TERRORISM AND THE INTERNATIONAL LAW OF WAR*

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I. INTRODUCTION

Recent events in the international social process have forced the community to consider how to better protect mankind from the scourge of international terrorism. Although some states have recently questioned the need for a total ban on all forms of international terrorism, all seem to share the view that the world community must reach an agreement which prohibits terroristic acts that are contrary to the principles of the United Nations Charter and to other goal values (policies) shared by the international community. Primary efforts are being made to reach a working consensus on a definitional framework, to consider the adoption of a treaty prohibiting international terrorism in general or of treaties prohibiting certain specific types of international terrorism (such as terror attacks on civilian populations, diplomats, air transport facilities, communications facilities, international governmental facilities, educational institutions, cultural and religious edifices, medical units and facilities, food production and distribution processes, etc.), to identify and consider the underlying causes of international terrorism, and to consider various implementary measures at both the national and international levels for the coordinated prevention and punishment of terroristic acts of an impermissible nature that have an international impact.[1]

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[1] For a general coverage of these developments *see* U.N. S.G. Report, Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, And Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence Which Lie in Misery, Frustration, Grievance and Despair and Which Cause Some People to Sacrifice Human Lives, Including Their Own, in an Attempt to Effect Radical Changes, 27 U.N. GAOR, U.N. Doc. A/C.6/418, Annex I (2 Nov. 1972) [hereinafter cited as U.N. S.G. Report A/C.6/418]. U.N. *Ad Hoc* Committee on International Terrorism, Observations of State Submitted in Accordance with General Assembly Resolution 3034(XXVII), U.N. Doc. A/AC.160/1 and Adds. 1-5 (May-July 1973) [hereinafter

Interspersed among these efforts is a specifically articulated realization by at least some twenty per cent of the states that norms of international human rights are directly relevant to the current effort to articulate an authoritative distinction between permissible and impermissible terror of an international nature if there are to be any permissible types;[2] but only a handful of states, in addition to the Secretary General of the United Nations, have articulated a realization that the law of war or the law of human rights in time of armed conflict, is directly relevant as well.[3] The United States Draft Convention for the Prevention of Certain Acts of International Terrorism[4] had at least recognized the applicability of the law of war to the legal regulation of terrorism in the context of an armed conflict; but, curiously, had completely abdicated the matter to a normative regulation, at least in that context, by the law of war. Indeed, Article 1(1)(c) of the U.S. Draft Convention sought to exclude acts committed by or against "a member of the armed forces of a State in the course of military hostilities," and Article 13 quite properly stated that the 1949 Geneva Conventions shall "take precedence" in the case of a conflict with the Draft Convention on Terrorism, but added:

> Nothing in this Convention shall make an offence of any act which is permissible under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War or any other international law applicable in armed conflicts.

It is one thing to say that the Geneva law takes precedence in case of a conflict, but the effect of the second phrase of Article 13 is at least specifically more far reaching than one might normally

cited as U.N. Doc. A/AC.160/1]; U.N. S.G. Report, Analytical Study, Observations of States, U.N. Doc. A/AC.160/2 (June 22, 1973); and U.N. *Ad Hoc* Committee on International Terrorism, 28 U.N. GAOR, Supp. No. 28, U.N. Doc. A/9028 (Sept. 1973) [hereinafter cited as *Ad Hoc* Committee Report]. For a survey of possible implementary measures *see* J. Paust, *Possible Legal Responses to International Terrorism: Prevention, Punishment and Cooperative Action*, forthcoming.

[2] *See* U.N. Doc. A/AC.160/1 and Adds. 1-5; and *Ad Hoc* Committee Report. Included here are: Canada, Cyprus, Denmark, Federal Republic of Germany, Greece, the Holy See, Italy, Japan, Luxembourg, Spain, Sweden, United States, Uruguay, and Venezuela.

[3] *See id.* Included here are: Canada, Israel, Norway, Sweden, and Yugoslavia. One might add the United States because of the reference to the law of war in its Draft Convention for the Prevention of Certain Acts of International Terrorism, U.N. Doc. A/C.6/L.850 (Sept. 25, 1972), *reprinted at* 67 DEP'T STATE BULL. 431 (Oct. 16, 1972) [hereinafter cited as U.S. Draft Convention on Terrorism].

[4] *Supra* note 3.

infer from the use of the phrase shall "take precedence" in connection with Geneva law conflicts. The import of such a specific exception to the Draft Convention on Terrorism lies in the fact that regardless of what conduct is prohibited in the Draft Convention the action is not to be considered illegal if it occurs during an armed conflict and is otherwise permissible or unregulated under both Geneva law and other norms of the international law of war. Thus, it becomes extremely important to consider what is and is not permissible under the law of war in order to understand what would be the full effect of such an article in a general Convention on Terrorism in the context of an armed conflict. It is also necessary to note that, although the problem of terrorism has been dealt with in the past under the law of war, it would be useful to identify any present gaps in regulation as well as recent claims of exception from coverage.

First, it is most useful to begin the inquiry with a general perspective of international terrorism as a process and, then, to briefly explore the applicable normative prohibitions found today in the law of war. With this beginning, one can identify and interrelate certain general expectations of the international community and also explore the changes in perspective recently articulated by some members of the community in an effort to justify exceptions to a general proscription against terroristic conduct. Finally, an exploration can be made of the gaps or potential ambiguities which may exist in coverage by the law of war of all forms of terror in the battle context.

II. DEFINITIONAL FRAMEWORK

At the outset, a general definitional framework is disclosed so that readers may pursue the inquiry with the author on a shared footing. Moreover, it is not the purpose here to provide an in-depth analysis of definitional criteria, but it is nevertheless felt that the absence of a working definition could lead to confusion or ambiguity in a manner not unlike the debate carried on so far in the General Assembly and the literature. Terrorism is viewed here as one of the forms of violent strategies which are themselves a species of coercion utilized to alter the freedom of choice of others. The terroristic process—terrorism—involves the purposive use of violence or the threat of violence by the precipitator(s) against an instrumental target in order to communicate to a primary target a threat of future violence so as to coerce the primary target into behavior or attitudes through intense fear or anxiety in connection

with a demanded power (political) outcome. It should be noted that in a specific context the instrumental and primary targets could be the same person or group of persons. For example, an attack could be made on a military headquarters in order to instill terror or intense anxiety in the military elite of that headquarters. Additionally, the instrumental target need not be a person since attacks on power stations can produce a terror outcome in the civilian population of the community dependent upon the station for electricity.

There must be a terror outcome or the process could hardly be labeled as terrorism, a realization which seems to have eluded some of the U.N. debaters, but there are fine lines for juridical distinction to be made between fear and intense fear outcomes although in many cases the type of strategy could well be prohibited under different normative provisions of the law of war. For example, an attack upon or hijacking of a civil aircraft in the zone of armed conflict which produces no terror outcome among the crew, passengers or others may nevertheless violate prohibitions against attacks upon noncombatants or the taking of hostages as well as new international treaty norms governing hijacking. The point, however, is that this cannot properly be referred to as terrorism—perhaps attempted terrorism in some cases—and present definitions which refer merely to "acts of violence," "repressive acts," "violent acts of a criminal nature" (full of circuitous ambiguity per se), "a heinous act of barbarism," are strikingly incomplete. It may also be noted that terrorism can be precipitated by governments, groups or individuals so any exclusion of one or more sets of precipitators from the definitional framework is highly unrealistic. Equally unrealistic are definitional criteria which refer to "systematic" uses of violence, since terrorism can occur at an instant and by one act. Indeed, the law of war already makes no distinction between singular or systematic terroristic processes, governmental or nongovernmental precipitations, or governmental and nongovernmental targets, if distinctions in permissibility result, it is usually the result of a conscious policy choice and not a definitional exclusion in the fashion of an ostrich. Similarly unhelpful definitional criteria include: "unjust" activity, atrocious conduct, arbitrariness, irrationality, indiscriminate, selective and unexpected. Terror can be caused by an unintended act and terror can occur in connection with a demanded wealth or other nonpolitical outcome (motivation), but such events are not the purpose of this inquiry and do not seem to be those considered by the community.

III. GENERAL PRINCIPLES OF LAW AND TRENDS IN RELEVANT EXPECTATIONS

With this definitional framework in mind, the next matter of initial inquiry concerns certain general principles of law applicable to international terrorism in the broad sense not merely to terrorism in armed conflicts. One should recognize that not all strategies for violent coercion are permissible[5] and that the "justness" of one's political cause does not simplistically "justify the means" utilized.[6] Indeed, the Secretary General has put it more directly in his report on international terrorism:

[5] *See, e.g.*, U.N. S.G. Report A/C.6/418 at 7 and 41. Even in time of war, when power struggle is at its greatest intensity, it has long been a basic expectation of man that there are limits to allowable death and suffering and that certain normative protections are peremptory. *See, e.g.*, Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, preamble and art. 22, 36 Stat. 2277, T.S. No. 539; League of Nations, *Treaty Series* vol. XCIV (1929) No. 2138 [hereinafter cited as H.C. IV]. *See also* R. Rosenstock, *At The United Nations: Extending the Boundaries of Int'l Law*, 59 A.B.A.J. 412, 413 (Apr. 1973); J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 139-143 (1972), and references cited; U.N. S.G. Report, Respect for Human Rights in Armed Conflicts, 25 U.N. GAOR, U.N. Doc. A/8052 (1970) [hereinafter cited as U.N. S.G. Report A/8052]; G.A. Res. 2675, XXV (Dec. 1970), *reprinted at* 119 INT'L REV. OF THE RED CROSS 104, 108-109 (1971); U.N. S.G. Report, Respect for Human Rights in Armed Conflicts, 24 U.N. GAOR, U.N. Doc. A/7720 (20 Nov. 1969) [hereinafter cited as U.N. S.G. Report A/7720]; G.A. Res. 2444, 23 U.N. GAOR, Supp. 18, at 50, U.N. Doc. A/7218 (1969), condemning indiscriminate warfare, attacks on the civilian population as such and refusals to distinguish between "those taking part" in the hostilities and those who are not; U.S. DEP'T OF ARMY, FIELD MANUAL No. 27-10, THE LAW OF LAND WARFARE (1956) [hereinafter cited as FM 27-10]; and H. Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. YRBK. I.L. 360, 369 (1952) on the peremptory norm against intentional terrorization of the civilian population, as such, not incidental to lawful military operations.

