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## *Belligerents or Criminals? Terrorism in a World Without Peaceful Redress*



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On the face of things, the issue seems fairly simple and straightforward. Terrorism is bad, even horrific. The killing or harming of innocents is morally wrong and indefensible, no matter what the circumstances. Since the October 7<sup>th</sup> attack by Hamas on Israeli civilians, Israeli officials have denounced the terrorists in no uncertain terms. “We are fighting human animals,” declared Israeli Defense Minister Yoav Gallant. Where do you go from there?

Well, several places. If we sincere about “combatting terrorism,” then we must both understand its rationale and provide alternative avenues of redress. We must understand that terrorism often represents for oppressed peoples a strategic component of armed

struggle and resistance in their efforts to obtain their fundamental human, national, cultural, religious and civil rights, particularly when peaceful channels of addressing their grievances are blocked or absent altogether. We must also take in account that despite an impressive architecture of international humanitarian law (IHL) intended to ensure and protect individual and collective rights even during violent struggles and wars, IHL's enforcement regime is weak. Not only is its implementation dependent upon the very states that have created and perpetrate the oppressive conditions in the first place, but it exists in a transactional political system in which universal rights-based rules count for little. Indeed, we must recognize that State Terror far outweighs that of non-state actors in its scope, deadliness and political effect. Attributing terrorism to "human animals" lays the blame for its atrocities solely at the feet on non-state actors, the victims of the State-based international system, while effectively delegitimizing the political grievances or aspirations that lay behind it. An analysis of terrorism that recognizes it as a strategic and often justifiable, if inherently illegal, form of political violence at least focuses us on its political nature, thus enabling us not to merely "counter" or condemn it, but to restructure IHL and our mechanisms of conflict resolution so that political terrorism is eliminated by the availability of more peaceful avenues of redress.

Here I want to make it clear that we are talking about *political* terrorism integrated into struggles with clear political aims, not of criminal terrorism concerned mainly but not always with material gain. To be sure, there are overlaps: irregular forces, including groups employing terror, often engage in criminal activities (such as trafficking in arms, drugs, gems or kidnapping for ransom) in order to support their political or ideological goals, but that is not the goal itself. For its part, organized crime may engage in forms of political terrorism (assassinating judges or public officials, for example) in order to protect their criminal enterprises, though that is peripheral to their goals. But the distinction is crucial. "The core premise [of taking into consideration the differing motives of political versus criminal terror]," writes Ben Saul, a prominent theorist of international law, "is that *political* violence, or violence done for some other public-oriented reason (such as religion, ideology, or race/ethnicity) is *conceptually* and *morally* different than violence perpetrated for private ends (such as profit, greed, jealousy, animosity, hatred, revenge, personal or family disputes and so on)." Criminalizing what is essentially a political phenomenon – and one that is vague, lacks any internationally accepted definition and whose legitimacy is viewed differently by different actors, thus easily broadened to include all forms of just popular struggle – denies the oppressed any effective redress,

thereby perpetuating repression and the denial of their legitimate rights, a condition that is itself illegal under the UN Charter and IHL. “[T]he criminalization of terrorism,” Saul continues, risks empowering the State – including autocratic ones – at the expense of other (potentially legitimate) political claims to the use of violence. Terrorism may often jeopardize the human rights of civilians; but if terrorism is defined more widely as any violence against the State, then the criminalization of terrorism itself strips away the human freedom to resist oppressive or authoritarian regimes.

The danger, Saul concludes, lies in that “the international community [meaning States] has repeatedly condemned terrorism as ‘criminal and unjustifiable,’ irrespective of ‘considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to ‘justify’ it.” Indeed, the danger of criminalizing all political resistance or struggle is embedded in the UN Security Council’s edict in Resolution 1373, passed immediately in the wake of 9/11, requiring states to criminalize terrorism. As against, IHL considers those who engage in legitimate armed struggle for their political rights, including those employing strategies of terrorism, as belligerents, not criminals, even though criminal acts cannot be considered legitimate and must be punished. In the end, we should focus on the issue of terrorism as a form of political violence. Broadly labeling all non-state fighters “terrorists” only delegitimizes them and their political struggles, reducing complex political and military contests to the legality of specific strategies or acts.

### **What is Terrorism?**

While there exists no universal definition of terrorism, there is wide agreement on its basic elements. Paul Wilkinson, a researcher on terrorism, identifies five major ones:

- 1) It is premeditated and aims to create a climate of extreme fear or terror;
- 2) It is directed at a wider audience or target than the immediate victims of the violence;
- 3) It inherently involves attacks on random and symbolic targets, including civilians;
- 4) The acts of violence committed are seen by the society in which they occur as extra-normal, in the literal sense that they breach the social norms, thus causing a sense of outrage; and
- 5) Terrorism is used to try to influence political behavior in some way.

