughter of those 290 souls, and suggests a tort rationale and settlement *ex gratia* to satisfy "Iran's and the world's gut feeling that America must be wrong." *Id.* I would submit that although the tort model is appropriate and that compensation ought to be forthcoming, criminal action should not be ruled out. If the evidence is such that the killing of those innocent people was done intentionally or in a grossly reckless (wanton) fashion, mass murder has been committed. If both sides were grossly reckless, perhaps both are responsible. Naval Commander, David R. Carlson, Commander of the U.S.S. Sides, a frigate on the scene when the Vincennes shot down the Iranian Airbus, in *Proceedings*, U.S. Naval Institute magazine, said that the Vincennes, nicknamed *Robo Cruiser* had "no good reason" for downing the Iranian Airbus. He noted, further, "[t]he Vincennes saw an opportunity for action, and pressed hard for Commander Middle East Force to give permission to fire. . . . The tragedy was avoidable, and we must learn from it. . . . When the decision was made to shoot down the Airbus, the airliner was climbing, not diving; it was showing the proper identification friend or foe. . . . The Vincennes was never under attack by the Iranian aircraft." Brennan, *Iran Air Tragedy Was Avoidable, Officer Says*, Baton Rouge Morning Advocate, Sept. 2, 1989, at 9A, col. 1.

² CNN Network News, on March 24, 1988, showed videotape of the grotesque slaughter. *World Report*, (CNN television broadcast, Apr. 3, 1988); see also *Iraq Threatens Chemical Warfare on Iran*, Baton Rouge Morning Advocate, March 30, 1988, at 9A, col. 1 (report of bombing). Now Iraq has threatened to use them on Israel.

³ *Iraq Threatens Chemical Warfare on Iran*, Baton Rouge Morning Advocate, March 30, 1988, at 9A, col. 1; Smolowe, *Return of the Silent Killer*, TIME, Aug. 22, 1988, at 46; Smolowe, *Where is the Outrage?*, TIME, Sept. 26, 1988, at 36.

ons manufacturing facility.⁴ It has been proposed that the United States Government increase its capacity to research biological agents for use as weapons or defenses.⁵ The Salvadoran Army has reconstituted, after a hiatus, its program of mass execution of civilians to intimidate "its enemies."⁶ In September 1982, innocent men, women and children were slaughtered in the refugee camps at Sabra and Shatila, Lebanon by Lebanese-Christian forces dependent on Israel.⁷ The Achille Lauro Affair is well known.⁸ The Soviets, among other things, are alleged to have used booby-trapped dolls for Afghan Moujahadeen children.⁹ The outrage of the *desaparacidos* is now well known.¹⁰ The United States Government has supported, both directly and indirectly, the Nicaraguan "Contras", who allegedly have killed innocent Americans and Nicaraguans by their guerilla warfare.¹¹ Sandinistas too have allegedly killed innocents in the effort to maintain their power.¹² The depredations that occurred in

⁴ *Les Armes Chimiques en Proces: Relance de Negociations par MM. Reagan et Mitterrand*, Le Monde, Selection Hebdomadaire, Sept. 22-28, 1988, at 1, col. 2 (Ed. Internationale); *La Position Francaise*, *id.*, at 3, cols. 1 and 2.

⁵ E. FIRMAGE, *THE ENEMY, TESTIMONY GIVEN BEFORE THE UNITED STATES ARMY HEARINGS* (Tooele, Utah, Sept. 19, 1988) (copy available at the University of Utah College of Law and at the offices of the University of Colorado Law Review).

⁶ See *Salvador: Dix Paysans Tues Pres de la Capitale: l'Armee Reprend ses Executions Collectives*, Le Monde, Sept. 22-28, 1988, at 2, cols. 2-5 (Ed. Internationale). The articles describe the execution of seven men and three women, aged twenty to sixty years, dressed like poor farmers ready to work in the fields. The soldiers gathered some forty poor farmers to a school, claiming they wanted to advise them of the situation in the region. Once at the school, the soldiers accused them of collaborating with the guerrillas. They blindfolded and took ten of them from the schoolhouse and executed them less than a kilometer from the school.

⁷ L.C. GREEN, *War Crimes, Extradition and Command Responsibility*, in *ESSAYS ON THE MODERN LAW OF WAR* 228-37 (1985).

⁸ See, "We Want Justice," *Reagan Declares*, N.Y. Times, Oct. 12, 1985, at A1, col. 6.

⁹ See SENATE COMM. ON FOREIGN RELATIONS & HOUSE COMM. ON FOREIGN AFFAIRS, *COUNTRY REPORTS ON HUMAN RIGHTS FOR 1984*, 99th Cong., 1st Sess., 1159-69 (Joint Comm. Print 1985) (State Department report presenting the atrocities and abuses of human rights committed in Afghanistan by the Soviet-backed regime); INDEPENDENT COUNSEL ON INTERNATIONAL HUMAN RIGHTS, *REPORT ON THE HUMAN RIGHTS SITUATION IN AFGANISTAN* (Nov. 18, 1987).

¹⁰ See Lippman, *Disappearances: Towards a Declaration on the Prevention and Punishment of the Crime of Enforced or Involuntary Disappearances*, 4 *CONN J. INT'L L.* 121, 122, 124 (1988) (citing NUNCA MAS: *THE REPORT OF THE ARGENTINE NAT'L COMM'N ON THE DISAPPEARED* (1986)); *TORTURE IN BRAZIL: A REPORT BY THE ARCHDIOCESE OF SÃO PAULO* 204 (J. Wright trans. 1986); AMNESTY INTERNATIONAL, *DISAPPEARED PRISONERS IN CHILE* 16-17 (1977); AMNESTY INTERNATIONAL, *REPORT OF THE AMNESTY INTERNATIONAL MISSION TO ARGENTINA* 6-15 (1975).

¹¹ See, e.g., *Sancez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985); Lobel, *The Constitution Abroad*, 83 *AM. J. INT'L L.* 871 (1989); Neier, *There's a Contradiction*, *Sacramento Bee*, Apr. 5, 1987, at 1, col. 6.

¹² Neier, *supra* note 11, at 1, col. 6.

Kampuchea are renown.¹³ The South African Government terrorizes and oppresses the non-white population within its territory.¹⁴ There are many, many others, tragic episodes that continue the ugly saga of terrorism,¹⁵ our nauseating modern equivalent of the ancient bloodfeud.

II. RESPONSE: RAGE, OVERREACTION AND THE CREATION OF THE SECURITY STATE

Our tendency is to turn our fright into rage then to seek vengeance. Virtually every group in the world suffers from this fear, rage and desire for vengeance. The result is our participation together in an ugly death dance, as Albert Camus put it. We are, indeed, caught in an infernal dialectic. Our horror and rage are easily translated into vengeance by leaders having selfish interests or confused outlooks.

The domestic and international legal response to terrorism is confusion or anti-terrorism that amounts to terrorism itself, combined with obfuscation. Governments often overreact to the threat of terrorism, abusing their peoples' fears about its dangers in order to accomplish selfish foreign or domestic policy goals. Some have even exploited these fears to bolster their own acts of criminal terrorism. The tactic crystallized for American policy early in the cold war era. A special *Report of Covert Operations* commissioned by President Eisenhower has been adopted as hallowed American policy: "Another important requirement is an aggres-

¹³ See KAMPUCHEA: DECADE OF THE GENOCIDE (K. Kiljunen ed. 1984) (report of Finnish Inquiry Commission); Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN J. INT'L L. 547, 550-53 (1987) ("campaign of wholesale genocide"); Stanton, *Kampuchean Genocide and the World Court*, 2 CONN. J. INT'L L. 341 (1987) ("Kampuchea was turned into a vast concentration camp").