[6] Here as elsewhere the theory that "the ends justify the means" is refuted. *See supra* note 5; and U.N. S.G. Report A/C.6/418 at 41. *See also* 1971 O.A.S. Convention to Prevent and Punish the Acts of Terrorism taking the form of crimes against persons and related extortion that are of international significance, 2 Feb. 1971, art. 2 T.S. No. 37, O.A.S./Ser. A/17, O.A.S./Off. Doc. AG/88 rev. 1; *reprinted at* U.N. S.G. Report A/C.6/418 at Annex V (not yet in effect) [hereinafter cited as 1971 OAS Convention on Terrorism]; Convention for the suppression of unlawful acts against the safety of civil aviation, 23 Sept. 1971, arts. 7 and 8 (ratified or acceded to by some 11 states) [hereinafter cited as 1971 Montreal Convention]; *reprinted at* U.N. S.G. Report A/C.6/418 at Annex IV: Convention for the suppression of unlawful seizure of aircraft, 16 Dec. 1970, arts. 7 and 8 (ratified or acceded to by some 46 states including the U.S.) [hereinafter cited as 1970 Hague Convention], *reprinted at* U.N. S.G. Report A/C.6/418 at Annex III; O.A.S. Res. 4, O.A.S. Doc. AG/Res. 4(I-E/70) (June 30, 1970), *reprinted at* U.N. S.G. Report

> At all times in history, mankind has recognized the unavoidable necessity of repressing some forms of violence, which otherwise would threaten the very existence of society as well as that of man himself. There are some means of using force, as in every form of human conflict, which must not be used, even when the use of force is legally and morally justified, and regardless of the status of the perpetrator.[7]

Another relevant trend in expectation has excluded the offense of terrorism from "political" crimes in connection with norms of extradition;[8] and relevant human rights instruments allow no exception to human rights protections on the basis of a postulated

A/C.6/418 at 36, and 9 (ASIL) INT'L LEG. MAT. 1084 (1970), stating: "The political and ideological pretexts utilized as justification for the crimes in no way mitigate their cruelty and irrationality or the ignoble nature of the means employed, and in no way remove their character as acts in violation of essential human rights"; and Convention on offenses and certain other acts committeed on board aircraft, 14 Sept. 1963, art. 2, implying an exclusion of any exceptions to prosecution on the basis of purpose or "political" offense (ratified or acceded to by some 62 states including the U.S.) [hereinafter cited as 1963 Tokyo Convention], *reprinted at* U.N. S.G. Report A/C.6/418, Annex II. For other relevant references which refute the simplistic "ends justify the means" myth *see, e.g.*, M. McDOUGAL, F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER, 72, 80 ns. 194-195, 134-135, 186-188, 521-524 and 529 (1961) [hereinafter cited as McDOUGAL, FELICIANO]; II OPPENHEIM'S INTERNATIONAL LAW 218 (Lauterpatch ed., 7 ed. 1952); FM 27-10, para. 3(a); J. PICTET (ed.), IV COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVIL PERSONS IN TIME OF WAR 15-16, 34, 37-40 and 225-226 (1958) [hereinafter cited as J. PICTET, IV COMMENTARY]; United States v. List, 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 66 (1949); United States v. von Leeb, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93-94 and 123 (1949); and H. HALLECK, INT'L LAW 426 (1861).

[7] U.N. S.G. Report A/C.6/418 at 41.

[8] Early work on terrorism prior to 1937 included drafts which specifically excluded terrorism or related acts from "political" offenses and created a criminal offense where the purpose was to "propound or put into practice political or social ideas" or "commit an act with a political and terroristic' purpose, thus pointing to the exclusion of the offense from the category of "political" crimes for extradition purposes. *See* U.N. S.G. Report A/C.6/418 at 11, 13, 16 and 22. Furthermore, many extradition treaties have excluded terrorism from "political" offenses; see *id.* at 16-21. The 1937 Convention for the Prevention and Punishment of Terrorism, 16 Nov. 1937, 19 LEAGUE OF NATIONS OFF. J 23 (1938), arts. 1, 9-10 and 19 [hereinafter cited as 1937 Convention on Terrorism], would seem to fit within this trend; and so would the United States Draft Convention on Terrorism, arts. 2-4, 6 and 7. The new U.S.-Cuba Agreement on Hijacking also seems to exclude the offense listed from the category of "political" crimes for purposes of extradition (and this seems the whole purpose of the agreement). *See* U.S. Dep't of State, Press No. 35, "Text of Note Signed Today by Secretary of State William P. Rogers Containing Agreement with Cuba on Hijacking," articles First and Fourth (Feb. 15, 1973).

political purpose in cases of conduct which would amount to acts or threats of terrorism.[9] It is worth emphasizing that even Marx, in sharp contrast to those who feign to follow him on a blood-filled battlefield, had declared in a clear and trenchant manner: "An end that requires unjust means is not a just end."

It cannot be overemphasized that this recognition of legal restraints on violent coercion and the unacceptability of "just" excuses per se is a key to the efficacy of norms proscribing terroristic strategies; for without a shared acceptance of these two basic premises, law can have little effect on the participants in the power process and they will increasingly defer to raw, violent power as the force and "just" measure of social change.[10] Numerous examples of claims to utilize any means of violence, to expand permissible target groups or to

[9] For example, even though the European Convention on Human Rights allows certain derogations under specified conditions, it affirms that no derogation is permissible from articles 2 (except "lawful" acts of war) and 3 or from other international obligations (such as H. C. IV or the 1949 Geneva Conventions). The Convention adds that nothing shall imply any right for any state, group or person to derogate from the rights and freedoms of persons set forth in the Convention or to limit such rights to a greater extent than is provided in the Convention. *See* 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 15 and 17, 213 U.N.T.S. 221 (1950) (arts. 2 and 3 prohibit conduct most often connected with terrorism). Similar absolute prohibitions against conduct which includes terroristic acts appear in other human rights instruments. *See* 1969 American Convention on Human Rights, arts. 4-5, 8, a5, a7, 29 and 32 (not yet in effect), *reprinted at* 65 AM. J.I.L. 679-702 (1971); 1966 Covenant on Civil and Political Rights, arts. 6-7 and 4(1) and (2), adopted by G.A. Res. 2200, 21 U.N. GAOR, Supp. 16, at 52-58, U.N. Doc. A/6316 (1966) (vote: 106-0-0) (not yet in effect); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, arts. 3, 4, 13, 16, 27-33 and 147 (1956), 6 U.S.T. 3516, T.I.A.S. No. 3365; 75 U.N.T.S. 287 [hereinafter cited as G.C.]. Note also that these prescriptions do not depend on reciprocity between contending participants in a particular arena for their force and effect, but are obligations to mankind (or at least to regional persons) and state provisional characterizations of persons and protections are subject to community review. *See* McDOUGAL, FELICIANO at 218-219; U.N. S.G. Report A/C.6/418 at 6-7 and 40-41; U.N. S.G. Report A/7720 at 31; and J. PICTET, IV COMMENTARY at 15-17, 21, 23, 34, 37-40 and 225-229.

[10] The concept of law adopted here recognizes the interplay between patterns of authority and patterns of control and that "authority" is ultimately based in the shared expectations of all members of the living human community. Decisions which are controlling but not based at all on authority are not law but naked power. *See* H. Lasswell, M. McDougal, *Criteria For A Theory About Law*, 44 S. CAL. L. REV. 362, 384 (1971) and references cited, *id.* at 380 n. 36 and 390 n. 40. See also J.N. Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968), and references cited, *id.* at 664 n. 3. Terrorism motivated by "blind fanaticism, or . . . the adoption of an extremist ideology which subordinates morality and all other human values to a single aim"

excuse human rights deprivations on the basis of a "holy" or "just" macro-political purpose appear in recent writings, and misconceptions of legal norms and goal values (policies) are far too frequent in legal literature.[11] Moreover, much of the philosophic literature

or the dominance of parochial political dogma by coercive violence is, of course, rejected. *See*, U.N. S.G. Report A/C.6/418 at 9, para. 18; and "Air Piracy Curb Signed By Nixon," Wash. Post, Nov. 2, 1972, at 7, col. 3, quoting the President: "A civilized society cannot tolerate terrorism. . . . Any action which makes a diplomat, a government official or any innocent citizen a pawn in a politically motivated dispute undermines the safety of every other person." *See also* Sec. Rogers, "A World Free of Violence," 67 DEP'T STATE BULL. 425, 429 (Oct. 16, 1972), stating that terrorist acts "must be universally condemned, whether we consider the cause the terrorists invoke noble or ignoble, legitimate or illegitimate"; and statement of M. Feldman, Assistant Legal Adviser for Inter-Am. Aff., Dep't of State, Executive Report No. 92-93 to Senate Committee on Foreign Relations, 92d Cong., 2d Sess., *Convention to Prevent and Punish Acts of Terrorism* 4 (June 5, 1972).

[11] *See, e.g.*, W. Lawrence, *The Status Under Int'l Law of Recent Guerrilla Movements in Latin America*, 7 INT'L LAWYER 405 (repeating the false myth that the law of war did not consider guerrilla tactics or revolutions), 406 (repeating the myth that support of the people is necessary for terrorists to come to power), 407 (stating that it is objectionable to require guerrillas to follow the law), 408 (falsely stating, in effect, that no guerrilla movements have met the requirements of H.C. IV, Annex, art. 1 or can in the future), 413 (repeating the last falsehood), and 420 (arguing for a reprisal right in case of an article 3 conflict contrary to shared expectation) (A.B.A. 1973); A. Rubin, *The Status of Rebels Under the Geneva Conventions of 1949*, 21 INT'L & COMP. L.Q. 472, 481 (1972); T. FARER, *The Laws of War 25 Years After Nuremberg* 42-43 (1971); and R. FALK, *Six Legal Dimensions of the United States Involvement in the Vietnam War*, II THE VIETNAM WAR AND INT'L LAW 216, 240 (R. Falk ed. for ASIL 1969), stating that the insurgent-guerrilla has no alternative other than terror to mobilize an effective operation. The incongruence of these claims with present and inherited legal expectation and the goals of human dignity and minimum world public order, and the inaccuracy of related guerrilla "myths" is sufficiently explored in J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, *supra* note 5, at 128-146. See also E. Rosenblad, *Starvation as a Method of Warfare—Conditions for Regulation by Convention*, 7 INT'L LAWYER 252, 258 and 267 (1973); G. Schwarzenberger, *Terrorists, Guerrilleros and Mercenaries*, 1971 UNIV. OF TOLEDO L. REV. 71 (1971); T. Meron, *Some Legal Aspects of Arab Terrorists' Claims to Privileged Combatancy* 1-10 and 25-28 (Tel Aviv 1970); T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 17, 22, 39-41, 136-137, 145, and 192-195 (1970); G. Wales, *Algerian Terrorism*, 22 NAVAL WAR COLL. REV. 26 (1969); W. Ford, *Resistance Movements and Int'l Law* (ICRC reprint 1968) (reviewing several customary trends, opinions of scholars and relevant cases); U.N. S.G. Report A/C.6/418 at 7 and 41; J. PICTET, IV COMMENTARY at 15-16, 31, 34, 37-40 and 225-226 (concerning the peremptory prohibition of terrorism); P. BORDWELL, THE LAW OF WAR BETWEEN BELLIGERENTS 229-231 (1908); H. HALLECK, INT'L LAW 386-387, 400-401 and 426-427 (1861); and H. G. VON MARTENS, THE LAW OF NATIONS 287 (Cobbett trans., 4 ed.

of certain revolutionaries contains "argument" (and not much profound thinking) that violence permeates all societies and institutions (everyone is doing it); man is exploited, tyranized, alienated (they're doing it to you); violence is a cleansing force and frees the alienated (you can resist and benefit from your own psychodrama); and violence is "necessary" in politics or for the dominance of one's own political predilection (you can do it and you can win).[12] A typical statement is that of Marcuse, that violence used to uphold domination is bad but violence practiced by the "oppressed" against the "oppressor" is good.[13] Although the average terrorist would probably be convinced by that statement, once one begins to map out the types of participants, perspectives, arenas of interaction, resource values, strategies employed, outcomes and effects in con-

1829). This is not the place for a more elaborate exploration, but it should be noted that Mr. Lawrence's conclusions about the general "humanitarian" nature of Latin American guerrillas and their "discriminating" tactics, see *supra* at 406 and 418-419, can be questioned; and he deleted certain references in Che Guevara's cited work, *supra* at 406 n. 2, concerning the harassment of cities with concomitant paralysis and distress to the entire population and certain "ruthless" tactics therein elaborated. On this point he also ignored the 1970 resolution of the O.A.S. Inter-American Commission on Human Rights, which condemned acts of political terrorism and of urban or rural guerrillas as being grave violations of human rights and fundamental freedoms. OAS/Ser.L/v/II.23, Doc. 19, Rev. 1, 23 Apr. 1970; see also U.N. S.G. Report A/C.6/418 at 35-39.

