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The Terrors of Dealing with September 11th

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The Terrors of Dealing with September 11th
Addressing the new circumstances.

Traditional international law must be refined to address the new circumstances. The events of Sept. 11 stunned us out of our usual state of denial that human beings could actually be willing to direct their energies as long as their demise includes innocents they consider enemies or enemies by association. To fathom someone fashioning an airliner filled with innocent passengers into a missile to incinerate buildings and the innocents inside to see is too difficult to fathom. Responsible people and government must protect themselves after such an atrocity.

Part of the protection must include answering the question: how it is possible for leaders to inflame such ferocious fear and hatred to prompt their minions to commit this pathological and unjustifiable horror? Similarly, if we actually wish to prevent it in the future, we do not only need to take protective and preventive measures, we also must resolve the problem of whether it is possible that U.S. actions somehow might play a synergistic role by playing into the hands of those who wish to foment hatred against us. Whether or not this is true, nothing justifies the atrocity of Sept. 11. Indeed, the tu quoque defense (you did it too) has been repudiated, at least since the Nuremberg Trials.

The atrocities caused the U.S. to take three approaches in an attempt to claim some justice. The first was to attack the perpetrators and their supporters militarily, diplomatically, and economically. The second was to capture and prepare to prosecute some of them; and the third, much more questionable, was to capture and keep them incommunicado indefinitely. International criminal law provides important insight for analyzing these approaches, including their legal limits. It behooves soldiers, political leaders, defense counsel, prosecutors, legislators, judges, and legal scholars in criminal law and international law to develop a more refined understanding of these issues and international criminal law, considered exotic prior to Sept. 11.

The post-Sept. 11 world requires questioning of traditional law of armed conflict and how it may apply to terrorism. For development of a viable and worthy rule of law, it is necessary to fashion a meaningful and useful definition of terrorism, and what might be a proper legal response to it.

Formal belligerency is an anachronism. Warfare has changed to the point that it is difficult to make sense of distinctions between terrorism, crimes against humanity, and war crimes. Perhaps we are in a phase of world history in which the norm is continual low-level, but horrific warfare. Some recent wars would meet the traditional definition of belligerency, although they are often civil wars: the wars in Rwanda, in the former Yugoslavia, Sierra Leone, or East Timor.

Others, like Palestine, the Sept. 11 attacks, the troubles in Northern Ireland do not meet the definition. Small, loosely organized groups with access to weapons or other means of destruction foment continual armed strife and terror. Perhaps, in this way, we have devolved into an existence similar to that prior to the birth of the nation state, where power and war are not state-based. Traditional international law must be refined to address the new circumstances.

Jus in bello leaves no doubt that even during all out war, certain conduct violates international humanitarian law. Conventional and customary international law traditionally has proscribed certain universal crimes, including: war crimes, genocide, and crimes against humanity. The Four Geneva Conventions of 1949, For the Protection of War Victims, provide an illustrative listing, expanded by Article 85 of Protocol I, Additional to the Geneva Conventions of 1949 (1977).

International Criminal Law & Terrorism

Terrorism is not formally categorized as a crime in the Rome Statute for the International Criminal Court (the ICC). Certain forms of terrorism clearly fit conceptually within ICC proscription as a crime against humanity, but formal inclusion as a distinct offense has been debated from the beginning. In the 1998 Rome negotiations, representatives of Algeria, India, Sri Lanka, and Turkey proposed explicit inclusion. The major reason it was not included was the politically based difficulty in defining the term and fear of politicizing the tribunal. Since Sept. 11, momentum has increased toward inserting terrorism into the Statute. To do this will require a clear definition and elaborated elements.

Criminalizing terrorism with integrity is difficult. States often adopt anti-terrorism rhetoric, but actually commit or support terrorism. They often pass laws or enter into treaties, which although based on international law and principles of universality, actually condemn only their enemy's conduct, but legitimize their own actions. Lawmakers, thus, mock the rule of law and actually promote terrorism. They appropriate the term and the law for propagandistic purposes. An example is when terrorism is deemed rhetorically to be a generic universal crime transcending time and space, but is suppressed or prosecuted only when it occurs within a specified period of time and place. Acts of terror committed within the former Yugoslavia after 1991, serve as an example. Alternatively, sometimes legislation and treaties calling for "universal jurisdiction" will adopt a racial, cultural, ethnic, or religious stereotyping - calling for the deportation or arrest of the exotic "Islamic terrorist." Bias, discrimination, and demonization of "the enemy," arouse fear and hatred, while they exclude "one's own kind."