¹⁴ See Dugard, *The Judiciary in a State of National Crisis—With Special Reference to the South African Experience*, 44 WASH. & LEE L. REV. 477, 486-87 (1987).

¹⁵ When United States fighter pilots intercepted an Egyptian jetliner carrying the hijackers of the Achille Lauro, who were later convicted in Italy (N.Y. Times, Oct. 11, 1985, at A1, col. 6), the pilots themselves either committed kidnapping or hijacking or were able to claim justification. The only justifications could be that the Egyptian pilot or his government consented, or that the pilot or his government were participating in the attempted escape. See McGinley, *The Achille Lauro Affair—Implications for International Law*, 52 TENN. L. REV. 691 (1985).

The compelling policy reasons that a country may have for committing an illegal act cannot amount to a legal justification. As one court has explained:

[T]here is no discretion to commit or to have one's officers or agents commit, an illegal act Whatever policy options may exist for a foreign country, it has no "discretion" to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.

Letelier v. Republic of Chile, 488 F. Supp. 673 (D.D.C. 1980); see Singer, *Terrorism, Extradition, and FSIA Relief: The Letelier Case*, 19 VAND. J. TRANS'L L. 57, 69 (1986).

sive covert psychological, political and paramilitary organization more effective . . . and, if necessary, more ruthless than that employed by the enemy There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply.”¹⁶ One must be careful not to become a terrorist to fight terrorism or an oppressor to overcome oppression.

Professor Richard Falk is correct in noting that there is currently a symbiotic relationship between the leaders of terrorist groups and the leaders of regimes fighting against these groups.¹⁷ Both sides tend to use law as exhortation, to summon public support for the use of force where the victim of that force can be associated with terrorism.¹⁸ There exists a melodramatic tendency in leaders of every side to blind their adherents to any humanity on the other side. Each wants his own to believe they are fighting the devil himself. Each wants his adherents to believe that all truth rests with him and is being destroyed by the enemy. This mindset facilitates the use of unrestrained violence. Law and morality are seen as tools to promote power, but, sadly, their restraining power is thrown aside. This damns us all to a world devoid of law and morality to a world where law and morality are brute power.¹⁹

Alexander Haig recently manifested this dangerous attitude when he noted, “[t]he . . . flaw is that we have tended thus far to believe that a counteraction that endangers innocent lives dirties our hands. That places the terrorist on the same moral plane as the victim”²⁰ General Haig is wrong! Forgoing counteraction that endangers innocent life does not place the terrorist on the same moral plane as the victim. It is the innocent lives that are set on the same moral plane. Innocent victims are on equal footing, no matter what ideology or motive is used to rationalize their slaughter. Notwithstanding the views of General Haig, we do not want to become counter-terrorists who are willing to kill innocents to get back at terrorists. Killers of innocents place themselves on equal footing with other such killers. The hundred plus innocents killed in Tripoli, including Quadaffi’s infant daughter are on an equal footing with Leon Klinghoffer. All of their deaths are reprehensible.

¹⁶ Firmage, *Rogue Presidents and the War Power of Congress*, 11 GEO. MASON U. L. REV. 79, 89 (1988) (citing REPORT OF THE SPECIAL STUDY GROUP ON THE COVERT ACTIVITIES OF THE CENTRAL INTELLIGENCE AGENCY (the “Doolittle Report”) (Sept. 30, 1954) (declassified April 1, 1976)).

¹⁷ R. FALK, *REVOLUTIONARIES AND FUNCTIONARIES: THE DUAL FACE OF TERRORISM* 54 (1988).

¹⁸ *Id.* at 144. This tactic is misguided if we wish law and moderation to have a place in society. Our government and many commentators use the label “terrorist” against moderates and actually eviscerate the moderates’ bargaining power within their own group. Thus, we allow the terrorist arm of revolutionary groups to maintain power. *Id.* at 52-54, 140-44.

¹⁹ *Id.*

²⁰ Friedlander, *When Will the Madness End?*, 18 TOLEDO L. REV. 125, 130 (1986) (footnote omitted).

Using terrorism as a justification for the arrogation of executive power is not unique to the United States. Indeed, it is the typical response by governments around the world.

A. *Examples*

1. Great Britain

It appears that the Reagan Administration took its lead from Great Britain, which, despite having a great tradition in the development of civil liberties, may have been backsliding, at least with regard to security problems in Northern Ireland. In Northern Ireland, even the judiciary has become very "executive minded." For example, the courts have seemed willing not only to admit the unconfirmed, verbal confessions that alleged Irish Republican Army members or their sympathizers give police during intensive interrogation, but also "to absolve security forces from responsibility for lethal use of force."²¹ This erosion of civil liberty may stem from a general malaise caused by the local strife and an executive mindedness illustrated by Lord Pearson in *McEldowney v. Forde*,²² where Pearson declared that the Minister of Home Affairs is the one who ought to make regulations "for the preservation of the peace and maintenance of order":

The Northern Ireland Parliament must have intended that somebody should decide whether or not the making of some proposed regulation would be conducive to the 'preservation of the peace and the maintenance of order.' Obviously it must have been intended that the Minister of Home Affairs should decide that question. Who else could? . . . The courts cannot have been intended to decide such a question, because they do not have the necessary information and the decision is in the sphere of politics, which is not their sphere.²³

The backsliding in civil liberties has accelerated, with the promulgation of a ban on reporting statements of individuals with certain "terroristic" backgrounds and the abrogation of the three-hundred year old right not to incriminate oneself. One cannot yet be forced to speak, but her silence may be used against her. Lord Pearson's statement sounds like the rhetoric of the Legal Adviser to the United States Department of State regard-

²¹ Dugard, *supra* note 14, at 482; see K. BOYLE, T. HADDEN & P. HILLYARD, TEN YEARS ON IN NORTHERN IRELAND 76-77, 86 (1980); K. BOYLE, T. HADDEN & P. HILLYARD, LAW AND STATE: THE CASE OF NORTHERN IRELAND 102-03 (1975); see also Abramovsky, *The Political Offence Exception and the Extradition Process: The Enhancement of the Role of the U.S. Judiciary*, 13 HASTINGS INT'L & COMP. L. REV. 1, 6 (1989) ("Traditional rights and safeguards granted to 'ordinary' criminal defendants are denied to suspected terrorists").

²² See Dugard, *supra* note 14, at 482 (discussion of *McEldowney*).

²³ *Id.* (footnote omitted).

ing the U.S.—U.K. Treaty.²⁴ The trend in programs and policy of the Reagan Administration also was in the direction of eliminating civil liberties, if the elimination could be sold as a means to combat crime or terrorism. If that trend continues it will lead to additional serious infringements. One must hope that it can be thwarted before it goes as far as in the United Kingdom.

2. South Africa

Another even more ominous similarity is found in South Africa, where the parliament and the judiciary have become so obsessed with security, anti-communism and preservation of the status quo that even many of those who are opposed to apartheid have been co-opted. The evil of apartheid has been maintained through laws passed in the name of security. For example, in addition to the "Group Areas Act,"²⁵ the South African legislature has "legalized" lengthy detention without trial for the purpose of interrogation.²⁶

In addition, the South African judiciary has at least acquiesced, indeed has expanded upon, the executive's authority to "protect against terrorism," in a manner that has eviscerated civil rights and liberties.²⁷ For example, detainees have been denied reading and writing materials because such materials relieve "tedium" and "negative the inducement to speak," thereby depriving the government of more information on other

²⁴ See 24 INT'L LEGAL MATERIALS 1104-09 (1985). The U.S.-U.K. treaty, known as the Supplementary Treaty, considerably limits the application of the political offence exception to the 1972 Extradition Treaty. For evaluation in support of the political offence exception, see Sofaer, *The Political Offence Exception to Extradition*, 15 DEN. J. INT'L L. & POL'Y 125 (1986) and Lubet, *Extradition Unbound: A Reply to Professors Blakesley and Bassiouni*, 24 TEX. I. L.J. 47 (1989). For a critical evaluation, see Blakesley, *The Evisceration of the Political Offence Exception to Extradition*, 15 DEN. J. INT'L L. & POL'Y 109, 109-24 (1986), Bassiouni, *The "Political Offence Exception" Revisited: Extradition Between the U.S. and the U.K.—A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy*, 15 DEN. J. INT'L L. & POL'Y 255, 255-82 (1986) and A. ABRAMOVSKY, *supra* note 21.