Although the terms “terrorist” and “terrorism” are applied almost exclusively to non-state fighters, these elements apply equally to State and non-state actors. States associate terrorism exclusively with non-state actors as a way of criminalizing them. But if we shift our view of terrorism from the actors themselves to their actual acts, the term expands to

encompass State atrocities in war and suppression as well. State repression, State Terrorism, State-sponsored terrorism and asymmetrical warfare – these forms of political violence also contain the key elements of terrorism: the killing of innocent civilians and the intimidation of entire populations for political ends.

Indeed, in his book *Death By Government*, R.J. Rummel compared non-state terrorism “from below” with the scale of State Terrorism “from abroad.” Referring to State Terrorism as “democide,” “the intentional government killing of an unarmed person or people,” he calculated that over the course of the 20<sup>th</sup> Century, 170,000 innocent people were killed by non-state terrorists, truly an appalling number. Yet in that same period, 272 million innocent people (and conceivably up to 400 million) were murdered by states (versus 41 million killed in armed conflict). Hamas, to be sure, has engaged in terrorism, the latest example being the 865 Israeli civilians killed in the October 7<sup>th</sup> attack. But that pales in comparison to 23,000 (and counting) Gazans killed by the Israeli military, more than half women and children.

Characterizing non-state actors that employ terrorism and other military actions in their political struggles as “terrorists” (with all the moral opprobrium that conveys) or depraved “human animals” with whom dialogue is impossible, their killing being the only mode of engagement with them, together with the self-interest of states to criminalize all non-state struggles, certainly poses dangers to the right of resistance to oppression and to popular struggle for the achievement of just political order, as Saul warns. Indeed, the right of resistance was described by the pioneer of IHL, Hersch Lauterpacht, as “a right which, in the final resort, is the supreme assertion of the inalienable rights of man.” Gwilym David Blunt follows that with a compelling logic: “The right to resistance is a necessary part of the political conception of human rights [because], without it, rights would only be privileges.”

### **Defending the Right of the Oppressed to Armed Struggle and Resistance**

That right is embodied in layers of IHL, treaties, covenants and UN resolutions based on Article 1(2) of the UN Charter requiring “respect for the principle of equal rights and self-determination of peoples and The Declaration on the Granting of Independence to Colonial Countries and Peoples. In 1987, UNGA resolution 37/43 reaffirmed “the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial and foreign domination and foreign occupation by all available means, including armed struggle.”

The rules of IHL, then:

- + Forbid a state in such circumstances from taking military or other coercive action to suppress the lawful exercise of the right to self-determination;
- + Recognize that peoples exercising the right to self-determination have, in the last resort, a license to engage in armed conflict to protect themselves, and to prevent the violent suppression of the exercise of the right to self-determination by the oppressor state;
- + Forbid third states from affording support to oppressive states so as to assist them in suppressing the exercise of the right to self-

Not only are states enjoined from denying people their right to self-determination, they also cannot thwart any attempt by the occupied people to exercise its right to self-determination either. This means that resorting to military force by the organization representing the oppressed is legitimate in the absence of other avenues of recourse.

Reflecting these concerns and acknowledging the justice of many struggles of oppressed non-state actors which may turn to terrorism (or, as belligerents, to irregular warfare) if other avenues of redress are denied, the UN General Assembly in 1987 condemned all acts of terrorism *except those* fighting for the right to self-determination against foreign and racist regimes as “criminal.” (Tellingly, the US and Israel were the only countries to vote against). This seems to indicate circumstances where acts that might otherwise be considered “terrorist” might be considered “illegal but justifiable” as a “collective defense of human rights.” Saul proposes five conditions that could support such a legal and moral position:

- 1) Serious, repeated and sustained violations of fundamental rights that rise to the level of the right to resist oppression;
- 2) The availability of effective means of peaceful redress, which if exhausted may justify terrorism as a last resort;
- 3) For a valid claim of self-determination, non-state groups must show themselves to be representative of “the people,” although “the people” is itself a “radically indeterminate” term. Only this entitles them to undertake the resort to violence.
- 4) If the justification for violence is resistance to oppression, then the purpose of any terrorist acts must be to replace oppression with freedom, rights violations with rights protection, and tyranny with democracy. The legitimacy of terrorist violence, therefore, depends upon the lawful end to which it is directed. Terrorism cannot be defended if it pursues objectives other than core, rights-based, legal values. [Harkening back to point #3, representation, this condition appears to suffer from a Western bias. Religious- political- or ethnic-based groups may fight for ends that are not rights-based, as in *jihad* or in a mere

struggle for power. Still, their justification depends upon not violating the rights of others, which would make crusades to impose a single religious view, ideology or repressive political regime on unwilling populations unjustifiable]; and

