The Terrors of Dealing with September 11th

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Photo: John H. Mowbray
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 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 cultural, racial, 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 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. 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. 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. The actus reus for murder as a crime against humanity is an act or omission causing the death of "protected persons," 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. 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. In common law systems, the intentional part is having "malice aforethought," which may either be intent to kill or killing with a "depraved heart." 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. Killing a human being who is hors du combat is a war crime during international or civil war. The same conduct is a crime against humanity or terrorism when committed when there is no "traditional" armed conflict.

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. It is also self-defense in the international law of war. On the other hand, if one is the initial attacker, one cannot claim self-defense. To attack another state without having been attacked violates jus ad bellum. 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.

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.

Christopher L. Blakesley is a professor of law at the Boyd School of Law.

ENDNOTES


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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 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. 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 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.

21 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 235-39.

22 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, 23-42;

23 See also, R. v. Howe supra note 17; R. v. Williams (March 5, 2002); Jean Pierre Stroobants, Trois questions a... Federico Andreu, Le Monde, SECTION: International, February 18, 2002.

24 See, e.g., UN Charter chs. I, VII; especially arts. 51 and 2(4).