²⁵ Group Areas Act 36 of 1966 replaced and consolidated the provisions of Group Act 41 of 1950 and Group Areas Act 77 of 1957. See Dugard, *supra* note 14, at 489 n.1. "The Group Areas Act is one of the main pillars of apartheid as it authorizes the executive to establish separate residential and business areas for the different racial groups." *Id.* at 489 (footnote omitted).

²⁶ In 1965 the period of detention was extended to 180 days, and today indefinite detention is authorized. Dugard, *supra* note 14, at 490. The most recent changes to the Act permit any commissioned officer, without a warrant, to arrest any person he believes has committed or intended to commit or has information relating to the commission of an offence. See *id.*

²⁷ See Dugard, *supra* note 14, at 484-98 (discussing judicial behaviour in promulgating apartheid in South Africa). But see Comment, *What Role Can South African Judges Play in Mitigating Apartheid? A Study of the Urban African Legal Regime*, 1987 Wis. L. Rev. 325, 325-61 (analyzing four cases in which South African Judiciary exercised its interpretive power to abate severity of statutory provisions).

"terrorists."²⁸ The South African Judiciary even stopped exercising its long-honored powers over the admission of confessions obtained by abusive means.²⁹ Moreover, the contempt of court conviction of an anti-apartheid law professor was upheld on appeal on the ground that he called for the courts to "adopt a more activist approach to the interpretation of the security laws in order to curb police torture."³⁰

Needless to say, a climate of violence and repression has grown as security forces have been given a free hand. Widespread anxiety about terrorism and communism, as well as racist sentiment, have been used by the government in South Africa effectively to eliminate what had been an independent judiciary from playing its role as protector of civil liberty.

3. Israel

Professor Pnina Lahav's eloquent account of the tragic Shin Bet affair in Israel presents the classic denouement:³¹ (1) the peoples' constant suffering under murderous terrorism; (2) "the resort to murder as a counter-terrorist method"; (3) "the use of censorship to shield the method from the public eye"; (4) "once censorship [has] failed, the cover-up of the affair to shield illegality from the institutions of law enforcement"; (5) "the President's pardon, which extended to agents of the secret police for both the murder and the cover-up, and which was challenged before and sustained by the High Court of justice; (6) the acquiescence or connivance of the judiciary with the security minded tactics at the expense of the due process system. The secret police gain ascendancy and eventually society "relaxes its demand" that police be accountable for their actions."³²

B. *Symbiotic Relationship Between Terrorists and Counter-Terrorists*

There seems to be a paradoxical, symbiotic relationship among the

²⁸ See Dugard, *supra* note 14, at 490 (citing Roussouw v. Sachs, 1964 (2) S.A. 551(A)).

²⁹ See *id.* at 490-92.

³⁰ *Id.* at 491 (citing *S. v. Van Niekerk*, 1972(3) S.A. 711(A)); see also J. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 290-302 (1978)(discussing *Van Niekerk*).

³¹ See Lahav, *A Barrel Without Hoops: The Impact of Counterterrorism on Israel's Legal Culture*, 10 CARDOZO L. REV. 529 (1988). The Shin Bet Affair refers to the incident in which terrorists hijacked what became known as Bus #300. Israel Defense Forces eventually stormed Bus #300 and liberated the hostages, killing two of the terrorists. The remaining two terrorists were led off the bus and handed over to Shin Bet for interrogation. The hijackers were interrogated and severely beaten by Shin Bet agents and, finally, "executed pursuant to an order by the head of the Shin Bet." *Id.* at 531-32.

³² *Id.*, at 529-536. Professor Lahav asks the poignant question in relation to Israel that may be generalized as fundamental for us all: "to what extent may the Children of Abraham partake in the practices of Sodom and Gomorrah before Israel becomes a Sodom or Gomorrah?" *Id.* at 532.

leaders of terrorist groups and leaders of regimes fighting against those groups.³³ Even law has been perverted or appropriated by each as a tool for terrorism.³⁴ All camps want to blind their adherents to any humanity on the other side. Each side wants its people to believe they are fighting the devil himself; that all truth rests with them and is being destroyed by the enemy.³⁵ This tactic allows the use of unrestrained violence. All camps tend to pervert law and use it as exhortation to summon public support for the use of force, provided the person against whom the force is applied can be associated with the evil of the other side terrorism.³⁶ Thus, law and morality are mocked; they are cynically seen as tools to promote one's own power. Sadly, their restraining power is thrown aside. This damns us all to a world devoid of law and morality to a world where the only "law" and the only "morality" are brute power.³⁷ This is not the brightest tactic in the world, if we wish law and moderation to have a place.

Government, media and most commentators today, use the label "terrorist" in a propagandistic fashion. It is applied to anyone in the "enemy" camp. It is applied to moderates and actually eviscerates those moderates' bargaining power within their own group, allowing the terrorist arm of revolutionary groups to maintain power.³⁸ Leaders of revolutionary groups tend to do the same.

III. WHY WE HAVE TERRORISM: A PLAGUE—AN INFERNAL DIALECTIC

Sadly, today, apologists in every camp, including our own and those of our real or perceived enemies, are unable to justify aggressive conduct that, if it were perpetrated against the aggressors, would be considered by them criminal. We all seem to be caught up, as Albert Camus said, in some "infernal dialectic that whatever kills one side kills the other too, each blaming the other and justifying his violence by the opponent's violence. The eternal question as to who was first responsible loses all meaning then . . . [W]e can at least . . . refrain from what makes it unforgivable—the murder of the innocent."³⁹ I trust that Albert Camus was right, however, in his belief that humanity generally does not want to be victim

³³ R. FALK, *supra* note 17, at 54, 84-87, 93.

³⁴ *Id.* at 140.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 82-87, 140-44.

³⁸ *Id.* at 52-54, 140-44.

³⁹ A. CAMUS, *Appeal for a Civilian Truce in Algeria*, in RESISTANCE, REBELLION, AND DEATH 101-02 (1960). "[Even] [i]f murder is in the nature of man, the law is not intended to reproduce that nature." A. CAMUS, *Reflections on the Guillotine*, in *id.*, at 198.

or executioner.⁴⁰ When we participate in or accept oppression or the slaughter of innocents, however, no matter how lofty the articulated end, we simply become oppressors or slaughterers of innocents.

Notwithstanding all our attempts to make it appear acceptable through obfuscation, secrecy and rhetoric, we must come to realize that we are participating in a "miasma of evil" and that we are deluded by "[t]he self-assurance of those who know all the answers in advance and who are convinced of their own absolute and infallible correctness [which] sets the stage for war, pestilence, famine, and other personages we prefer to leave unnoticed in the pages of an apocalypse."⁴¹ This ignorance which Camus and Merton reject "prefers its own rightness to the values that are worth defending. Indeed it sacrifices those values by its willingness to kill men in honor of its dogmatic self-idolatry."⁴² "As long as one is content to justify one's existence by reference to these automatically accepted norms, one is in complicity with the absurd, with a murderous society, with death, with 'the Plague.'"⁴³

A. *All Sides Caught in the Infernal Dialectic or the Plague Mentality*

Unfortunately, we are all caught-up in this "infernal dialectic," this horrible "death-dance," this "*Plague*" which is a propensity to pestilence and destruction that we try to hide. Thomas Merton, analyzing Camus' *The Plague*, states the tendency beautifully:

It is the willful negation of life that is built into life itself: the human instinct to dominate and to destroy to seek one's own happiness by destroying

⁴⁰ See Friedlander, *Terrorism and National Liberation Movements: Can Rights Derive From Wrongs?*, 13 CASE W. RES. J. INT'L L. 281, 282, n. 3. But in this, we must still try to overcome, by rectifying wrongs done in the past or currently being perpetrated, the tendency to allow inertia to make executioners or victims of us all.