5) Any form of justifiable terrorism must construct outer limits on the permissible means and targets of violence that cannot be breached, as generally defined in IHL. Indiscriminate attacks on non-governmental civilians would always be prohibited, but since such attacks form the essence of terrorism – premeditated attacks on random and symbolic targets, including civilians, intended to create a climate of extreme fear or terror in order to influence political behavior – proportionality as a general principle of law becomes an issue. [By this standard indiscriminate attacks on civilians by Boko Haram, the right-wing death squads in El Salvador, the Hutu militia groups, the Janjaweed in Darfur or the Hamas attack of October 7<sup>th</sup> would be examples of non-justifiable terrorism.]

Where violence satisfies these five conditions, argues Saul, it could be considered “illegal but justifiable.” In extreme cases of oppression, he points out, individuals at any rate are likely to resort to violence even if it is absolutely prohibited by some body of law. A mechanism such as justifiable defense provides a fair and flexible way of addressing the absence of effective international enforcement of human rights, permitting victims of oppression redress through a well-defined range of remedial violence. Legal expert Mark Muller agrees. “A dangerous political and human rights lacuna has been created in the international legal system,” he writes.

This lacuna consists of the international community’s failure to address the position of stateless nations, peoples, and persecuted minorities, and those involved in the collective fight for democratic reform against authoritarian regimes. Instead, member states within the United Nations have preferred to reinforce the virtual inviolability of the system of state sovereignty.... This lacuna has led to numerous internal conflicts which could have been avoided had certain avenues of international political and legal redress been available. The failure to provide avenues of redress has led numerous groups to turn to more violent methods. The recent swathe of domestic terror legislation simply entrenches this process through its failure to distinguish between terrorism and true resistance in support of democratic change.

### **A Weak Regime of IHL Implementation**

No one can accept either the indiscriminate cruelty of terrorism or the conditions that drive it. Can we determine some boundaries beyond which neither State military attack or counterinsurgency on the one hand, nor resistance to oppression by non-state actors and

their armed struggle for rights one the other, are allowed to go – where no justification exists, moral, legal or political? How do we defend the right under IHL of oppressed people to engage in political violence in order to achieve self-determination and freedom, yet, *without jeopardizing their ability to achieve their just ends*, impose nonetheless limits to the forms of violence they may employ? How do we ensure the accountability of states for their own acts of terror, far more deadly towards civilians, as we have seen, than those of non-state actors?

The good news is that a legal framework already exists that both defines basic rights, including those of oppressed peoples, and offers, if not remedies, then at least some protections. The bad news is that the the international legal system of enforcement is extremely weak, depending upon states to police themselves and each other. The will to expend the political capital necessary to coax or force states complicit in war crimes, crimes against humanity or genocide to desist, or to punish them if they do not, fails before more expedient political considerations.

There are several official, “legitimate” avenues of redress. Under “universal jurisdiction,” the notion that some crimes – such as genocide, crimes against humanity, war crimes, and torture – are of such exceptional gravity that all national courts are required to take up such cases even if they involve foreign nationals or governments. In practice, however, few courts actually do so. Indeed, some countries have repealed universal jurisdiction (Belgium, Estonia), limited it in scope (Britain, Spain, Germany) or never incorporated it into their legal system (the US).

The International Court of Justice in The Hague is supposed to be the highest court of the world. It is where states themselves are judged – it is where South Africa has brought Israel under the legal requirement to prevent and not merely punish genocide. But even here the judges are appointed by governments and often render politically-tinged rulings. And even when a conviction passes through the legal system and reaches the UN Security Council for imposing the sanctions mandated by the Court, it can be vetoed by any one of the five Permanent Members, with all the political implications that entails. The US, for example, has vetoed UNSC resolutions 89 times since 1945. More than half of those vetoes (45 as of January 2024) were against resolutions critical of America’s client Israel – 33 of them directly pertaining to Israel’s occupation and its treatment of the Palestinian population. Indeed, Israel stands in violation of 31 Security Council resolutions, the most of any country, with no fear of sanctions.) All this eviscerates the regime of IHL compliance, thus giving license to State offenders.

Finally, the Fourth Geneva Convention provides for the convening of its High Contracting Parties in order to sanction gross violations by a state. Since its occupation of the Palestinian Territories in 1967, Israel has systematically violated the Convention's most significant articles, especially around its illegal annexation of East Jerusalem, its massive but also manifestly illegal settlement of the West Bank, its demolition of tens of thousands of Palestinian homes, its deadly assaults on Palestinian population centers (Gaza s this is being written) and its de-development of the Palestinians economy – all gross violations of the Convention, including the Occupied Power's responsibility for the well-being of the Protected People

As I write in the midst of the ongoing Gazan tragedy, a number of countries and human rights organizations such as Amnesty International, Human Rights Watch and the International Commission of Jurists are calling for yet another urgent Conference of High Contracting.

