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The Terrors of Dealing with September 11th

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CHRISTOPHER L. BLAKESLEY

The Terrors of Dealing with September 11th



Photo: John H. Mowbray

Attempts to suppress terrorism have proved far from satisfactory. The events of Sept. 11 stunned us out of our usual state of denial that human beings could actually be willing to destroy themselves as long as their demise includes innocents they consider infidels 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 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 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.² 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,³ expanded by Article 85 of Protocol I, *Additional to the Geneva Conventions of 1949* (1977).⁴

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.⁵ 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.⁶ 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,⁷ but is suppressed or prosecuted only when it occurs within a specified period of time and place.⁸ 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."⁹

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

continued on page 15

The Terrors of Dealing with September 11th

continued from page 7



and murder of captured prisoners, and may have aided in the 'disappearance' of up to 3,000 men in the region of Mazar-i-Sharif," according to Jamie Doran, an Irish documentary film maker, in his documentary entitled "Massacre at Mazar."¹⁰ The Pentagon has denied this, stating that the torture claims are "highly suspect in the face of it" and has denied outright the claim that U.S. soldiers participated in the massacre of the 3,000 Islamic fighters who surrendered to the Northern Alliance.¹¹ Still, if our agents did this we are responsible.

The Need to Define Terrorism

It is necessary and possible to define terrorism in a manner that accommodates the rule of law. Our definition must be neutral and serious. Our reaction to it must be moral and legal. Otherwise, we become what we are fighting. To try to have it both ways is ultimately self-destructive. Survival as a democracy requires recognition that we must ensure our definitions and reactions are the same for everyone. We cannot do what they do and we must react within the rule of law.

Comparing terrorism to war crimes and crimes against humanity helps.¹² These traditional offenses are less poorly defined than terrorism, but they do suffer from sufficient vagueness, potentially to violate basic constitutional and criminal law principles. Proof of an *actus reus* and a *mens rea* are necessary. The *mens rea* for a "grave breach" under the Geneva Conventions or for terrorism is intent or recklessness.¹³ Recklessness may include common law *depraved heart murder*. The Preparatory Committee (PREPCOM) for the ICC deemed the general *mens rea* to be intent, knowledge, or both.¹⁴ The *actus reus* for murder as a crime against humanity is an act or omission causing the death of "protected persons."¹⁵ "Protected persons," are "innocents," including prisoners of war or captured persons of the opposing military, or innocent civilians.

Therefore, causing death by starvation, execution without a fair trial, torture or ill treatment of POW's or innocent civilians in violation of the laws and customs of war would satisfy the *actus reus*.¹⁶ The same is true for terrorism. Terrorism is generally applied to conduct in circumstances of relative peacetime. The exact same conduct would constitute either a war crime, a crime against humanity, terrorism, or even a common crime,

depending on the circumstances in which it occurred. The differentiating feature is the factual-legal context.

Intentional killing of a human being is murder in domestic law.¹⁷ In common law systems, the intentional part is having "*malice aforethought*," which may either be intent to kill or killing with a "depraved heart."¹⁸ The exact same conduct - intentionally killing a human being - is considered "*justifiable*" during war, as long as that human being is an enemy combatant, not one who is *hors du combat*.¹⁹ Killing a human being who is *hors du combat* is a war crime during international or civil war.²⁰ The same conduct is a crime against humanity or terrorism when committed when there is no "traditional" armed conflict.²¹

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.²³ 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. ■

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ENDNOTES

¹ Kriangsak Kittichaisaree, INTERNATIONAL CRIMINAL LAW at 227 (2001); Christopher L. Blakesley, TERRORISM, DRUGS, AND THE PROTECTION OF HUMAN LIBERTY (1992).

continued on page 16

The Terrors of Dealing with September 11th

continued from page 15

² Yoram Dinstein, *The Distinctions Between War crimes and Crimes Against Peace*, in Yoram Dinstein & Mala Tabory, eds., *WAR CRIMES IN INTERNATIONAL LAW*, at 1, 3 (1996); *Trial of Hagendorf* (U.S. Military Court, Dachau, 1946), 13 *Law Reports of Trials of War Criminals* 146, 148 (1949); Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 *Brit. Y.B. Int'l L.* 58, 77 (1944); B.V.A. Röling, *The Law of War and the National Jurisdiction Since 1945*, 100 *Recueil des Cours* 323, 340 (1960).

³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. See Dinstein, *Distinctions*, at 4.

⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977).