Consider also, the view of Thomas Merton:

Man's drive to destroy, to kill, or simply to dominate and to oppress comes from the metaphysical void he experiences when he finds himself a stranger in his own universe. He seeks to make that universe familiar to himself by using it for his own ends, but his own ends are capricious and ambivalent. They may be life-affirming, they may be expressions of comprehension and of love, or they may be life-denying, armored in legalism and false theology, or perhaps even speaking the naked language of brute power. In any case, the message of Camus is that man cannot successfully seek the explanation of his existence in abstractions: instead of trying to justify his life in terms of abstract formulas, man must create meaning in his existence by living in a meaningful way.

T. MERTON, *The Plague of Albert Camus: A Commentary and Introduction*, THE LITERARY ESSAYS OF THOMAS MERTON 181-83 (1981).

⁴¹ T. MERTON, *supra* note 39, at 199. See Generally A. CAMUS, *L'HOMME REVOLTE* (1954)(describing the concept of revolution as justification for mass murder).

⁴² T. MERTON, *supra* note 39, at 195.

⁴³ *Id.* at 198.

the happiness of others, to build one's security on power and, by extension, to justify evil use of that power in terms of "history," or of "the common good," or of "the revolution," or even of "the justice of God."⁴⁴

It is easy to slip into Camus' infernal dialectic to participate in his "death-dance" and to be overcome by the "Plague." From the perspective of those who are oppressed, it is easy to believe that all law, including that prohibiting violence against innocents, works to continue the oppression. Indeed, what is claimed to be law by many actually does oppress. Jean-Paul Sartre put the argument well:

A fine sight they are too, the believers in non-violence, saying that they are neither executioners nor victims. Very well then; if you're not a victim when the government which you've voted for, when the army in which your younger brothers are serving without hesitation or remorse have undertaken race murder, you are, without a shadow of doubt, executioners . . . Try to understand this at any rate: if violence began this very evening and if exploitation and oppression had never existed on the earth, perhaps the slogans of non-violence might end the quarrel. But if the whole regime, even your non-violent ideas, are conditioned by a thousand year-old oppression, your passivity serves only to place you in the ranks of the oppressors.⁴⁵

Thus, the oppressed perceive international law as fostering and promoting their oppression.⁴⁶ They argue, accurately, that the oppression is a form of violence against innocents—themselves. The violence and oppression against them that began ages ago continues to date, so they are determined to strike-out with similar violence against the oppressors through those who will inherit the fruits of the oppression. Alternatively, they argue that since the rules of today's international society foster oppression—terror-violence against the oppressed—the oppressed are not bound to obey the rules that work against them. As a means to break the yoke of oppression and terror, the oppressed or their leadership sometimes opt for violence. Why, argue the oppressed, should we abide by rules that provide for others at our expense; that function to oppress and to do violence to us? Children of the oppressors can be seen as enemies, as they will inherit the fruit of oppression. Violence is justified under certain circumstances, but should never be applied to noncombatants or their equivalents (innocents) as a means to break the yoke of oppression, to maintain the status quo, or to promote "democracy."

It is true that those of us who sit by and allow, affirm, or even acqui-

⁴⁴ *Id.* at 181.

⁴⁵ Sartre, *Preface to F. FANON, THE WRETCHED OF THE EARTH* at 21 (1963).

⁴⁶ Some oppressing nations justify their conduct by claiming that it is consistent with international law. Others simply suggest by their actions and their cynical excuses that there is no international law. But the reality is that oppression violates international law, no matter what the excuse given and regardless of whether some nations "get away with it" for a time.

esce to the oppression or who allow international law to be its tool, are, no doubt, on the side of oppression and terrorism. If we behave in this manner, we are on the side of the executioners; we have succumbed to the "Plague" and are no different from those who allow or affirm killing of innocents. Sartre was wrong, however, to suggest that violence against noncombatants is justified. Revolution and "freedom fighting" are often "facile justification[s] of mass murder."⁴⁷ Camus was correct to reject both the Sartiran ethic that finds virtue in slaughtering innocents for a just cause and the nihilism which "negates all virtue in order to dedicate itself to revolutionary action."⁴⁸ Sartre was also wrong to suggest that we all are terrorists on one side, if we are not terrorists on the other. One can defend and protect the innocents of the world without killing other innocents.

However valid the arguments of the oppressed in today's world, any violence that they direct against noncombatants or innocents is criminal. Moreover, they should realize that usually such violence allows the oppressors to feel justified in their oppression, or at least to sell to their constituents the view that the use of violence in maintaining their power is valid. When innocent civilians are attacked by those claiming to represent the oppressed, the constituents of the oppressing governmental power side with the government. The government, feeling the support of its people, tends to increase its own oppression in order to quash the counter-violence. Oppression and counter-violence increase, rather than decrease, in a frightening cycle.

But we do need to be on the side of the victims. We must refuse to affirm the oppression of terrorism. We must oppose the leaders of the world who function as executioners or oppressors. Otherwise, we are all executioners. Terrorism pervades our world culture; we participate in terrorism when we passively allow our government or group leaders to commit it or to bolster regimes or groups that commit it.⁴⁹

B. Modern Blood-Feud: A Plague For Fundamentalist Zealots and "Realists" Alike

We seem to have slipped quite easily into the ancient mentality of the blood feud. *Lex talionis*, "an eye for an eye,"⁵⁰ calls for the victims or the victims' proxies to carry out the sanction against the victimizers. Re-

⁴⁷ T. MERTON, *supra* note 39, at 199. See generally A. CAMUS, *L'HOMME REVOLTE* (1954) (describing the concept of revolution as justification for mass murder).

⁴⁸ T. MERTON, *supra* note 39, at 199.

⁴⁹ See, C. BLAKESLEY, *Terrorism and the Constitution*, 27 B.Y.U. STUDIES 198 (1987); R. FALK, *supra* note 17, at 71.

⁵⁰ *Exodus* 21:24; see Dinstein, *International Law as a Primitive Legal System*, 19 N.Y.U. J. INT'L L. & POL. 1, 11 (1986).

taliation is aimed at the collectivity of the actual or perceived oppressors. Any member of that group is the enemy. The history of *lex talionis* is interesting and may provide important insight into the modern "need" to retaliate. In ancient times, the tribe or group would hold certain conduct to be punishable and to require vengeance. When this conduct occurred, the society was required to purge itself of the crime's taint so that the wrath of the god or gods would be avoided. The metaphysical dangers sometimes could be avoided only through spilling the blood of the perpetrator or his proxy.⁵¹ When a person who had committed an act that put the group at metaphysical risk escaped, the group had to seek that person's return to expiate itself. If the person's return was not possible, the group had to purge the taint by proxy, often through attack and slaughter of those who represented the fugitive.⁵² Still today, oppression or perceived oppression by one group against another is the impetus for retaliation by the oppressed against the oppressors, resulting in counter-retaliation by the original oppressors. Any member of the opposing group (call it the family, clan, tribe, people, or nation-state) is fairly subject to retaliation. The retaliator is not viewed by his or her own group as a criminal or a terrorist because he or she is an instrument of the group's need to avenge itself. Once this occurs, the other group feels justified in a counter-reprisal and the vendetta rages.⁵³