[12] *See, e.g.*, M. CRANSTON (ED.), PROPHETIC POLITICS: CRITICAL INTERPRETATIONS OF THE REVOLUTIONARY IMPULSE (1970). This work is useful for a concise reference to relevant claims by Che Guevara, Frantz Fanon, Jean-Paul Sartre, Herbert Marcuse, Ronald Laing and others, and for a critical analysis of those claims from political, sociological, historical and philosophical perspectives.

[13] *See id.* at 11; and H. MARCUSE, FIVE LECTURES 89-90, 93 and 103-104, *cf. id.* at 79 (1970). For a related claim by the state (the Soviet Union), *see, e.g.*, CONTEMPORARY INTERNATIONAL LAW 6 and 13 (G. Tunkin ed. 1969). For a recent evidence of insurgent practice along these lines *see* "Argentine Guerrillas Vow More Attacks," N.Y. Times, May 28, 1973, at 3, col. 6. It is not difficult to realize why the Soviets are prone to accept neo-Machiavellian theories that the ends (political) justify (legally) the means when it is known that part of the Leninist ideological tradition has been that morality is entirely subordinated to the interests of the proletarian class struggle—that its principles "are to be derived from the requirements and objectives of this struggle." H. MARCUSE, SOVIET MARXISM—A CRITICAL ANALYSIS 199 and 201 (1961). At least here Marcuse seemed highly critical of this approach, stating that "the means prejudice the end" and that the "end recedes, the means becomes everything; and the sum total of means is 'the movement' itself. It absorbs and adorns itself with the values of the goal, whose realization 'the movement' itself delays." *Id.* at xiv and 225. See also M. OPPENHEIMER, THE URBAN GUERRILLA 50, 57, 59-60, 63-64, 66, 69, and 161 (1969); A. CAMUS, THE REBEL 209, 292 (the means justify the end), passim (1956); and the declaration of Marx in the text, *supra*, p. 7.

nection with the "violence" in society and the strategies of "resistance" by the "oppressed," one should begin to ask a few questions and to reject such simplistic justifications for all sorts of violent strategy. Actually, not only is there insufficient guidance in the words "oppressed" and "oppressors," as with the errant meaning of the word "just," but necessarily the "oppressed" who use coercive violence are going to become the "oppressors" of someone else or some other thought so the "guidance" leaves us in circular confusion and mankind in a ridiculous spiral pursuit of self-destructive terror and counter-terror.[14] To add simplistically that terrorism is "necessary" so that the "will of the people" can be expressed is similarly unattractive and incredulous as a generality. An intentionally created terror necessarily suppresses a free expression of all viewpoints and a free participation of all persons in the political process.[15]

With such simplistic analyses of social and political process and conclusions of the "necessity" of violent revolution, it is not difficult to predict sweeping generalizations concerning the necessity of terrorism and transpositive notions of legality. These types of analytic inquiry and conclusions are, of course, also made by certain advocates of the "new" Right who seem to find their pleasure in an equally repugnant guardianship of the people. What is harder to understand is why some lawyers contribute to the abnegative claims that "just" or "good" (in their hearts) groups or guerrillas can ignore the law—especially international norms governing armed conflict and human rights.[16]

[14] *See* U.N. S.G. Report A/C.6/418 at 9 and 41; and G. Schwarzenberger, *Terrorists, Guerrilleros, and Mercenaries, supra* note 11, at 76. See also McDOUGAL, FELICIANO at 79-80, 652 and 656-658; and authorities cited *infra* note 26.

[15] See also text *infra* re: self-determination.

[16] *See, e.g.*, W. Lawrence, *The Status Under Int'l Law of Recent Guerrilla Movements in Latin America, supra* note 11 at 407-409, stating that the inclusion of the requirement that guerrillas observe the rules of warfare is "highly objectionable," "unlikely" and an "unbelievable" condition for pw status or recognition of the state of belligerency while adding that "the only essential condition" should be political recognition (apparently deferring to politicized conclusions or raw power); T. FARER, THE LAW OF WAR 25 YEARS AFTER NUREMBERG, *supra* note 21, at 42-43 (concerning terrorism); and R. Falk, *Six Legal Dimensions of the United States Involvement in the Vietnam War, supra* note 11, at 240. Mr. Lawrence's observations and goal values of human indignity necessarily intertwined with the deference to power are not surprising when we recognize that his teacher was Professor Rubin. *See* A. Rubin, *The Status of Rebels Under the Geneva Conventions of 1949, supra* note 11 at 476-479 for a surprising (knowing the ability and views of this author) textualist abhorrence of word ambiguity (or "meanings" which do not jump out

Those willing to explore the relevant juristic effort of mankind will find that recent trends in prescription and authoritative pronouncement which are themselves additional forms of legal response to terrorism have been sufficiently clear in recognizing that there are limits to permissible death, suffering and competitive destruction, no matter what the cause or type of participants. A basic human expectation incorporated into the customary law of war has been that even in times of extensive competition by arms (armed conflict) mankind expects that each party to the conflict will conduct his operations in conformity with the laws and customs of war. It has also long been generally expected that these norms "do not allow to belligerents an unlimited power as to the choice of means of injuring the enemy" [17] and that a respect for the law is not merely owed to the enemy but to all mankind. Furthermore, there is respected authority for the position that the customary law of war and practice have prohibited terrorism as an intentional strategy.[18] Moreover, there were at least two commissions estab-

of the document and pound on the head of the reader) which has led some to run from past and present context, identifiable goal values and shared expectations with defeatist warnings of the unworkability of rules and arguments that "ambiguities" must necessarily force us into a restrictive or myopic and textualist approach to interpretation or to some form of cowing to raw power and community inability to judge the claims of imaginative word jugglers who seek to derogate from the shared goals of human dignity. I would strongly recommend that the reader confronted with such "arguments" examine M. McDOUGAL, H. LASSWELL, AND J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967).

[17] *See* Project of an International Declaration Concerning the Laws and Customs of War, Adopted by the Conference of Brussels, Aug. 27, 1874, arts. 9(4) and 12, *reprinted at* I AM. J.I.L., SUPP. 96, 97-98 (1907). These expectations of law and custom were reiterated in the 1899 and 1907 Hague Conventions. *See* Hague Convention with respect to the Laws and Customs of War on Land, arts. 1(4), 2 and 22 (1899), *reprinted at* I AM. J.I.L., SUPP. 129, 134-135 and 142 (1907); and H.C. IV, Annex, art. 22.

The Hague Conventions were considered customary at Nuremberg; *see* FM 27-10, para. 6; and Judgment of the I.M.T., I T.M.W.C. 221 and 254 (1947). See also WINTHROP, MILITARY LAW AND PRECEDENTS 778-779 (2 ed. 1920) [hereinafter cited as WINTHROP].

[18] *See* Q. Wright, *The Bombardment of Damascus*, 20 AM. J.I.L. 263, 273 (1926); ASIL Report, Subcommittee No. 1, *To restate the established rules of international law*, 1921 PROCEEDINGS OF THE ASIL 102, 104 (1921), stating that "treacherous killings, massacres and terrorism are not allowed by the laws of war;" I J.W. GARNER, INT'L LAW AND THE WORLD WAR 283 (1920); E. STOWELL, H. MUNRO, INT'L CASES 173-176 (1916); and II WHEATON'S ELEMENTS OF INT'L LAW 789-790 (6th ed. 1929). See also the 1818 trial of Arbuthnot and Ambrister, III WHARTON'S DIG. OF THE INT'L LAW OF THE U.S. 326, 328 (1886); and the Code of Articles of

lished early in the 20th Century for the purpose of articulating the established norms of the law of war and they identified a widespread denunciation of terrorism as well as murder, massacres, torture and collective penalties.[19] A third group charged with the investigation of the German control of Belgium in World War I concluded that a deliberate "system of general terrorization" of the population to gain quick control of the region was contrary to the rules of civilized warfare, and that German claims of military necessity and reprisal action were unfounded.[20] The pre-World War I German Staff and jurists had openly favored terrorization of civilians in war zones to hasten victory or in occupied territory to insure control of the population;[21] but these views and implementary actions during the War were widely denounced as unlawful strategies.[22]

King Gustavus Adolphus of Sweden, art. 97 (1621), *reprinted at* WINTHROP 907, 913, stating that no man shall "tyrannize over any Churchmen, or aged people, men or women, maides or children, unless they first take up arms . . ." This prohibition grew into the customary prohibition of any form of violence against noncombatants. *See* WINTHROP at 778 and 843 (concerning the case of the "anarchist" Pallas, tried by a court-martial at Barcelona in September, 1893).

[19] *See Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement and Penalties,* List of War Crimes, items no. 1, 3 and 17 (1919) (copy at United States Army TJAG School) (members were: U.S., British Empire, France, Italy, Japan, Belgium, Greece, Poland, Romania, Serbia); and ASIL Report, *supra* note 18. It was not clear whether all form of violent terrorism (including terrorization of combatants not in force control) were denounced, but a general ban on terrorism was affirmed along with other strategies generally utilized only against combatants or against both combatants and noncombatants (*i.e.*, assassination, use of prohibited weapons, treachery, etc.)

[20] See Report of the Bryce Committee, 1914, *extract at* E. STOWELL, H. MUNRO, INT'L CASES 173 (1916). The Bryce Report added that the murder of large numbers of innocent civilians is "an act absolutely forbidden by the rules of civilized warfare"; *id.* at 176.

[21] For a brief consideration of the German jurists and the Prussian War-book *see* T. BATY, J. MORGAN, WAR: ITS CONDUCT AND LEGAL RESULTS 176 and 180-181 (London 1915). Karl von Clausewitz in 1832 had favored terrorizing the occupied populace including a spread of the "fear of responsibility, punishment, and ill-treatment which in such cases presses like a general weight against the whole population . . ."; see *id.* at 180 n. 1; and I. J.W. GARNER, INT'L LAW AND THE WORLD WAR 278-282 and 328 (1920). Garner added that it was "entirely in accord with the doctrines of the German militarists that war is a contest . . . against the civil population as well, that violence, ruthlessness, and terrorism are legitimate measures, and that whatever tends to shorten the duration of the war is permissible;" *supra* at 328. It is not clear whether Baty and Morgan repudiated the German views; but most other writers did. *See* J. W. GARNER, *supra* at 283.

[22] *See, e.g.*, E. STOWELL, H. MUNRO, *supra* note 20; J.W. Garner, *supra* note 21

Despite this background on the general prohibition of terrorism, however, Stowell had identified a problem in connection with air bombardment that was of great importance. He placed this problem before the community in 1931 when he stated that he recognized that under inherited expectations "the shocking inhumanity of acts of terrorism was rightly considered to be disproportionate to the military advantage to be derived from their use," but "the conditions of modern warfare as exemplified in the last war have given rise to serious doubts" concerning the condemnation of acts against the civilian population "intended to break down the stamina of the civilian population and to cause them to become so weary of further resistance that they would induce their government to sue for peace." [23] He also stated that an "impartial observer must recognize that the last war constitutes a precedent for directing operations against the civilian population in order to make them crave peace, and induce their government to submit." [24] But, he added, a study should be made of this problem in terms of these modern conditions of war, the military impact of such usages, which can be considerably high, the psychological outcomes among the civilians, which can be considerably grave, and the long-term effects of such a strategy "on the post-war survival of natural animosities and bickerings which will render the preservation of peace much more difficult." [25] This was an important insight by Stowell for he had thus predicted a massive aerial bombardment of civilian populations, difficult decisional questions and the need for a more comprehensive focus in order to achieve the most rational, realistic and policy-serving type of decisions in actual context. With similar

at 283; II WHEATON'S ELEMENTS OF INT'L LAW 789-790 (6th ed. 1929); and France, Ministry of Foreign Affairs, GERMANY'S VIOLATIONS OF THE LAW OF WAR, 1914-1915 at 77-215 (J. Bland trans. 1915). *Cf.* E. STOWELL, INT'L LAW 523-526 (1931), arguing for a reconsideration of the German claim of permissible terror in cases where the principle of military necessity applies and warning of a "precedent" for a World War II calamity which he could only dimly envision and would not deny. The 1949 Geneva Conventions would prohibit all acts of terrorism against protected persons regardless of military necessity claims, but Stowell's remarks were significant with respect to certain World War II bombardments which were most likely permissible then but would be condemned today. *See* McDOUGAL, FELICIANO at 79-80 and 652-657.