We frequently hear comments like: "the terrorists did not care about our innocent civilians, so why should we care about theirs?" Thus, we are easily beguiled into using terror-tactics directly to fight terrorism or to use terror-tactics in disguise, claiming "collateral damage." Certainly, this is a problem, as most, if not all, groups who use terrorism, believe that their goals are more important than the damage done by their terrorism. True believers in a "just cause" rationalize their own conduct as just, even when they would consider that same conduct committed against them for whatever reason to be terrorism.

Oppression does constitute a form of terrorism. On the other hand, real or perceived oppression becomes a facile excuse to slaughter innocents, because it is easier. This may breed terroristic reaction. We hope, for example, that reports in June 2002 that, "American soldiers have been involved in the torture..."
against humanity, terrorism, or even a common crime, the exact same conduct would constitute either a war crime, a crime against humanity, or terrorism when committed when there is no "traditional" armed conflict.11

When one is at war, the enemy combatant has the status of an attacker. He is trying to kill and may be killed. Basic criminal law allows deadly force to be used against another attacking with deadly force.22 It is also self-defense in the international law of war.3 On the other hand, if one is the initial attacker, one cannot claim self-defense.24 To attack another state without having been attacked violates jus ad bellum.25 Customary restraints on warfare, jus in bello, are premised on the general doctrine that destruction and violence that are superfluous to actual military necessity are immoral and wasteful. Air bombardment, for example, is subjected to constraints both in relation to the selection of targets and to the accuracy of bombardment.

Definition of Terrorism

I propose, therefore, to define terrorism as the use of violence against innocent individuals to obtain some military, political, or philosophical end from a third-party government or group. If the violence is aimed at or wantonly impacts on innocent civilians, it is terrorism, obviating any right to self-defense. Innocents include non-combatants in war (war crime) and non-attackers in a non-war setting (terrorism). Terrorism is political or ideological violence without restraint of law or morality during relative peacetime.

The essential commonality in all these offenses is that they entail individual responsibility, with differing jurisdiction and, perhaps, penalties.26 This is terrorism even if it is fully domestic, but it is international terrorism only when the conduct transcends borders, or is so massive or includes a use of weapons of mass destruction, that it poses a threat to international peace and security. n.

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ENDNOTES

1 Kriangsak Kriitchaisaree, INTERNATIONAL CRIMINAL LAW at 227 (2001); Christopher L. Blakesley, TERRORISM, DRUGS, AND THE PROTECTION OF HUMAN LIBERTY (1992).
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6 Id.; see, e.g., UN News Centre, Robinson says establishment of International Criminal Court key to fighting terror (March 5, 2002); Jean Pierre Stroobants, Trois questions a… Federico Andreu, Le Monde, SECTION: International, February 18, 2002.

7 See, e.g., War Crimes Act 1945 (Cth), as amended By War Crimes Amendment Act of 1988 (Cth), ss. 5 & 9 (Australia); Gerry J. Simpson, War Crimes: A Critical Introduction, Ch. 1, in THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 1, 9 (McCormack & Simpson, eds. 1997).


10 Clive Freeman, Documentary of US ‘war crimes’ shocks Europe, Independent on Line (South Africa), 06/12/2002.


12 I have attempted this. See Blakely, Terrorism & Anti-terrorism in Law, Literature, and Reality, (submitted; 2002).


14 See, e.g. Doc. PCNICC/1999/WGEC/INF. 1, at 12; Kittichaisaree at 142.

15 See, e.g., the Celebici Judgment, supra note 13, at 431; Kittichaisaree, at 142.

16 See, e.g. Doc. PCNICC/1999/WGEC/INF. 1, at 2.


18 See, LaFave, supra note 13, at Ch. 7; Perkins & Boyce, supra note 13, at 46-119; Fletcher, supra note 13, at 235-39.

19 A person not taking direct part in the hostilities is hors du combat. One is also hors du combat, upon surrender, when sick or wounded, or when one is a medical personnel. See, International Committee of the Red Cross, Basic Rules of the Geneva Conventions and Their Additional Protocols (ICRC 1987); Kittichaisaree, supra, at 22-139.


21 See, e.g., UN News Centre, Robinson says establishment of International Criminal Court key to fighting terror (March 5, 2002); Jean Pierre Stroobants, Trois questions a… Federico Andreu, Le Monde, SECTION: International, February 18, 2002.

22 See, LaFave, CRIMINAL LAW supra note 13 at Ch. 7; Perkins & Boyce CRIMINAL LAW supra note 13, at 46-119; Fletcher, RETHINKING supra note 13, at 235-391.