IV. UNDERPINNINGS: TERROR IN THE FRENCH MIDDLE AGES AND THE REVOLUTION

Adversaries in modern conflicts, those seeking to maintain the status quo and those trying to destroy it, seem to apply power in the same manner as the theoreticians and technicians of punishment in the French

⁵¹ See, e.g., 1 Kings 2:28-34; *Code of Manu*, Bk. VII, 18, 23-24, Bk. VIII, 17. On the notion of purging the taint in the context of the Hindu Code, or Laws of Manu and the like, see generally K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941); H. MAINE, *ANCIENT LAW* 16-17, 358 (1878); S. SINHA, *ASYLUM AND INT'L LAW* 6 (1971); and R. Fairbanks, *A Discussion of the Nation State Status of American Indian Tribes: A Case Study of the Cheyenne Nation* 31 (LL.M. thesis available in Columbia Law School Library). Intratribal murder, for example, "required the keeper of the arrows to cleanse the tribe of the spectre of death." *Id.* Expiation, rest and happiness for the sinner as well as the society had to be obtained through the soul-purging punishment of the Wrongdoer or his proxy. *CODE OF MANU*, Bk. VII: 18: 23-24; bk VIII; see 1 Kings 2: 28-34.

⁵² See, e.g., 1 Kings 2:28-34; Blakesley, *The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History*, 4 B.C. INT'L & COMP. L. REV. 39, 46-47 (1981). Expiation, rest and happiness for the sinner as well as the society had to be obtained through the soul-purging punishment of the wrongdoer or his proxy. *CODE OF MANU*, Bk. VII: 18: 23-24; Bk. VIII; see 1 Kings 2: 28-34.

⁵³ Blakesley, *supra* note 52, at 46-47.

Middle Ages, described brilliantly by Michel Foucault.⁵⁴ The symbol of the person condemned to be “expiated” for attempted regicide or parricide was the symmetrical, inverted figure of the king, like the playing card king. The king on top represented total, absolute power over his people. He was omnipotent.

Naturally, the omnipotent king had control of life and death over his subjects. Indeed, he had power over their very souls. Thus, one who would challenge that power, the traitor who had attempted regicide (or parricide—an analogue of regicide), had to be symbolized to the people as the opposite. The person who attempted regicide had no power. Indeed, that person had to be shown to lack even the power to die; the king had power over that person’s very soul. In fact, the people’s soul was born of the punishment applicable to them. Thus, it followed that the traitor must die a thousand deaths. It would not do simply to execute her. The executioner, therefore, was to take that person to the brink of death by torture, but bring her back again. This process was to be repeated a thousand times. Finally, the individual was “allowed” to die when it suited the king. The inverted king was a strong symbol of the power held by the monarchy. Terror and power were joined in a very significant and horrifically symbolic way.

Of course, revolution eventually ensued. Tactics of terror learned from their masters were used in the French Revolution and the Reign of Terror that followed. Some violence is justified in certain circumstances. For example, some violence was justified in rebellion and revolution to escape oppression. John Stuart Mill wrote: [P]olitical liberties or rights which it was to be regarded as a breach of duty in the ruler to infringe . . . specified resistance, or general rebellion, was held to be justifiable.”⁵⁵

Thus, revolution and related violence have been seen as culminations of the Enlightenment philosophy and have been considered justified, even noble. Violence and terror against innocents, however, is not included.

The French learned too well from the *Ancien Régime*. The Revolution utilized similar attitudes about power and terror to accomplish its ends. It moved from revolution to the “Reign of Terror.” Murder was murder and terror was terror, no matter how it was rhetorically glorified at the time. Madame DaFarge in *A Tale of Two Cities*⁵⁶ is an interesting literary symbol of the concept. She certainly had good reason to wish to avenge herself and the French people. She registered all who would be executed to avenge and “free” the French people. Once the wave of violence and concomitant power took hold, they consumed her and she em-

⁵⁴ M. FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 11-13, 28-30 (A. Sheridan trans. 1979).

⁵⁵ J.S. MILL, ON LIBERTY 2 (1947).

⁵⁶ C. DICKENS, A TALE OF TWO CITIES (Penguin Classics ed. 1986).

bodied them. Similarly, in Anatole France's *Les Dieux Ont Soif*,⁵⁷ Evariste Gamelin a sensitive artist interested in rectifying injustice, became a paranoid monster, consumed with the need and desire to execute all who might have been connected with the Ancien Regime. When violence exploded with its brutal fury against those who "represented" or "symbolized" the enemy, it consumed those who wielded it as well. Righting wrongs exploded with ferocious and relentless intensity into violence against not only those who did evil and violence, but eventually against those who were viewed as a symbol of that evil. Thus, this violence, consumed the good that prompted it. It consumed even its own. Gamelin, who is finally decapitated by his beloved Guillotine, enunciated the point:

Until recently it was necessary to seek out the guilty to try to uncover them in their retreats and to wrench confessions from them. Today it is no longer a hunt with packs of hounds, no longer the pursuit of a timid prey. From all sides the victims surrender themselves. Nobles, virgins, soldiers, prostitutes flock to the Tribunal to extract their delayed condemnations from the judges, claiming death as a right, which they are eager to savor. Today we seem no different.⁵⁸

Whenever violence is applied to strike down innocents, as opposed to combatants or their leaders, it is murder, even if rhetorically glorified at the time. Such is the movement from revolution to the Reign of Terror. The masters of revolutionary violence became terroristic murderers. Violence against innocents for whatever end, however glorified, is immoral and criminal. It was immoral and criminal when perpetrated by the "Ancien Régime" and it was immoral and criminal when perpetrated by the "directorat." It is immoral and criminal when perpetrated today by those claiming to defend democracy, to defend against oppression or to promote "national liberation."

V. "MODERN" MOTIVATIONS AND PREDISPOSITIONS

Every faction in our pretended, modern world attempts to justify killing or maiming innocents in much the same pernicious and symbolic way. This willful or wanton violence against innocents is used to obtain, maintain or to destroy power. It is terrorism.

Sometimes, the terrorist is motivated by the fundamentalist vision of

⁵⁷ A. FRANCE, *LES DIEUX ONT SOIF* (Norwood ed. 1978).

⁵⁸ *Id.* at 198. I use *Les Dieux ont Soif* and *A Tale of Two Cities* in my Comparative Criminal Law Course, to present the role of ideology and morality in the development of the criminal law. I use Camus, *l'Etranger* and his essay, *Reflections on the Guillotine*, to show their application. This particular quotation is well fit to indicate the impact violence against relative innocents has on the actor. It was brought to my attention in a paper, *Revolutionary Justice*, unpublished (May 18, 1987), done for that course by Stephanie Brown, a student at the University of the Pacific, McGeorge School of Law.

having the truth and, therefore, the obligation to apply any means, including violence against innocents and self-destruction, to enunciate, establish and maintain the truth on earth. This attitude is built upon a zealot's vision of the world of "good order" he or she will establish.

Other times, it is simply the so-called revolutionary, looking to destroy the status quo with terror. This may include the nihilist, who has an almost metaphysical vision of the need to destroy. Often the revolutionary practices a pretend nihilism, for terrorism is simply his or her way of gaining power and becoming a statist functionary who can use terror to maintain power.