[23] *See* E. STOWELL, INTERNATIONAL LAW 524 (1931).

[24] *Id.* at 525. See also J. GARNER, RECENT DEVELOPMENTS IN INTERNATIONAL LAW 174 (Calcutta 1925); and J. Garner, *Proposed Rules for the Regulation of Aerial Warfare,* 18 AM. J.I.L. 56, 65, (1924) (but in each case expressing the desire for a prohibition of such acts).

[25] *See* STOWELL, *supra* note 23, at 524 n. 2, 525 n. 4 and 526.

claims being made today by certain precipitators of terro among civilian targets in many sectors of the world and intense ebate on the propriety of such conduct, it seems that we need a similar focus in order to reach any sort of consensus and to thus initiate an effective preventive and sanctioning effort by the community. At least now we have a more extensive documentation of human rights, both general and in times of armed conflict, for policy guidance.

In fact, since World War II distinguished authorities have recaptured the need for a peremptory norm which prohibits the intentional terrorization of the civilian population as such or the intentional use of a strategy which produces terror that is not "incidental to lawful" combat operations.[26] Underlying these viewpoints are policy considerations involving the need for limiting the types of permissible participants and strategies in the process of armed violence and a shared awareness of the need to prohibit the deliberate terrorization of populations in order to preserve any "vestige of the claim that war can be regulated at all" and to save from extinction the "human rights" limitations on the exercise of armed coercion within the social process.[27]

As if to reaffirm these trends in expectation, the 1949 Geneva Conventions contained a specific peremptory prohibition of "all measures" of "terrorism," [28] and numerous humane treatment pro-

[26] *See H.* Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. YRBK. I.L. 360, 378-379 (1952); McDOUGAL, FELICIANO at 79-80, 652 and 656-658; Carnegie Endowment for Int'l Peace, REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS 39, 42 (1971); and J. W. GARNER, RECENT DEVELOPMENTS IN INT'L LAW 174 (Calcutta 1925). *Cf.* E. STOWELL, INTERNATIONAL LAW 524-526 (1931). Present support for a peremptory prohibition of international terrorization of noncombatants would also seem to come from: Professor R. Baxter, G.I.A.D. Draper, Professor J. Freymond, M. Greenspan, Professor H. Levie, T. Meron, J. Pictet, G. Schwarzenberger, Dr. H. Meyrowitz, Professor Y. Dinstein and others. *See* T. Meron, *Some Legal Aspects of Arab Terrorists' Claims to Privileged Combatancy*, *supra* note 11; I and III ISRAEL YRBK. ON H.R. (1973); and G. Schwarzenberger, *Terrorists, Guerrilleros, and Mercenaries*, *supra* note 11 at 73-76.

[27] *See supra* note 26.

[28] G.C., art. 33. See also J. PICTET, IV. COMMENTARY at 225-226 and 594. This article is technically applicable only to noncombatants in the terror process since "protected persons" are defined in article 4. The article is also specifically applicable in case of an armed conflict of an international character including a civil war between "belligerents" (an article 2 conflict). *See* FM 27-10, para. 11(a); II OPPENHEIM at 370 n. 1; and HALLECK, ELEMENTS OF INT'L LAW AND LAWS OF WAR 151-153 (1866) concerning the applicability of the law of war to civil war between "belligerents." Respected authority states that terrorism is also prohibited in an

visions prohibit these and related acts of violence in all circumstances. Specific prohibitions include: violence to life and person, cruel treatment, torture, the taking of hostages, summary executions and other forms of murder or punishment without judicial safeguards, outrages upon personal dignity, and humiliating and degrading treatment.[29] A nonabsolute ban on all forms of "physical or moral coercion" against protected persons is also contained in the Conventions, and Pictet states that the prohibition is very broad although the drafters "had mainly in mind coercion aimed at obtaining information, work or support for an ideological or political idea." [30] Coercion of a violent or violence threatening nature to induce behavioral or attitudinal outcomes in the primary target, either the captured person or some "home" audience, in connection with an effort to gain "support for an ideological or political idea" is, however, just the sort of thing envisioned in the definitional framework provided above. The specific interrelated Geneva prohibitions mentioned above can also be viewed as means or strategies employed during a terroristic process in order to produce the desired outcome; and, thus, torture and inhumane treatment prohibitions become extremely relevant in limiting the possible methods one might seek to employ in carrying out a terroristic process. Recent efforts to supplement the Geneva Convention norms through two new Protocols have also contained specific reiterations of the prohibition of terrorism as well as the prohibition on any other form of armed violence directed at the civilian population as such.[31] Included in a 1972 ICRC Draft were "terrorization attacks" and "acts of terrorism, as well as reprisals against persons." An early 1973 Draft included changes such as: "acts and measures that spread terror,"

article 3 conflict (not of an international character), and it seems sufficiently clear that those who follow article 3 will not commit acts of terrorism against noncombatants. *See* J. PICTET, IV COMMENTARY at 31 and 40.

[29] *See, e.g.*, G.C., arts. 3, 16, 27, 31-34 and 147, and GPW, arts. 13, 17 and 130. Common article 3 contains each of these.

[30] See G.C., art. 31; and J. PICTET, IV COMMENTARY at 219-220. See also GPW, arts. 13, 17 and 99. Permissible derogations from this ban must serve other Geneva policies. *See* J. PICTET, IV COMMENTARY at 219-220.

[31] *See, e.g.*, ICRC, I BASIC TEXTS, Protocol I, art. 45, and Protocol II, art. 5 (Jan. 1972) (proposed draft Protocols to the Conventions, Conference of Governmental Experts, Geneva 3 May-3 June 1972), concerning specific prohibitions of "terrorization attacks" and "acts of terrorism." These prohibitions appear in articles designed to protect the general population and individual noncombatants against the dangers of armed conflict in both article 2 and 3 types of conflict (international and noninternational).

"attacks that spread terror among the civilian population and are launched without distinction against civilians and military objectives" [32] and "violent acts of terrorism perpetrated without distinction against civilians who do not take a direct part in hostilities." [33] If properly framed, the new prohibitions of terrorism in the Geneva Protocols will be important because they might help to implement customary and current expectation prohibiting *attacks* on the civilian population as such, whereas the present Conventions primarily protect persons already in control of the military force or in occupied territory and the wounded, infirm, women, children or "other persons" who are "exposed to grave danger." [34]

Similar trends in expectation have developed within the interconnected sphere of human rights contained in norms other than the law of armed conflict. Whether the 1474 trial of Peter von Hagenback fits into developing trends of human rights, the law of war or norms prohibiting the dominance of other people and territory by a "regime of arbitrariness and terror," is not important for this inquiry. The significance of the decision for our focus stems from the indicia of an early community condemnation of a government by terror as being an egregious defiance of "the laws of God and man." [35] In that case, the arrant denial of shared expectation necessitated community military action and the trial of captured perpetrators.

[32] It is doubtful that the "and" is meant as a condition or that attacks with distinction or discriminate attacks on civilians is meant to be approved.

[33] Again, it is doubtful that this sloppy draftsmanship contains an intended permissibility of discriminate attacks on noncombatants.

[34] It should be noted that most of those protected by G.C., art. 4 are those in force control ("protected persons"); however, article 4 also refers to Part II of the Convention and to a broader group of persons protected by articles 13 and 16, for example, ("persons protected"). *See* J. PICTET, IV COMMENTARY at 50-51 and 118-137; and J. Paust, *Legal Aspects of the My Lai Incident: A Response to Professor Rubin*, 50 ORE. L. REV. 138 (1971), *reprinted at* III THE VIETNAM WAR AND INTERNATIONAL LAW 359 (R. Falk ed. for ASIL 1972). No such "in the hands of" or control limitations attach to common article 3 of the Conventions and its prohibitions apply "in all circumstances" including "any time" and "any place" whatsoever. See also J. PAUST, A. BLAUSTEIN, WAR CRIMES TRIALS AND HUMAN RIGHTS: THE CASE OF BANGLADESH (Praeger 1974).

[35] See II G. SCHWARZENBERGER, INT'L LAW 462-466 (1968). The ancients had used terror to dominate others, but by the time of Vattel this was condemned. *See* III R. PHILLIMORE, COMMENTARIES UPON INT'L LAW 73 (3 ed. London 1879); and J. MACQUEEN, CHIEF POINTS IN THE LAWS OF WAR AND NEUTRALITY 1-2 (London 1862), adding that "cruelty, pillage and marauding, though practised largely in the first Napoleon's wars, have no sanction from any modern jurist."

Related claims to control the population of occupied territory in times of war through a process involving the taking of hostages and their execution in response to local population resistance have been authoritatively denied after both World Wars. After the Second World War it was further declared that the executions of hostages without strict compliance with reprisal principles and certain minimum judicial safeguards "are merely terror murders" and are impermissible regardless of a "reprisal" or other objective.[36] Now the Geneva Conventions also prohibit the taking of hostages in any type of armed conflict and for any purpose.[37] To serve a similar policy, they also prohibit collective penalties and reprisals against protected persons, no matter what the postulated need of those engaged in the armed struggle.[38]

Today it also seems reasonable to conclude that all forms of violent terrorism against noncombatants and captured persons and the governmental or private terrorization of others in order to coerce them from a free participation in the governmental process would violate human rights expectations documented in numerous international instruments. The 1948 Universal Declaration of Human Rights stated that "[e]veryone has the right to life, liberty and security of person" and that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." [39] This is the same type of language contained in the 1949

[36] *See* United States v. von Leeb, 10 TRIALS OF WAR CRIMINALS 1, 11 T.W.C. 528 (1948), adding that it might be impermissible to execute hostages under any circumstances. *Cf.* United States v. List, 11 T.W.C. 757, 1250 (1948).

[37] *See* G.C., arts. 3, 34 and 147; GPW, arts. 13, 84-85 and 130; and J. PICTET, IV COMMENTARY at 35-40, 229-231 and 596-601.

[38] *See* G.C., arts. 27 and 33; and J. PICTET, IV COMMENTARY at 199-202, 205 and 224-229. These prohibitions are arguably applicable to an article 3 conflict as well even though no specific mention of reprisals or collective penalties exists in the article. *See* J. PICTET, IV COMMENTARY at 34 and 39-40. In any event, it would be a very limited type of "reprisal" or "collective penalty" that could survive the absolute ban on hostages, murder, cruel treatment, torture, outrages upon personal dignity, other forms of inhuman treatment, and summary executions or the "passing of sentences" without regular court proceedings. Indeed, in view of the purpose of the article and the last mentioned form of prohibition it would seem that collective "penalties" are also prohibited unless such is actually beyond the connotation of the phrase in that a personal guilt of each accused has been somehow determined by an authoritative judicial body utilizing fair procedure. See also J. PICTET, IV COMMENTARY at 225.