⁵ Doc. A/CONF. 183/C. 1/L. 27/Corr. 1, of 29 June 1998. See proposals of Algeria, Armenia, Congo, India, Israel, Kyrgyz Republic, Libya, Macedonia, Russia, Sri Lanka, Tajikistan, and Turkey; Kittichaisaree, at 227.

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).

⁸ See, e.g., Security Council Res. 827 (1993) on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the territory of the Former Yugoslavia since 1991, U.N. SCOR, 48th Sess., 3217th mtg. at 112, U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1203. See Statute of the International Tribunal, Annex, art. 4, U.N. Doc. S/25704, reprinted in 32 I.L.M. 1159, 1193, [hereinafter ICTY Statute] <http://www.un.org/ict>; Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., Annex, art. 2, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598, 1602 [hereinafter ICTR Statute] available at <http://www.un.org/icttr/>.

⁹ See, Simpson & McCormack, *supra* note 7, at 10; Prevost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 *Hum.Rts.Q.* 303, 305 (1992) (on race); Pratt & Fletcher, *Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia* (1994) 9 *Berkeley Women's L.J.* 77 (1994) (on gender).

¹⁰ Clive Freeman, *Documentary of US 'war crimes' Shocks Europe*, *Independent on Line* (South Africa), 06/12/2002.

¹¹ Gareth Harding & Elizabeth Manning, *Pentagon Denies Afgan Torture Claims*, *UPI & Washington Times*, June 13, 2002.

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

¹³ See, discussion of this in the *Celebici Judgment*, *Prosecutor v. Zejnir Delalic, Zdravko Mucic (aka "Pavo"), Hazim Delic, and Esad Landzo (aka "Zenga")*,

commonly known as the *Celebici Case* (Case No. IT-96-21-A, at 437-439; the *Blaskic Judgment*, 153, 788, *Prosecutor v. Blaskic, Judgment*, Case No. IT-95-14, (Int'l Crim. Trib. for the Former Yugoslavia 2000), <http://www.un.org/icty>; the *Celebici Appellate Judgment*, Feb. 20, 2001, at 422, *Prosecutor v. Delalic*, Case No. IT-96-21-A, (Int'l Crim. Trib. for the Former Yugoslavia 2001), <http://www.un.org/icty>. These types of *mens rea* are also roughly part of common law malice aforethought. See; e.g., discussion in Rollin M. Perkins & Ronald N. Boyce *CRIMINAL LAW*, at 125-138 (3rd ed. 1982); George Fletcher, *RETHINKING CRIMINAL LAW* 235-391 (1978); Wayne R. LaFave, *CRIMINAL LAW* at 651-687, and authority cited (3rd ed. 2000).

¹⁴ *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.

¹⁷ *Regina v. Dudley & Stevens*, [1884] 14 Q.B.D. 273, 285;86 (U.K.). See also, *R. v. Howe* [1987] 1 A.C. 417 (H.L.) (U.K.); *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842).

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.

²⁰ International Committee of the Red Cross, *Basic Rules of the Geneva Conventions and Their Additional Protocols* (ICRC 1987); *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion of 8 July 1996, ICJ Rep. 1996, para. 78; L.C. Green, *CONTEMPORARY LAW OF ARMED CONFLICT*, chs. 10-12, 14, 21 (1993); Kittichaisaree, at 129-139.

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.

²³ See, e.g., UNITED NATIONS WAR CRIMES COMMISSION, *XIII LAW REPORTS OF TRIALS OF WAR CRIMINALS* 14951 (1949). For analysis of self-defense in wartime, see generally, Dinstein, *WAR, AGGRESSION* *supra* note 2. See Michael Walzer, *JUST & UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 86 (2d ed. 1992).

²⁴ See U.N. Charter chs. I, XVII; especially arts. 51 and 2(4).

²⁵ See Alfred P. Rubin, *Jus ad Bellum and Jus Cogens: Is Immorality Illegal?*, in *HUMANITARIAN LAW OF ARMED CONFLICT CHALLENGES AHEAD; ESSAYS IN HONOUR OF FRITS KALSHOVEN* 595611 (Astrid I. M. Delissen et al. eds., 1991). On reprisal, see L.C. Green, *THE CONTEMPORARY LAW OF ARMED CONFLICT* (1993).

²⁶ See Robert H. Jackson, Chief Counsel for the Prosecution in the Nuremberg Trials, *Opening Statement*, delivered 20 Nov. 1945, *quoted in* Telford Taylor, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 167-169 (1992).

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