A. *The "Modern" Political Realist*

Political and legal theoreticians have played a role, as well. The so-called "realist" vision of law as the command of the sovereign and the use of the concept of "necessity" to eliminate terrorism and communism have led to depredation and the break-down of any semblance of legal order based on protection of the individual and human rights.⁵⁹

Often both the revolutionary and his opponent are so-called modern political "realists." The "realist" has disdain for fundamentalist zeal, but will still use terror against innocents, if "necessary" and "effective." The writings and conduct of Machiavelli, Kissinger, Brezezinski, Kennon, and McNamara, Lenin, Frantz Fanon, Sartre, Lin Piao, and Mao are examples. The so-called realist harbours no normative limits on violence and, thus, accepts unquestioningly that the end justifies the means. There are limits, to be sure, but they are "realist limits." The realist recognizes that one must be sure that the end is achievable and that the means are necessary to the achievement of that end.⁶⁰

This form of "realism" promotes terrorism. Thomas Merton teaches that "modern" society's vision and justification, both "realist" and "fundamentalist," of existence is actually a "derisory, almost satanic repudiation of that existence. What society [revolutionary or status quo] preaches as 'the good life' is in fact a systematically organized way of death, not only because it is saturated with what psychologists call an unconscious death wish, but because it actually rests on death. It is built on the death of the nonconformist, the alien, the odd ball, the enemy, the criminal. It is based on war, on imprisonment, on punitive methods which include not only mental and physical torture but, above all, the death penalty."⁶¹

⁵⁹ R. FALK, *supra* note 17, at 87-94.

⁶⁰ The "terrorist mindset" and its application, with all its frightening implications to both the revolutionary and status quo sides, is developed in R. FALK, *supra* note 17, at ch. V.

⁶¹ T. MERTON *supra* note 39, at 197-98.

B. *Terrorism and Notions of Total War*

Terrorism and "total" war are parallel concepts in the sense that they have parallel results and rationales.⁶² In total war, where innocent civilians are used as targets for military victory, war becomes quintessentially criminal terrorism. Thus, it was considered acceptable to drop the atomic bomb on Hiroshima and Nagasaki, which left "[p]eople in rags of hanging skin, wandering about and lamenting aloud the dead bodies."⁶³ This horrible tragedy was designed to terrorize the population and leadership of Japan so that they would quit the war more quickly. Innocent persons in these undefended cities were chosen so that the shock would have sufficient impact.

Sadly, today, and perhaps back then too, the concept of the inevitability of total war has pervaded all political and military theory and practice. When total war was accepted as a possibility, it became so ingrained in the consciousness of all powers that it pervaded all of our relational thought processes.⁶⁴

Consider the fearsome view of the world held by much of its inhabitants. On each side of essentially every world issue, people believe they have absolute right on their side. Each side applies absolutist terminology and belief. Each side believes that its very existence is threatened by its enemies. Each side believes that total war is appropriate and may be necessary for survival. Each side accepts the possibility of its own annihilation. Thus, revolutionaries see the state as absolute evil to which absolute destructive power may be applied. The state sees the revolutionary as absolute evil to which it may apply absolute power.⁶⁵ Is it any wonder that terrorism is the mode of warfare and even politics today?

The tragedy is that terrorism has permeated orthodox military strategy—or perhaps has grown naturally out of that strategy. Nearly every nation's basic political and military strategic planning is based on this dangerously flawed vision of ourselves and the world. With the current availability of absolute destructive power we must figure a better way to envision the world and each other.

C. *Self-Centered, Self-Justified, and Self-Serving Abuse of Self-Defense*

It was argued by the Reagan Administration that it is "justifiable

⁶² This interconnection of war and terrorism is developed in R. FALK, *supra* note 17, at 76, 90-93.

⁶³ Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759, 761 (1965).

⁶⁴ *Id.*; R. FALK, *supra* note 17, at 90-94.

⁶⁵ See generally R. FALK, *supra* note 17.

self-defense to apply military force to preempt anticipated terroristic activity or to retaliate against terrorists or against states which support terrorism by harboring, financing, or training terrorists. In addition, abduction of "terrorists" from abroad is argued also to be "justifiable self-defense."⁶⁶ From this point of view, the bombing of Tripoli, including the targeting of Qaddafi and his family, was "self-defense."⁶⁷

Moreover, it was argued that the only judge of the justification in such a situation is the administration itself. A decision to take such measures of "self-justified self-defense" is per se legal. No other branch of government, and certainly no other nation or institution, may question it.⁶⁸

One obvious practical danger of this attitude of self-justification is that other nations or groups may utilize it as well. Could the Soviet Union "justify" a pre-emptive strike against the United States? Can groups that consider themselves violated by the United States "justify" similar conduct? Why not? If self-justification is elevated to the level of legality, there is no rule of law in any crucial context.⁶⁹

Unfortunately, self justification is a popular tactic among the governments of the world, as well as among the rebels and revolutionary leadership. Thus, a significant danger of self-justifying self-defense is that it allows all nations or groups to profess the legality of any act they wish to commit "in self-defense." If one has the power to succeed, one is justified.⁷⁰ It is fearsome that this is the view of international law and self-defense held by most of the leaders in the world, including our own. Another concern is the impact that a self-defining vision of self-defense might have on our domestic constitutional order. It assumes a dangerous perception of the separation of powers.⁷¹

Self-justified self-defense is strikingly similar to Soviet and ancient

⁶⁶ In 1986, President Reagan authorized the C.I.A. to abduct suspected terrorists in other countries and to bring them to the United States for trial. Walcott & Pastor, *Reagan Ruling to Let C.I.A. Kidnap Terrorists Overseas Is Disclosed*, Wall St. J. Feb. 20, 1987, at 1, col. 6; Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. INT'L L. J. 1 (1988).

⁶⁷ Hersch, "Target Qaddafi," N.Y. Times, Feb. 22, 1987, (Magazine), at 17; R. FALK, *supra* note 17, at 123, 173, 178 (100 civilian casualties), and 198, n.1.

⁶⁸ See, e.g., N.Y. Times, Jan. 19, 1986, at A1, col. 4; *id.* Jan 28, 1986, at A2, col. 4 (Abraham Sofaer, Legal Adviser to Department of State, defends legality of abduction of terrorists). But see, Murphy, *The Future of Multilateralism and Efforts to Combat International Terrorism*, 25 COLUM. J. TRANSNAT'L L. 35, 83-84 (suggesting that except in rare occasions of anarchy, abductions would be illegal).

⁶⁹ Schachter, *Self-Judging Self Defence*, 19 CASE W. RES. J. INT'L L. 121, 122 (1987) (noting danger of allowing self-justification in self defence to be rule of law).

⁷⁰ *Id.*

⁷¹ See Blakesley, *Terrorism, Law and Our Constitutional Order*, 60 U. COLO. L. REV. 471, 503-04 (1989).

German notions of “necessary defense.” The ancient German notions of *das Recht* and “necessary defense” (*Notwehr*),⁷² and the Soviet vision (*neobxodimaja oborona*)⁷³ provide that any right or defensible interest, from life to personal honor, receive the same degree of protection and privilege. The only question is whether a right or interest is threatened; for if it is, the good social order is injured or threatened, and necessary defense is triggered. Whatever force is necessary to prevent the invasion of the right or interest—the destruction of “good order”—is justified.⁷⁴

In both the Soviet and German conceptualization of “necessary defence,” the notions of “legal order” (*die Rechtsordnung*) and social dangerousness (*protivopravnost*) identify “necessary defense” with protection of the legal order in its entirety.⁷⁵ Thus, attacks on the Sudetenland and Poland at the beginning of World War II and the elimination of many perceived “threats” to the legal order—the Jewish population, “deviates,” insane or other “mental deficient” in Germany, or similar enemies of the State in Stalinist U.S.S.R.—were justified in the name of the self-justified “necessary defense.” The policy of self-justified self defense and the cliché, “one person’s terrorist is another’s freedom fighter,” are analogous to the increasingly popular view among many private individuals that because many criminals are not caught or punished, there is no effective criminal law, and resort to “vigilante justice” is justified. When this mind-set prevails, power alone becomes the keystone of relations. Substantive and procedural constitutional protections are cast aside.