[39] U.N. G.A. Res. 217 A, 3 GAOR, U.N. Doc. A/810, at 71, arts. 3 and 5 (1948). This is the 25th Anniversary of the Declaration and many scholars view it as an evidence of customary law. *See* J. CAREY, UN PROTECTION OF CIVIL AND POLITICAL

Geneva Conventions, and it would seem to document a similar expectation of the prohibition of all forms of terrorism through acts of violence to persons or threats thereof.[40] Similar language also appears in the 1966 Covenant on Civil and Political Rights[41] and two regional human rights conventions.[42] In addition to these trends in the documentation of human rights, other authoritative pronouncements have declared that acts of terrorism constitute serious violations of the fundamental rights, freedoms and dignity of man.[43] The U.N. Secretary General has added that "terrorism threatens, endangers or destroys the lives and fundamental freedoms of the innocent," [44] and a recent resolution of the U.N. General Assembly stated that that body was at least "deeply perturbed" over acts of international terrorism which take a toll of innocent human lives or jeopardize fundamental freedoms and human rights.[45] In

RIGHTS 13-14 (1970), *citing* the 1968 Montreal Statement. *See also* U.N. G.A. Res. 3059 (XXVIII) (Nov. 2, 1973) (adopted unanimously), rejecting "any form of torture and other cruel, inhuman or degrading treatment or punishment"—apparently also rejecting, then, any excuse; *see supra* note 6.

[40] This type of language appears in common article 3 of the Geneva Conventions, and respected authority asserts that it is broad enough to cover acts specifically prohibited in other articles such as acts of terrorism. *See* J. PICTET, IV COMMENTARY at 3 and 40. Detailed prohibitions contained in G.C., art. 3 but not necessarily in the 1948 Declaration as such include: taking of hostages and mutilation. See also 1948 Universal Declaration, arts. 2, 10 and 11; and U.N. G.A. Res. 3059 (XXVIII) (Nov. 2, 1973).

[41] U.N. G.A. Res. 2200A, 21 U.N. GAOR, Supp. 16, at 52, arts. 6(1) and 7, U.N. Doc. A/6316 (1966) (vote: 106-0-0) (not yet in effect). Note that article 4(2) prohibits all derogations from this basic expectation. One wonders, however, if some claims to terrorize combatants not in force control could survive this blanketing prohibitory language through policy inquiry and a comparison with developed expectations concerning the law of war (note that the law of war may not forbid *all* terrorism). Since the human rights provisions apply to all persons and no derogation is allowed from relevant articles even in times of war or grave public danger, the presumption may lie with a peremptory prohibition (with respect to all participants).

[42] *See* European Convention on Human Rights, arts. 2 and 3, U.N.T.S. 221 (1950); and American Convention on Human Rights, arts. 4, 5, 7(1) and 11(1) (1969), *reprinted at* 65 AM. J.I.L. 679 (1971) (not yet in effect). These regional human rights conventions also prohibit all derogations from the listed articles; see arts. 15(2) and 27(2) respectively.

[43] *See* O.A.S. Res. 4, O.A.S. Doc. A G/Res. 4(I-E/70) (June 30, 1970), *reprinted at* 9 (ASIL) INT'L L. MAT. 1084 (1970); and U.N. S.G. Report A/C.6/418 at 35-39, also *citing* the 1970 Inter-American Commission on Human Rights resolution on terrorism.

[44] U.N. S.G. Report A/C.6/418 at 41. *See also id.* at 6.

[45] U.N. G.A. Res. 3034, 27 U.N. GAOR, U.N. Doc. A/RES/3034 (1972) (vote:

1969 the Red Cross Istanbul Declaration also provided that "it is a human right to be free from all fears, acts of violence and brutality, threats and anxieties likely to injure man in his person, his honour and his dignity." [46] Necessarily included in such a ban would be acts of violent terrorism.

Not only do human rights expectations seem to prohibit almost all forms of violent terrorism *per se*, but terrorism utilized as a strategy to coerce others from a free and full participation in the governmental process would undoubtedly offend norms designed to assure a full sharing of power in the political process for all participants in the social process and the full sharing of enlightenment or the free exchange of ideas.[47] These fundamental human goals are supplemented by specific human rights references to equality, the impermissible distinction of persons on the basis of conflicting political or other opinion,[48] and the shared principle of self-determination. Indeed, terrorism, as a strategy to coerce others through violence, offends not only the free choice of the whole people but the freedom and dignity of the individual.[49] Such a

76-35 (U.S.)-17). The author feels that the split of votes was not due to the perspective outlined here. *See* "U.S. Votes Against U.N. General Assembly Resolution Calling for Study of Terrorism," 68 DEP'T STATE BULL. 81, 87-89 (Jan. 22, 1973). It should be noted that the word "innocent" is not a very useful criterion for distinction; nor does terrorization of the "guilty" leave mankind much better off. *See supra* note 22 and *infra*.

[46] XXIst Int'l Conference of the Red Cross, Res. XIX (Istanbul 1969), *reprinted at* 104 INT'L REV. OF THE RED CROSS 620 (1969). See also J. PICTET, THE PRINCIPLES OF INTERNATIONAL LAW 34-36 (1966); and Final Act of the International Conference on Human Rights, Res. XXIII (Teheran, April-May 1968).

[47] *See* 1948 Universal Declaration, arts. 18-19 and 21; 1966 Covenant on Civil and Political Rights, arts. 18-19 and 25; 1950 European Convention on Human Rights, arts. 9-10 (*cf.* art. 16), and Protocol I, art. 3; and 1969 American Convention on Human Rights, arts. 6(1), 12-13, 16(1) and 23.

[48] *See* 1948 Universal Declaration, arts. 1-2; 1966 Covenant on Civil and Political Rights, arts. 2(1), 3 and 18(2); 1950 European Convention on Human Rights, arts. 1 and 14; and 1969 American Convention on Human Rights, arts. 1 and 24.

[49] *See* O.A.S. Res. 4, *supra* note 43, stating that acts of terrorism constitute crimes against humanity, serious violations of the "fundamental rights and freedoms of man" or "essential human rights," and flagrant violations of "the most elemental principles of the security of the individual and community as well as offenses against the freedom and dignity of the individual"; U.N. S.G. Report A/C.6/418 at 7, 9 and 41, stating that "terrorism threatens, endangers or destroys the lives and fundamental freedoms of the innocent"; and J. Irwin II, Letter of Submittal, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE CONVENTION TO PREVENT AND PUNISH THE ACTS OF TERRORISM TAKING THE FORM OF CRIMES AGAINST PERSONS AND RELATED EXTORTION THAT ARE OF INT'L SIGNIFICANCE, Executive D, at

coercive interference with the political process is an attempt to deny the full sharing of power by all participants in the given social process, or the denial of a "determination" by an aggregate "se[lf]." [50] Moreover, when such attempts at elitist control of the political process are made by parties or states outside of the particular social process (especially a state boundary) such "exported" terrorism for that purpose would offend norms governing intervention. More specifically, a widely recognized prescription with customary background declares that:

> Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed toward the commission of such acts. . .[51]

A similar prescription prohibits related attempts to "organize, assist, foment, finance, incite or tolerate subversive, terrorist or other armed

3, Senate, 92d Cong., 1st Sess. (May 11, 1971). See also Ambassador Bennett, "U.S. Votes Against U.N. General Assembly Resolution Calling for Study of Terrorism," *supra* note 45, at 81-83 and 92; G.A. Res. 3034, 27 U.N. GAOR, U.N. Doc. A/RES/3034, art. 4 (Dec. 18, 1972) (vote: 76-35(U.S.)-17) (re: governmental terrorism and human rights); and Secretary Rogers, "A World Free of Violence," *supra* note 10, at 429.

[50] *See* 1970 Declaration Concerning Friendly Relations and Cooperation, U.N. G.A. Res. 2625, 25 U.N. GAOR, Supp. 18, at 122-124, U.N. Doc. A/8028 (1970); Universal Declaration of Human Rights, arts. 21(1) and 21(3); U.N. G.A. Res. 2131, Declaration on the Inadmissibility of Intervention, *infra* note 51; and 1966 Covenant on Civil and Political Rights, arts. 1 and 25(a) and (b).

[51] U.N. G.A. Res. 2625, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, 25 U.N. GAOR, Supp. 18, at 122-124, U.N. Doc. A/8028 (1970) (elaborating expectations connected with U.N. CHARTER, art. 2(4) and adding: "when the acts referred to in the present paragraph involve a threat or use of force"). See also Draft Convention on Terrorism, preamble and art. 10(1); 1971 O.A.S. Convention on Terrorism, art. 8(a); 1971 Montreal Convention, art. 10(1); 1937 Convention on Terrorism, arts. 1(1) and 3; U.N. G.A. Res. 2131, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 20 U.N. GAOR, Supp. 14, at 11-12, U.N. Doc. A/6014 (1965) (vote: 109-0-1(U.K.)); and Draft Code of Offenses Against the Peace and Security of Mankind, art. 2(4), (5), (6) and (13), 9 U.N. GAOR, Supp. 9, at 11-12, U.N. Doc. A/2693 (1954) (adopted by the UN ILC). See also *League of Nations Covenant* art. 10; I OPPENHEIM'S INT'L LAW 292-293 (8 ed. 1955) and II OPPENHEIM'S INT'L LAW 698, 704 and 751-754 (7 ed. 1952). For comments on the 1970 Declaration Concerning Friendly Relations *see, e.g.*, U.N. S.G. Report A/C.6/418 at 27-29; and R. Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J.I.L. 713 (1971).

activities;" [52] and the United Nations Secretariat has stated that a punishable act should include the incitement, encouragement or toleration of activities designed to spread terror among the population of another state.[53] The above prescriptions are also supported by a long history of expectation usually categorized in terms of aggression or intervention.[54]

In view of the numerous documented expectations prohibiting acts of violence relevant to the terroristic process one might conclude that any new convention on terrorism will only reaffirm these trends and would be most significant for its procedural mechanisms for implementation.[55] Already supplementing the law of armed conflict and human rights, of course, are the more specific air hijacking and sabotage conventions[56] and the regional O.A.S. Convention on Terrorism.[57] But, one might ask, if there are numerous norms prohibiting terrorism in armed conflicts, as well as in certain other contexts, then why are there still problems ahead for the complete, rational and policy-serving regulation of terrorism in times of armed conflict? First, there is a minority of states which has recently articulated certain claims for an exception to the seemingly complete ban on terrorism during armed conflict; and second, there are hidden gaps within the present coverage of this matter by

[52] 1970 Declaration Concerning Friendly Relations and Cooperation, *supra* note 51. This prescriptive elaboration is listed under a section on U.N. Charter, art. 2(7).

[53] *See* U.N. S.G. Report A/C.6/418 at 26. This would include individual criminal sanctioning and such individual responsibility can be found in numerous examples of current expectation or traced to customary law as is the 1818 case of Arbuthnot and Ambrister. *See* III WHARTON'S, DIG. OF INT'L LAW 326 (1886).

[54] *See, e.g.*, U.N. S.G. Report A/C.6/418 at 30; *supra* notes 51-52; II Oppenheim at 656, 678-680, 698, 704, 751-754 and 757-758; Q. Wright, *Subversive Intervention*, 54 AM. J.I.L. 521, 533 (1960); II G. HACKWORTH, DIG. OF INT'L L. § 155, at 334-336 (1941); and United States v. Arjona, 120 U.S. 479 (1887).

[55] If this is true, then the main focus of this article and the author's other one cited *supra* note 1 should allow the reader to test the new efforts put before the United Nations in terms of Convention proximity to implementary needs and realistic possibilities.