But again, the High Contracting Parties, led by the UK and the US, have consistently refused to use the powers granted them by the Fourth Geneva Convention to sanction Israel or prevent its ongoing violations of its provisions.

### **Is There an Alternative to Terror?**

IHL is certainly an instrument at the disposal of oppressed peoples and those who seek justice in the world. The fact that it exerts so little influence in world affairs and conflicts only highlights the deeper, more fundamental problem: we do not live in an international system of rules, laws and institutions (though they exist and can be enforced by the strong against the weak), but rather in an anarchical system of competing sovereign states that arose after 1945. To make matters worse, pure transactionalism came to dominate international relations with the rise of neoliberalism in the late 1970s and the collapse of the Soviet Union in 1989, reaching its apogee in the presidency of Donald Trump. Purely instrumental, transactional relations have no ideology, no values (beyond an Ayn Rand-like self-interest), no allies and no Grand Strategy or vision. Corporate interests join national ones, and other states or parties are viewed simply as rational actors with whom one can “make deals.” Since foreign policy is focused on short-term gains, it drifts into reactive, inconsistent, and incoherent policies and actions. Dealings with other countries become fragile and mercurial, depending only on what they can deliver rather than on long-term interests. States prefer bilateral transactions that impose the fewest constraints on their freedom of action. By the same token, they avoid commitments to a rights-based international rule of law or to such international bodies as the United Nations that only

constrain their more egregious behavior. In this system, there is no place for “understanding the other side” lest it pose a challenge to the State’s own interests or impose constraints.

The chaos that the world order serves, of course, the powerful States and the corporate interests they serve, as well as their allies. A State is not a player unless it has something of value to bring to the bargaining table: a strong economy, military prowess, control over vital resources or strategic geopolitical territory, the patronage of another powerful state or some immediate instrumental value such as influence over a disruptive non-state actor. While lesser powers – State and non-state – may have clout on the lower regional or local levels of the international system, they are excluded from the Big Power politics at the global level. Israel is clearly at the table, Hamas has succeeded in getting to the table via the October 7<sup>th</sup> attack – terrorism. It now needs to adroitly bargain using the means at its disposal: the backing of states such as Qatar and Iran, as well as powerful non-state players like Hizbollah, while also mobilizing public pressure amongst the Arab and Muslim populations to ensure at least the tacit support of their governments. Moving from being a marginal and pariah “terrorist” group, Hamas is also parlaying its popularity as the only effective resistance to Israeli oppression into a position of formal power, working to join a renewed PLO, for instance, or making itself an indispensable element of any future Palestinian government. Despite its Islamicist program that has limited appeal at home or abroad, Hamas has also become a catalyst of worldwide support among the peoples of the world for the larger Palestinian cause. How this will all play out remains to be seen.

What October 7<sup>th</sup> demonstrates (sorrowfully), is that in the transactional system of power-based politics in which we live, terrorism, the ability to disrupt, is often the way weak and oppressed can bring their grievances and aspirations to the table. Hamas’s horrific attack on October 7<sup>th</sup> on Israeli civilians achieved political ends crucial for the very survival of the Palestinian people, ends that could not have been gained through any of the “legitimate” channels offered by the state-run system of conflict resolution: appeals to international law or good-faith negotiations. After more than 75 years (since 1948) of violent displacement and loss of land and national patrimony – all done by a member State of the UN with no constraint whatsoever by the international community (and indeed, with its active support) – the Palestinians were on the brink of erasure as a people and a political consideration. The US-sponsored process of “normalization” between Israel, now ruling permanently over all of historic Palestine, and major Arab states, was about to be

concluded, Saudi Arabia posed to sign on. In this light, October 7<sup>th</sup> stands more as an indictment of those who rule the world than of the group forced to resort to terrorism.

Is there an alternative to terror? Sadly “no” in the valueless transactional system we inhabit where human rights, IHL and fundamental justice count for little. We should deplore the indiscriminate killing and the spread of fear that is terrorism, of course, but in the same breath ask: Can we expect non-state actors fighting for their legitimate rights in an international system without effective avenues of redress to conform to IHL and “acceptable norms” when States themselves do not? Whether terrorism as political violence can be eliminated depends on whether we are able to offer the oppressed avenues of effective redress. That requires us to hold our governments accountable to IHL and, indeed, accountable for their policies and actions. A tall order, one for which progressive civil society and religious communities need far more organization and strategy than we currently have.

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