Most solutions to terrorism assume that terrorism is only a tactic of “the enemy.” The solution, therefore, is to eliminate the enemy. Power is accepted as the only medium of international relations. Obviously, when the leaders of all camps maintain this stance, terrorism is not going to diminish. The critics conclude, therefore, that there is no solution to the problem of terrorism.

VI. ESCAPING THE CYCLE

We must escape this cycle. No end justifies oppression or violence against innocents. We must condemn it. It violates domestic and international law. The best ways to combat terrorism are to eliminate the oppression and depredation which are at its root and to oppose terroristic activity by our own governments, even when euphemized as anti-terrorism. Domestic and international law provide the means to combat both

⁷² See *Strafgesetzbuch* § 53 [hereinafter *StGB*].

⁷³ *Ugolovnyj Kodeks R.S.F.S.R.* § 13.

⁷⁴ See Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, in *STUD. COMP. CRIM. L.* 123-127 (E. Wise & G. Mueller eds. 1975).

⁷⁵ *Id.* at 140.

aspects of terrorism; they provide a means to pressure perpetrators of oppression and to prosecute and punish all violence against innocents whether its goal is to intimidate a population or group, to trigger anarchy, or promote other military, political, ideological, or religious ends.

Elsewhere, I have developed a neutral definition of criminal terrorism.⁷⁶ Such a definition must apply to every group or nation, regardless of ideology.⁷⁷ The trick is accepting the application of the definition when one's own leaders or friends commit acts within its scope. The definition must allow us to determine exactly what type of violence we reject. We must deplore that conduct and adopt a consistent policy that condemns it. We must extradite, prosecute and punish its perpetrators, whoever they are.

Terrorism is political violence aimed at or wantonly impacting on innocent civilians. It holds no justification or excuse. It is political violence without the restraint of international law or morality.⁷⁸ It is a means to obtain or promote some political, military, ideological (including anarchy or nihilism), or religious end. It is no mystery. The criteria for terrorism are what is done (was it violence designed to achieve a political or military or philosophical end?) and against whom (was it done to non-combatants or innocents?). Terrorist conduct is condemned as criminal by every nation of the world. It is criminal and immoral, whether ostensibly committed in the name of democracy, communism, anti-communism, national liberation, self-determination, God, or whatever other piety. Each of us must personally choose to condemn all terrorism. If we support our own terrorism while condemning that of our "enemies," we will only reap more terrorism and strengthen the deadly grip that it has on us and the world.⁷⁹

⁷⁶ See Blakesley, *supra* note 71, at 472-90. Other commentators have correctly denominated terrorism against individuals (I would say innocents) as human rights violations. See, e.g., Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 351 n.12 (1988) (citing Paust, *The Link Between Human Rights and Terrorism and Its Implications for the Law of State Responsibility*, 11 HASTINGS INT'L & COMP. L. REV. 41 (1987)). In addition, case law supports my definition of terrorism. See, e.g., *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540-43 (N.D. Cal. 1987) (official torture, prolonged arbitrary detention, summary execution, and causing disappearances violate customary international law). For several United Nations documents that condemn hijacking and other forms of terrorism, see Randall, *supra*, at 351 n.12.

⁷⁷ See Blakesley, *supra* note 71, at 481.

⁷⁸ R. FALK, *supra* note 17, at 19; Blakesley, *supra* note 71, at 472-488.

⁷⁹ See Blakesley, *supra* note 71, at 472-488. See generally Stuesser, *Active Defense: State Military Response to International Terrorism*, 17 CAL. W. INT'L L.J. 1, 3 (1987) ("Unlawful use of force only encourages further illegal force. Breach invites counterbreach."); Comment, *Controlling International Terrorism: An Analysis of Unilateral Force and Proposals for Multilateral Cooperation*, 8 U. Tol. L. Rev. 209, 242 (1976) ("Indeed, for most terrorist acts, the acts themselves—aside from questions of political motivation—are precisely those

Unfortunately, the propagandistic appropriation of the term terrorism has made it nearly impossible to combat terrorism. People are ideologically opposed to the notion that terrorism is a phenomenon displayed in every camp, including their own. Professor Richard Falk, in his book, *Revolutionaries and Functionaries*,⁸⁰ applies theatrical imagery to clarify the ugly phenomenon of terrorism that has become frightening world theatre of death. Drawing from Robin Erica Wagner-Pacifici's *The Moro Morality Play: Terrorism as Social Drama*, Falk notes that the media, government leaders, leaders of revolutionary groups, and figures of political, moral, and religious authority perceive and propound terroristic events (for that matter, perhaps all significant events) in a melodramatic idiom. Events are interpreted in a good versus evil dichotomy. Ambiguity is non-existent and "we," the "good," must triumph over "them," the "evil." The danger is self-evident; each side feels this way. As a palliative to this delusional and dangerous tendency, Professor Falk counterpoises the opposing theatrical idiom of tragedy as the better vision of world events and world conflicts. Tragedy provides understanding and, through suffering and forgiveness, eventual transformation and transcendence.⁸¹ This metaphor runs throughout the work. It provides a useful and pragmatic tool for understanding the terrorist dilemma. It is no less practical than a proper and appropriate theory is necessary to a correct prognosis of a disease or to the resolution of a scientific conundrum.

The simple platitude: "one person's terrorist is another's freedom fighter," while bandied about and sometimes taken seriously, is a manifestation of the problem. It certainly misses the point. The issue is whether certain *conduct*, whether perpetrated by governmental officials, soldiers, police, freedom fighters, insurgents in a civil war, or dissidents, is criminal. There are freedom fighters who become criminal terrorists. It depends on what they do and to whom they do it.

Sartre was correct, but incomplete, in aphorizing, "once begun, [a war of national liberation] is a war that gives no quarter."⁸² Today, no war does. Killing in war, sadly, is deemed by nations and other groups to be justifiable or acceptable. Wars of any kind are, by definition, murderously violent. They are akin to murder and probably turn many of the combatants on both sides into victims, executioners, or both.⁸³ Some conduct, however, is not justifiable or acceptable even within war and, thus, a

crimes (for example, homicide and kidnapping) which are universally recognized as morally and legally unacceptable").

⁸⁰ See R. FALK, *supra* note 17, at 140 (propagandistic appropriation of law).

⁸¹ See R. FALK, *supra* note 17, at 86-87.

⁸² Sartre, *supra* note 45, at 21.

⁸³ See A. CAMUS, *NEITHER VICTIMS NOR EXECUTIONERS* 27 (D. MacDonald trans. 1972); E. REMARQUE, *ALL QUIET ON THE WESTERN FRONT* (1929).

fortiori, is inexcusable during times of relative peace. A fight for survival, or even one for gaining or retaining power, may cause people to do unspeakable things, but we do not have to justify or even accommodate such behavior. Thus, even if killing innocents is deemed effective to promote an end that the killers consider good—even if it actually is an efficient means to intimidate a government or dissident group, or to render a population insecure—it is not morally justified or legal. The claim of the oppressed that a child is the enemy, because she will inherit the benefits of the oppressors or because she will grow into an attacker, is unacceptable, just as it is unacceptable to oppress or to allow other governments or other groups to oppress.

Moreover, para-military or other combatant forces have no justification to hole themselves up and to use innocent non-combatant civilians as shields. This is a form of oppression or terrorism. Similarly, it is not acceptable—it is criminal terrorism—to bomb, gas, or starve villages, because one wishes to undermine confidence in the nation's leader in order to prompt a *coup d'état*, or because one believes that some enemy or "terrorist" forces may be hiding or interspersed therein. Unfortunately, governments and revolutionaries alike, as well as most international law jurists and commentators, have forgotten essential and basic criminal law.