[56] These are the 1963 Tokyo, 1970 Hague and 1971 Montreal Conventions, *supra* note 6.

[57] *Supra* note 6. Note that article 1 articulates the undertaking of the Contracting Parties to prevent and punish all acts of terrorism, although the Convention's main aim seems to lie in the protection of "persons to whom the State has the duty to give special protection according to international law" (notably diplomatic personnel). Do protected persons under the Geneva Conventions qualify? It would not seem to matter in view of the Geneva prohibition of terrorism and the Geneva obligations upon all signators and parties to take affirmative protective measures. *See* J. PICTET, IV COMMENTARY at 45-51, 133-135, 201-205 and 225-226 on this point.

the law of war. Moreover, although it appears that almost any form of terrorism will thwart some basic policy of human dignity or world public order, there may still be some overriding case of "necessity" which balances against a normal prohibition if the community has not already placed an absolute ban on the particular activity. All relevant legal policies have to be considered as well as all relevant features of context. Some of the claims which follow result from attempts to ignore all relevant policies and circumstances and this unavoidable need for rational choice.

IV. RECENT DIVERGENT CLAIMS

Apparently in direct conflict with their pledges to respect and to ensure respect for an absolute ban on terrorism against civilians protected by the Geneva Civilian Convention, there are claims being made by some states that community efforts to regulate terroristic acts should not apply in the context of a national liberation movement where a people are legitimately seeking self-determination.[58] It is difficult to judge, however, how many states make this sort of claim in connection with the general debate on international terrorism. Some fourteen states seem to openly take a similar stance, but upon close inspection many of these merely claim that a ban on international terrorism "should not affect" the inalienable right to self-determination and independence of all peoples or "the legitimacy of their struggle" (or words of similar effect).[59] Such a claim

[58] *See* U.N. Doc. A/AC.160/1 and Adds. 1-5; and *Ad Hoc* Committee Report. Included here (with some uncertainty as to actual position) are: Byelorussian Soviet Socialist Republic(?), Cyprus, Czechoslovakia, Greece(?), Italy(?), Lebanon, Nigeria, Norway(?), Romania(?), Syrian Arab Republic, Ukranian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yemen Arab Republic, Yugoslavia. Sweden would seem to wish to exclude this context as well by its unacceptable, conclusionary definition of what is "international" (in apparent disregard of U.N. CHARTER, art. 2(7) consequences for human rights efforts). See U.N. Doc. A/A.C.160/1 at 32-33.

[59] It should be noted that the Nonaligned Group in the *Ad Hoc* Committee (Algeria, Congo, Democratic Yemen, Guinea, India, Mauritania, Nigeria, Syrian Arab Republic, Tunisia, United Republic of Tanzania, Yemen, Yugoslavia, Zaire and Zambia) expressed the view that the ban on terrrorism "*should not affect* the inalienable *right to* self-determination and independence . . . *and the legitimacy of their struggle*, in particular the struggle of national liberation movements, in accordance with the purpose and principles of the Charter . . ." (emphasis added). Some of the members of the Nonaligned Group seem to actually have taken a much stronger position elsewhere; see *supra* note 58 (*i.e.*, Nigeria, Syrian Arab Republic, Yugoslavia). Note that a struggle "in accordance with the purposes and

seems merely to affirm that an otherwise legitimate use of force or overall struggle for self-determination should not itself be considered as an impermissible terroristic process per se.[60] With this, the author must agree. But, then, it would seem that no claim is being made by even these states that during such a self-determination struggle *any* means of force including terroristic strategies directed against civilians protected under the Geneva Civilian Convention is to be permissible in that context. With such a claim, the author would have to totally disagree and it has already been disclosed that the end does not simplistically justify any means to that end. Each claim as to the permissibility of terrorism would have to be analyzed in terms of the actual context with a comprehensive reference to: participants, perspectives, base values or resources, situations of interaction, strategies utilized, actual outcomes and long-term effects, as well as the goal values involved, impacts upon goal value realization, and so forth.[61] There are a few states which seem

principles of the Charter" would most certainly seek to respect and to ensure respect for human rights in times of armed conflict (plus general human rights). *See* U.N. CHARTER, preamble and arts. 1(2) and (3), 2(4), 55(c) and 56.

[60] Note that a claim that an otherwise permissible process of political change should not itself (as a whole be banned because of its terror impact is far different than a claim that any means utilized during such a process should be legitimate when they are analyzed as separate strategies. It seems quite likely that most states which mention self-determination or national liberation movements wish to claim only that the overall process should not be impermissible because of some terror impact. The author notes that the mere accumulation of terror producing strategies that are separately impermissible into a movement should not result in a conclusion of permissibility. Thus, the author wishes to reserve judgment on self-determination processes with the remark that they should not be impermissible per se because of some terror impact. Each process would have to be examined in terms of all relevant goal values and the actual context. *Contra* U.N. S.G. Report A/C.6/418 at 7, stating: "The subject of international terrorism has . . . nothing to do with the question of when the use of force is legitimate. . ." Moreover, because of the author's concept of authority and legitimate self-determination (by all participants in a freely determined process), see *supra*, the author finds the remarks of Czechoslovakia which condemn acts of "individual" terrorism "as a means to achieve revolutionary aims" quite compatible with his own view. See U.N. Doc. A/A..C.160/1/Add. 2 at 3. *See also* U.N. Doc.A/A.C.160/1 at 3, for the apt statement of Austria that "acts of individual violence should be condemned . . . since they, by their very nature, infringe upon the right of self-determination of those peoples whose Governments become the object and aim of such terroristic acts and jeopardize peaceful and constructive relations between States."

[61] *See, e.g.*, MCDOUGAL, FELICIANO, *passim*; and *supra* note 10. *See also* U.N. G.A. Res. 3166 (XXVIII) (Dec. 14, 1973), adopting the new Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons,

to have specifically claimed that *any* means utilized in such a self-determinative process, if not in an elitist attempt to control the ideological and political perspectives and events in a given social process—a form of dominance, should be legal; but their uncompromising and extreme viewpoints seem thus far to have convinced no one else.[62]

Another related type of claim recently coming into focus[63] is that any means utilized to confront an "aggressor" should be permissible or excluded from a ban on terroristic acts of international significance.[64] Of course, there is a well documented international consensus, inherited and present, that is opposed to such a claim and in modern times it has been fairly consistently expected that no exception to the coverage of the law of war should be made on the basis of the "aggressor" status or "unjust" quality of the actions of one or more of the parties to a particular armed conflict. Underlying this expectation is a recognition that it is often difficult to determine which party is an aggressor, that without an authoritative determination on such a matter each party to the conflict might refuse to apply the law of war to the other parties to the conflict in the context of conflicting assertions and escalating inhumanity, and that the law of human rights in times of armed conflict is designed to assure protection to all noncombatants regardless of race, colour, religion, faith, sex, birth, wealth, political opinion

including Diplomatic Agents, recognizing that the Convention "could not in any way prejudice the exercise of the legitimate right to self-determination. . ."

[62] *See* U.N. Doc. A/A.C.160/1 and Adds. 1-5; and *Ad Hoc* Committee Report. They have left no other feasible interpretation. Included are: Cyprus, Czechoslovakia, Lebanon, Nigeria, Syrian Arab Republic, Ukranian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yemen Arab Republic, Yugoslavia. Note that the Union of Soviet Socialist Republics is included here while the Byelorussian Soviet Socialist Republic is not (surely an oddity) because of the Byelorussian use of general terms such as movements, opposition and assertion of rights, whereas the U.S.S.R. refers to acts and action (presumably any acts or means within the struggle, opposition or assertion of rights). More specifically, Yugoslavia refers to an exclusion of interference "in any way" with struggles and an approval of the carrying on of a struggle "with all means at their disposal" (similar statements come from Cyprus, Czechoslovakia, Lebanon, Nigeria, Syrian Arab Republic, Yemen Arab Republic).

[63] Made only by three entities: Czechoslovakia, Ukranian Soviet Socialist Republic, Union of Soviet Socialist Republics.

[64] *See* U.N. Docs. A/A.C.160/1/Add. 1 and Add. 2. Close positions are those of Lebanon and the Syrian Arab Republic which refer to a situation where a people is fighting "to reconquer usurped territories, to drive out an invader," or to seek "the liquidation of foreign occupation."

or similar criteria and is a law built upon the expectancy of an obligation owed to all of mankind rather than to the mere number of participants actually involved in the fray.[65] Moreover, the goal values covered in that law are deemed too important to give way to such a claim and most norms are of a peremptory nature allowing for no derogation on the basis of state status, political or ideological pretext, military necessity or state or group interest unless specifically so stated for a particular prescription.

Regardless of the final acceptance or nonacceptance of such a claim in connection with the efforts to prohibit international terrorism in general, it seems clear that in connection with the regulation of terrorism under the law of war such a claim is doomed to failure in view of the widely shared and inherited expectations of the community and the important goal values at stake which provide a necessary backbone for all human rights.

A third claim of a related nature might seek to exclude the context of a struggle by workers from terroristic regulation.[66] Undoubtedly the lack of any adherents to this view beyond the Soviet frontiers will lead to its demise in the general debate. Although a little more specific than references to "oppressors" and "oppressed," this worker struggle exception suffers from a similar criterial ambiguity, though I am sure that the Soviets could call them as they see them for the rest of us if the community wanted to be left to such an uninclusive fate. Suffice it to say here that this claim has never been specifically raised in a law of war context and there does not seem to have ever been demonstrated any shared policy reason why "workers" should be allowed to terrorize everyone else.

A fourth claim of a related nature that has not appeared in recent general debates on international terrorism, but which has arisen in the context of efforts to revitalize certain provisions of the law of war, is that the means employed by insurgent guerrillas in a guerrilla war or armed conflict, including the terrorization of noncombatants, should be permissible.[67] Some have even advocated that in a guerrilla warfare context all participants should be allowed to escape the regulation of the law.[68] Both of these claims are minority

[65] *See, e.g., supra* notes 5, 6, 9 and 59.

[66] See U.N. Docs. A/A.C.160/1/Add. 1 and Add. 2. Advocates include: Byelorussian Soviet Socialist Republic, Ukranian Soviet Socialist Republic, Union of Soviet Socialist Republics.

[67] See *supra* notes 11-13; and U.N. S.G. Report A/8052 at 56-57 (view of "some of the ICRC experts").

[68] See *id.*

viewpoints and both run counter to a customary law and Geneva law which recognize no sweeping exception for guerrillas or guerrilla warfare.[69] Indeed, as disclosed elsewhere by the author with a more comprehensive analysis of the issues involved, the law of war was developed with both a guerrilla warfare and an insurgent/belligerent power struggle experiential and policy formulative background; adherence to its norms and goal values will more greatly assure the fulfillment of human rights, the lessening of indiscriminate suffering, the protection of noncombatants, restraint upon armed violence, the abnegation of raw power as the measure and force of social change, a human freedom from inhumane or degrading treatment, and the serving of all other policies intertwined with human dignity and minimum world public order.[70]

It seems that none of these four types of claimed exceptions will find community approval for law of war contexts. They are all extreme forms of attempted exception which seek to exclude a whole context of violent interaction from legal regulation rather than to advocate a particular policy for authoritative decisional balancing or the regulation of all contexts with deference to certain policies in the case where conflicting policies present themselves with an otherwise relatively equal weight. If the community chooses to give a strong policy weight in favor of self-determination, for example, then that preference should be balanced in terms of actual context, actual conflicts with other goal values, and the decisional questions familiar to law of war specialists which are generally categorized in terms of "military necessity," "proportionality," and "unnecessary suffering." Where, however, higher preference has been demonstrated for certain human rights goal values such as the peremptory Geneva law protections, these preferences should continue to balance against claimed "self-determination" exceptions to an applicable ban on terrorism. Thus, one should identify all goal values at stake in a given context of armed violence and also align the goal values for decisional consideration in terms of peremptory goals, higher order goals, lower order goals, etc. (and make these choices known). This type of approach might well lead to a conclusion that a specific form of a self-determination process is permissible in general even though its outcome is somewhat of a terroristic nature, but also lead to a conclusion that within such a self-determinative process a particular attack on a civilian population is impermissible in view of the peremptory goal values which regulate the means of carrying on any armed conflict. Another conclusion that seems possible is that within that general process, conflict or struggle, a terroristic attack on "counter" participants of a military character, in a specific subcontext, can be permissible. This brings up the final focus for our inquiry—are there any gaps in the present coverage by the law of war of terrorism in armed conflict?

[69] See *id.*

[70] *See* J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility, supra* note 5 at 128-146; and *J. Paust, Law In A Guerrilla Conflict: Myths, Norms and Human Rights,* III Israel Yrbk. on Human Rights (1973). See also U.N. S.G. Report A/7720 at 54-55 and 118-128; U.N. S.G. Report A/8052 at 56-73; and ICRC, I Basic Texts 15 (Protocol I, art. 38) and 40 (Protocol II, art. 25) (Geneva Jan. 1972).

V. GAPS OR AMBIGUITY IN COVERAGE

A. CLAIMS RELATING TO COMBATANTS

Whether there is a gap in coverage, an unregulated situation, or an intended exclusion of terroristic attacks on combatants under prohibitory norms of the law of war, a permissible situation, is hard to say; but it does seem that no complete ban on terrorism practiced against military combatants or military targets when the terror outcome relates to military personnel presently exists. There are, of course, general bans on "unnecessary suffering," the use of poison, assassination, refusals of quarter, the "treacherous" killing or wounding of individuals, among others regardless of the combatant or noncombatant character of the intended target.[71] These sorts of prohibition will regulate terrorism on the battlefield to a certain extent in the sense that some terroristic acts will be prohibited and others will not. Yet, no specific ban on the use of a strategy of terrorism against combatants specifically appears in the prescriptions as it does under customary law in connection with noncombatant targets or under the Geneva Conventions in connection with noncombatants[72] or captured military personnel—prior combatants that become noncombatants due to capture and control.[73]

Again, what is authoritatively interpreted as "treacherous" or "unnecessary" will vary with circumstances and the policies to be

[71] *See, e.g.,* H.C. IV, art. 23; FM 27-10, paras. 28-34 and 41; and J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility, supra* note 5, *passim.*

[72] *See, e.g.,* G.C., arts. 3, 13, 16, 31 and 33; and J. Pictet, IV Commentary at 31, 40, 220, 225-226 and 594.

[73] *See, e.g.,* G.P.W., art. 17 (prohibiting physical and mental torture or "any other form of coercion," etc.).

served. Sometimes the label "treacherous" will coincide with the use of a terroristic strategy and, thus, result in a legal decision of impermissibility. However, where there is a necessary, and not otherwise treacherous, terrifying attack on counter military groups, combatants, the conduct may well be permissible in most cases. Notably lacking are prescriptions governing terror or even fear inducing combat tactics utilized against combatants. The 1949 Geneva Convention on prisoners of war does not attach until the relevant person has "fallen into the power of the enemy" (article 4), in the case of an international armed conflict, or is a person "taking no active part in the hostilities," in the case of an armed conflict not of an international character, (common article 3). The same applies for "combatants" covered under the Geneva Wounded and Sick Convention.

History is far too replete with examples of the use of terror tactics against one's combatant enemies to support a claim that law prohibits such conduct entirely or that armies are willing to give up such a strategy in the context of armed conflict. We have referred to the remarks of von Clausewitz that favored the use of terror against civilians for effective control,[74] and one can imagine the lack of restraint which must have then existed upon the use of terror against combatants. In a recent article, Colonel Neale has stated that "[m]ilitary terror differs from civil terror whose ultimate end is control, while the first aims for the physical and moral destruction of the enemy's armed forces."[75] He rather unhesitatingly accepts it as "a legitimate instrument of national policy";[76] and adds that it has been extensively utilized in warfare. To document this statement he lists events such as the Nazi V-1 rocket attacks on English cities, the Allied terror-bombing of Dresden, events such as Hiroshima, Rotterdam, Coventry—all events apparently to place pressure upon the enemy military elites or overall capacity in much the same way the Germans attempted in World War I to do so for area control—and also states:

> Various modern warfare techniques are as terror-inducing as Hannibal's elephants were intended to be: unrestricted submarine warfare by Germany in the First World War, the initial use of tanks, napalm and poison gas.[77]

[74] See *supra* note 21.

[75] Col. W. Neale, "Oldest Weapon in the Arsenal–Terror," Army, Aug. 1973, at 11, 13.

[76] *Id. at* 11. "Legitimacy" here seems to be concluded more from extensive use and effectiveness than from any analysis of actual perspectives.

[77] *Id.* at 13-14.

Terrifying weapons probably have been used throughout history for a terror impact in addition to normal military use,[78] just as the ancients played upon psychological predispositions when they utilized new weapons, tactics or means of dress and deception. A 17th Century Dutch jurist (Zouche) posed the question whether "the superstition of enemies may be used to their hurt?," and apparently added the following passage to mark his approval:

> Philip, King of Macedon, crowned with laurel his soldiers when they were about to fight against the Phocians, because the Phocians had despoiled the temple of Apollo, and so would be terrified at the sight of that god's own leaf. The device succeeded, for they at once turned their backs, were cut down, and gave the King a bloodless victory . . . Gentilis says there is no reason why advantage should not be taken of the superstition of enemies. . .[79]

Ever since the time of the ancients, the practice of instilling panic in the enemy so that his forces can be cut down has persisted, and no legal distinction exists between the killing of the fighting or the fleeing soldier unless in a specific context it would be rather easy to capture him. But another 17th Century Dutch jurist Grotius, sought to draw a distinction between those still fighting and the captured with the following passage on the killing of those who are captured or willing to surrender:

> Exceptions, by no means just, to these precepts of equity and natural justice are often alleged:—Retaliation:—the necessity of striking terror:—the obstinacy of resistance. It is easily seen that these are insufficient arguments. There is no danger from captives or persons willing to surrender; and therefore, to justify putting them to death, there should be antecedent crime, of a capital amount. . .[80]

By the 18th and 19th Centuries, the distinction by Grotius was fairly well accepted, although one text writer, while criticizing an earlier practice, actually raised a claim that would be seen again as he stated:

[78] One is reminded of the earlier use of the cross-bow, arbalist, harquebus, musket and poison gas, and their subsequent condemnation. *See, e.g.*, MAINE, INTERNATIONAL LAW 138-140 (2 ed. 1894); and C. FENWICK, INTERNATIONAL LAW 667 (1965).

[79] R. ZOUCHE, AN EXPOSITION OF FECIAL LAW AND PROCEDURE, OR OF THE LAW BETWEEN NATIONS, AND QUESTIONS CONCERNING THE SAME 175-176 (Holland 1650; C.E.I.P. ed., J. Brierly trans. 1911).

[80] III. H. GROTIUS, DE JURE BELLI ET PACIS 222-223 (W. Whewell trans. 1853). See also J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility, supra* note 5 at 129, and authorities cited.

> In ancient times an invading army, to inspire terror, sought the earliest opportunity of displaying its severity. The slaughter of those who held out was vindicated on the ground that destroying one garrison without mercy might prevent others from resisting, and so save the effusion of blood.[81]

Today, Che Guevara has written of the use of terror against "point men," the lead elements of a military unit on the move:

> It is very important as a psychological factor that the man in the vanguard will die without escape in every battle, because this produces within the enemy army a growing consciousness of this danger, until the moment arrives when nobody wants to be in the vanguard.[82]

Moreover, in stressing the psychological impact of a guerrilla ambush but blurring the distinction made by Grotius and present norms he writes:

> After causing panic by this surprise, he should launch himself into the fight implacably . . . Striking like a tornado, destroying all, giving no quarter unless tactical circumstances call for it, judging those who must be judged, sowing panic among the enemy combatants. . .[83]

Also of recent import has been the practice of armies in combat in utilizing strategies aimed at inducing psychological states of fear, anxiety and terror by such methods as: using silencers on weapons for night sniping, using night barrages of fire or intermittent firing for such purposes, calling out to enemy encampments at night, using loudspeakers at night to threaten or play upon enemy superstitions such as fear of death–death moans, using intermittent silent periods between attacks upon enemy positions, using boobytraps–or any material or weapon–for such purposes, mutilating the dead or dying–strictly prohibited by customary law and Geneva law–torturing detainees for information or any other purpose–strictly prohibited by Geneva law–attacking all scouts or troop outposts–or any particular location or functionary–for such a purpose, playing

[81] J. MacQueen, Chief Points in the Laws of War and Neutrality 1-2 (London 1862). This claim of the ancients is close to a claim of military "necessity" and seems to have been followed by Clausewitz, many of the WW I and WW II German military officers if not as well by Allied air commanders, and U.S. General Sherman in a somewhat different style. See *supra* notes 20-22; and E. Stowell, H. Munro, International Cases 172-173 (1916).

[82] Che Guevara, Guerrilla Warfare 65 (J. Morray trans. 1969). See also *id.* at 10-11, 16-19, 85, 93-94.

[83] *Id.* at 36. Included in his "judging" of those "who must be judged" are claims for summary execution and assassination with terror outcomes of military advantage. *See id.* at 16, 18-19, 29, 85 and 93-94. Of course, summary executions, assassinations and "giving no quarter" are strictly prohibited by the law of war.

"cat and mouse" with an enemy unit readily subject to capture or quick annihilation, spreading false rumors of disease or other calamitous events in order to force a panic or surrender, threatening to summarily execute captured enemy personnel or armed "resisters" and sabatours–something that would be strictly prohibited by Geneva law–threatening other types of reprisals against persons protected by the Geneva Conventions–something that would be equally prohibited–including threatening to maltreat captured relatives or friends or "sympathizers" of enemy personnel or causes, and uses of massive fire power against enemy combatants for such purposes. Terrifying a combatant through conduct which is otherwise prohibited presents no problem for legal decision–it remains prohibited. Terrifying by threatening to do something which would be prohibited if the threat were carried out should be viewed as impermissible, as is the case under general efforts to prohibit threats and attempts under a general Convention on terrorism, since the policies behind the specific prohibitions would seem better served by such an approach; but there have been no actual cases or legal principles of such a specific character known to the author outside of the argument here. The remaining question–is everything else directed at combatants to be permissible or are there cases where the serving of goal values requires some restrictions on the use of terror against combatants by other combatants?[84] Only the community can provide the ultimate answer, but perhaps a proper deference to the principles of "necessity," "proportionality," "unnecessary suffering," and humane treatment will leave little else for regulation except where a specific consensus develops concerning the proscription of a specific type of strategy.

B. CLAIMS RELATING TO NONCOMBATANTS

Another area for policy consideration involves the use of terror tactics against noncombatants which are not in the actual control of the precipitator armed force.[85] As mentioned before, the customary law had developed principles prohibiting the attack, by any means, upon noncombatants per se, but intervening practice of aerial

[84] Note that attacks upon combatants by those without a recognizable uniform or insignia is already prohibited under the law of war. *See, e.g.*, J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility, supra* note 5 at 131-135 and 141, and references cited; and *supra* note 70.