We face such danger today that we must find a way to remind ourselves that the world is made up of human beings and that the law recognizes this. Then, we must ensure that the world is controlled by the rule of law and morality, not raw power. This was Albert Camus' vision, taken up by Thomas Merton and Richard Falk.⁸⁴ We can transcend ourselves and our current leaders' view of the world to establish peace maintained by government through law and morality. It is necessary first, however, to recognize that neither the revolutionaries nor the advocates of the status quo are currently living by law or morality. We are controlled by a pervasive terroristic mindset. If we cannot see this, we cannot transcend it and we are doomed to live in or destroy the world in a terroristic tragedy.

The conduct described herein and in my other articles⁸⁵ illustrates that terrorism poses a vicious threat to human dignity. There is a common core of values that condemns criminal terroristic conduct. This conduct is to be condemned, whether it emanates from states against inhabi-

⁸⁴ This is one of the essential themes of Falk's *Revolutionaries and Functionaries*. I have been working on similar thoughts over the years and have tried herein both to explore this theme and to ruminate on its depths and moral-legal implications.

⁸⁵ My other articles on the theme of terrorism include: *Terrorism, Law and Our Constitutional Order*, 60 U. Colo. L. Rev. 471 (1989); *Terrorism and the Constitution*, 27 B.Y.U. STUDIES 197 (1987); *Jurisdiction as Protection Against Terrorism*, 19 U. CONN. L. REV. 895 (1987); *An Essay on the Executive Branch Attempts to Eviscerate the Separation of Powers*, 1987 UTAH L. REV. 451; and *The Evisceration of the Political Offense Exception to Extradition*, 15 DEN. J. INT'L L. & POL. 109 (1986).

tants of their own territory, in violation of human rights law, or against noncombatants outside the state. It is criminal even when perpetrated by groups of insurgents struggling for independence or freedom from oppression. I am not arguing for punishment of "states," "nations" or "groups" for what has been called "state-terrorism," although such terrorism certainly exists. Individuals, even when functioning in their official governmental capacity, are subject to the rule of law and may be punished for committing or aiding and abetting criminal terrorism as defined herein. Criminal tactics in the name of freedom or anti-terrorism are criminal nonetheless, notwithstanding their rhetorically lofty purpose. The criminality of the conduct is determined by customary and other international law and by domestic criminal law. Evidence of its universal condemnation is found in the complex of international treaties and domestic substantive criminal law, arising to the level of general principle.

The excuses and reasons given by apologists for governments, terrorists and counter-terrorists alike ring frighteningly familiar. They should remind us of Milton's poignant warning: "So spake the Fiend, and with necessity, The Tyrant's plea, excused his devilish deeds."⁸⁶

We have seen violence justified in self-defense or when it occurs in revolution or breaking the yoke of oppression. Ideologists suggest, either by word or deed, that violence against innocent civilians is justified and legal when committed for a just cause. Both the substantive criminal law model and the law of war model condemn willful or wanton violence against innocents. While violence may sometimes be justified, violence against innocents is not. One is not justified to slit a weaker person's throat and to drink his blood or eat his flesh on the ground that one will starve otherwise.⁸⁷ Nor does it include killing innocents to benefit, or even protect, the nation or group. Self-defense does not comprehend the killing of innocents (those not in a mode of attack upon us), nor the use of in-

⁸⁶ J. MILTON, *PARADISE LOST*, bk. 4, lines 393-94; see also J. CONRAD, *LORD JIM* 86, 95, 357, 367 (1924) (to save his own life, captain abandoned ship without telling passengers); J. CONRAD, *HEART OF DARKNESS*, in *COMPLETE WORKS* (1926); Boyer, *Crime, Cannibalism and Joseph Conrad: The Influence of Regina v. Dudley & Stevens on Lord Jim*, 20 *LOY. L.A.L. REV.* 9 (1986).

⁸⁷ *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884) (sailors who, out of "necessity," killed a shipmate for food were sentenced to be hanged, but were later reprieved). Some have suggested that the German substantive criminal law would justify this conduct. See Franck & Scott G. Senecal, *Porfiry's Proposition: Legitimacy and Terrorism*, 20 *VAND. J. TRANS-NAT'L L.* 195, at 201-202 (1987). But it would not. It is true that the German vision of necessity as an *excuse* may excuse the conduct, recognizing it to be wrong or against the social order (*rechtswidrig*) but note culpable (*Schuld*). This notion recognizes that given some extreme pressures of circumstances, people may commit *rechtswidrig* acts, punishment for which will be forgone because society understands. This is not a justification in the least; nor is it self defense. See Wasserman, *Justifying Self-Defense*, 16 *PHIL. & PUB. AFF.* 356 (1987); Fletcher, *supra* note 74.

nocents as a means of self-preservation. A nation may not justifiably starve, attack and destroy, or otherwise oppress a group or nation, inside or outside its borders, to benefit the majority of the population or its power elite. Any group that adopts such a tactic—who oppresses or commits terror-violence, or promotes or condones its use, even in the name of God, communism, democracy, or whatever piety—has no room to complain about the other side doing the same. Condemnation of terrorism by those who either use it or condone its use is hollow.

Terrorism committed by a group against a nation or its nationals should not be an excuse to commit the same against innocents of that group. We should be beyond the blood-feud mentality of using innocent noncombatant members of our enemies' population as proxies for our vengeance or as tools for promoting our interests through intimidation. To the contrary, acceptance of the policy that one person's terrorist is another's freedom fighter is acquiescing to the notion that there is no rule of law in the international arena. Once one so acquiesces, he has no recourse to the rule of law.

Finally, Thomas Merton used the Trojan War to illustrate the horrible silliness of war. His condemnation applies just as well to criminal terrorism:

The only one, Greek or Trojan, who had any interest in Helen was Paris. No one, Greek or Trojan, was fighting for Helen, but for the "real issue" which Helen symbolized. Unfortunately, there was no real issue at all for her to symbolize. Both armies, in this war, which is the type of all wars, were fighting in a moral void, motivated by symbols without content, which in the case of the Homeric heroes took the form of gods and myths.⁸⁸

This was not so bad for the Greeks, because their myths limited them. For us, our myths are absolute and are integral with total war and terrorism. Our myths "penetrate the whole realm of political, social, and ethical thought."⁸⁹ We go to war or we condone or promote our own government's or group's criminal terrorism "because of 'secret plots' and sinister combinations, because of political slogans elevated to the dignity of metaphysical absolutes."⁹⁰ These have no content. "We seek to impart content to them by destroying other men who believe in enemy-words."⁹¹ Yet, this is equally without content.

Simone Weill and Thomas Merton were not far off in their belief that the monster, "the great beast," is the urge to collective power, "the

⁸⁸ T. MERTON, *The Answer of Minerva: Pacifism and Resistance in Simone Weil*, THE LITERARY ESSAYS OF THOMAS MERTON 134, 137 (1981).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 138.

grimmiest of all the social realities of our time."⁹² This lust for power is masked by the symbols of "nationalism, of capitalism, communism, fascism, racism,"⁹³ and, I would add, fundamentalism, anti-terrorism, self-determination, and even democracy.⁹⁴ Even national security, which is "a chimerical state of things in which one would keep for oneself alone the power to make war while all other countries would be unable to do so."⁹⁵ We must individually explode the myth and defeat the great beast. If terrorism is to be overcome, we must heal the plague that is rotting our souls and ensure that our leaders follow suit.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *Ecclesiastes*, 1: 2; 12:8 (noting that "everything is vanity [and evil] if abused" and all will pass away).

⁹⁵ T. MERTON, *supra* note 88, at 139, (quoting S. Weil).