[85] Of course, attacks upon noncombatants that are already in the actual control of the attacking military force (detaining power) is specifically prohibited in all contexts.

warfare left a gap in the prohibition in the context of a total war.[86] Much of the prior expectation has since been recaptured and efforts are underway to specify this prohibition in greater detail in the new Geneva Protocols being formulated, but it would seem that the community cannot be too repetitive in articulating its perspectives on this matter if it wants to guarantee an expectation that no noncombatants can ever be the intended object of a terroristic attack. Presently, during an international armed conflict, Article 4 of the Geneva Civilian Convention generally precludes from the coverage of Article 33, which prohibits all forms of terrorism, those persons who are not "in the hands of" a capturing power.[87] Articles 13 and 16, however, are much wider in coverage since they apply to the whole of the populations of the parties to the conflict; but for a terroristic strategy to be specifically prohibited there, it would seem to have to involve certain types of participants therein mentioned as either instrumental or primary targets: (1) those "exposed to grave danger," (2) wounded, (3) sick, (4) infirm, (5) expectant mothers, (6) shipwrecked, (7) children under the age of fifteen who are orphans or who have been separated from their families as a result of the war, and (8) members of a hospital staff protected under Article 20 or medical units.[88] In the case of a conflict not of an international character, common Article 3 of the Geneva law undoubtedly prohibits any terroristic attacks upon any noncombatants, captured or not,[89] but even here a specific prohibition such as the one contained in a new ICRC Draft Protocol would seem helpful.[90]

The next area for consideration involves the problem of "incidental" or "unintended" and unforeseeable terror. This problem can arise where an attack upon a combatant group would otherwise be deemed permissible, but the situation for consideration involves the close proximity of noncombatant personnel to legitimate military targets or combat operations. Generally, it can be stated, the presence of civilians in close proximity to a military target does not render the area immune from aerial or ground attack and unintentional suffering resultant from the proportionate engagement of that

[86] *See* E. Stowell, *supra* note 34; and J. Paust, *The Nuclear Decision in World War II—Truman's Ending and Avoidance of War*, 8 INT'L LAWYER 160 (1974).

[87] *See* J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, *supra* note 5 at 148.

[88] *See* J. Paust, *Legal Aspects of the My Lai Incident*, *supra* note 34 at 145-149.

[89] *See* J. PICTET, IV COMMENTARY at 31 and 40.

[90] See also U.N. Doc. A/A.C.160/1/Add. 1 at 4 (reply of Canada).

target is not a violation of the law of war.[91] This is usually categorized as "incidental" terrorism or suffering, but is all "incidental" terror among noncombatants, which is something that to a certain extent seems to occur in all armed conflicts, to be totally banned, freely allowed or to be analyzed by community decision makers in terms of actual context and the impact upon shared goal values?

Sir Lauterpacht, in commenting on the gap in the complete legal proscription of the attacks upon noncombatants which occurred during World War II, had stated that civilians *per se* must never be targets and that "indiscriminate" attacks were outlawed, but that in the context of World War II there may have been a distinction between these impermissible acts and the bombing of "civilian centers" for imperative military objectives "in an age of total warfare." He also made a distinction between the peremptory prohibition of "intentional terrorization—or destruction—of the civilian population as an avowed or obvious object of attack" and induced terror which is "incidental to lawful operations."[92] Close to this claimed distinction, and with a different interpretation of what is "incidental" that is more akin to von Clausewitz, Guevara and Soviet ideology, is a remark from the early Spanish jurist Suarez that:

> . . . innocent persons as such may in nowise be slain, even if the punishment inflicted upon their state would, otherwise, be deemed inadequate; but incidentally they may be slain when such an act is necessary in order to secure victory . . . the case in question involves both public authority and a just cause.[93]

What is merely "incidental" to lawful military operations is a key question which should be approached with a comprehensive map of policy and context. Otherwise the community will be drawing fine conclusionary lines between attacks on populations *per se* and population "centers," or between "intentional" terror

[91] *See, e.g.*, G.C., art. 28; J. PICTET, IV COMMENTARY at 208-209; FM 27-10, paras. 40-42; H. DeSaussure, *The Laws of Air Warfare: Are There Any?*, 23 NAVAL WAR COLLEGE REV. 35, 40-41 (1971); T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 141 (1970); and J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, *supra* note 5 at 150.

[92] *See* H. Lauterpacht, *The Problem of the Revision of the Law of War*, *supra* note 26 at 365-369.

[93] See also T. BATY, J. MORGAN, WAR: ITS CONDUCT AND LEGAL RESULTS 176 (London 1915), *citing* the German jurist Holtzendorff for a claim that the *levy en masse* should be granted pw protective status upon capture "unless the Terrorism so often necessary in war does not demand the contrary."

and foreseeable "incidental" terror, in a manner unresponsive to all community values. It is assumed that Professor McDougal and others would approach the question this way, but it is not clear whether they would now ban outright the "incidental" population terror utilized to coerce state political elites (or is such ever merely "incidental" to a military objective when utilized as an essential component of the process?)[94] Today, even if the community outlaws all attacks on population "centers" (we still seem to be hostages in a nuclear balance), this question of "incidental" terror in armed conflict seems unavoidable.

Additionally, this type of distinction, as stated before, points to the need for a greater clarification by the community of the goal values it wishes to protect in this and related contexts, and to the need for a more useful set of decisional criteria than the mere conflicting conclusions of intended "object of attack" or "incidental" terror. Words that have appeared in recent debates and studies on the general question of international terrorism such as "innocent" or "indiscriminate" seem to evince a groping for a similar legal distinction between direct attacks upon noncombatants, attacks upon combatants and indiscriminate uses of armed violence. The use of the word "innocent" in reference to targeting or needed protection has permeated recent governmental statements on the general question of international terrorism.[95] It is not clear at all, however, whether states had actually intended to hinge the question of permissibility on such a nebulous concept and its implied opposite: "guilty," with its potential for a greatly divergent moral, political and other ideological content as well as summary decisional procedures, generally of a simplistic nature. Most likely, the word has merely been repeated from the use made in the Secretary General's Report on Terrorism. Such a copying is dangerous unless the community is changing its perspectives on the above matters. The word "innocent," again, is fraught with human rights problems connected with the prohibition under the law of war of summary executions and related prohibitions under general human rights law of the denial of a fair trial.[96]

[94] *See* McDougal, Feliciano at 657-658; but *compare id.* at 80 n.195 and 660 n. 421 *with id.* at 668.

[95] The use of the word "innocent" appears in some 39 of the 55 replies made to the Secretary General by August 1973 or contained in the *Ad Hoc* Committee Report of September 1973.

[96] For relevant legal norms *see, e.g.*, G.C., arts. 3, 5, 22, 33, 71 and 147; G.P.W., arts. 13, 82-108 and 130; FM 27-10, paras. 28, 31, 78 and 85; and United States v. List, 11 T.W.C. at 1253 and 1270. See also J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility, supra* note 5 at 138-139 on the potential for human disaster and massacres inherent in the use of such ambiguous criterial references as "innocent."

A much less extensive use of the word "indiscriminate" appears in the general debate and no clear consensus as to its criterial value appears,[97] but it is at least a word of some use and with an historic underpinning in the type of decisional distinction made in connection with discriminate attacks upon combatants and attacks made with little or no effort to distinguish between combatants and noncombatants or between permissible and impermissible targets. If we consider the normative content of the law of war and tie in words such as "object of attack," "incidental," and "indiscriminate," we at least have some identifiable goal values and criteria for arriving at a more rational and comprehensive decision in cases involving terror outcomes and effects outside of the intended arena of interaction or outside of the permissible targets, especially if we include in such a consideration the general principles of proportionality, humane treatment and unnecessary suffering including the requirements of protection and respect for persons protected by Geneva law. Most likely, the use of phrases such as states and persons "not directly involved" in the conflict, persons "unconnected with—or not responsible for—the basic cause of the grievance," and "third states" is connected with an attempt to make a criterial distinction of a similar nature (and not just a self-protective apathy).[98] It is most difficult, however, to relate the use of such phrases in the early comments of states on the general problem of international terrorism to some implied geographic, "guilt," or involvement criterial distinction in connection with terroristic prohibitions under the law of war. Most of the comments are short

[97] The use of the word "indiscriminate" appears in some 7 of the 55 replies made to the Secretary General. See U.N. Doc. A/A.C.160/1 and Adds 1-5. Included here are: Federal Republic of Germany, France, Israel, Italy, Norway, Romania and South Africa.

[98] See *id.* Included are: Austria (particularly countries which have nothing to do with the conflict), Barbados (third States), Belgium (Third states having no connection with the state of war), Canada, Czechoslovakia ("unconcerned" persons re: political or other motives), Federal Republic of Germany ("not involved" in the conflicts), Iran (persons "unconnected with—or not responsible for—the basic cause of the grievance"), Ireland, Italy (particularly persons with "no link" and arenas "beyond areas of tension"), Netherlands (concentrate on those "not parties" to a conflict), Norway (concentrate on acts against third state), Yugoslavia (acts "outside the areas of belligerence").

and vague, perhaps intentionally so, and do not seem to consider the law of war.

VI. CONCLUSION

It can be stated that in future efforts by states to articulate an authoritative distinction between permissible and impermissible terror of an international nature, some effort will have to be made to consider the existent norms and expectations articulated under the law of war and the general law of human rights. Already the law of war prohibits terroristic attacks directed at noncombatants, but there are several questions which seem to require greater attention and a more detailed set of decisional criteria for a more rational and policy-serving community effort. Some of these questions involve the distinctions to be drawn in the case of terroristic attacks upon combatants, criterial distinctions in connection with the problem of "incidental" or "unintended" terror, and the general question of definitions and broad exclusions.

Broad exclusions from the legal regulation of conduct in certain contexts such as self-determination struggles, struggles against aggressors, workers struggles or guerrilla warfare would be extremely unwise and contrary to general trends and expectations which relate to the development of a more inclusive referrent to authority, a more interdependent and cooperative world community, and the quest for human dignity and a minimizing of armed violence. Mankind simply cannot afford to leave whole areas of the most violent of confrontations outside of the regulation of law and the broad demand for human dignity.

PROOF OF THE DEFENDANT'S CHARACTER*

Lieutenant Colonel Richard R. Boller**

> The subject seems to gather mist which discussion serves only to thicken, and which we can scarcely hope to dissipate by anything further we can add.[1]

I. INTRODUCTION

Judge Hand's statement must be the result of the sense of frustration one encounters in attempting to reconcile the myriad of conflicting rules that govern the presentation of character evidence. In no other area of the law of evidence are questions of basic relevancy faced more frequently than they are when dealing with character evidence. This is true because character evidence, as it is most frequently employed, is circumstantial in nature and requires the fact finder to draw certain inferences and arrive at conclusions based on those inferences.

Confusion results from the interuse of the terms *character* and *reputation*. The two are not synonomous: character is what the man is; reputation is what he is thought to be. Thus, it is conceivable that a man of poor character may enjoy a splendid reputation and the converse might also be true.

Many of the current rules which govern the admissibility of character evidence were in use in the early 18th century. These rules are not always based upon logical or relevant considerations, but are sometimes the result of extrinsic factors. The most relevant types of character evidence are frequently incapable of use because they are *too* probative[2] and the old maxim "actions speak louder than words," though still logically valid, is not followed when proving character. An accused's past acts whether good or

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (Judge Learned Hand referring to character evidence).

[2] *See generally*, Faulknor, *Extrinsic Policy Affecting Admissibility*, 10 RUTGERS L. REV. 574, 584 (1956).

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