Prohibition of terrorist acts in international humanitarian law *

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This paper deals with the provisions of contemporary international humanitarian law which prohibit "terrorist acts", commonly referred to, simply, as "terrorism".

Since the paper is mainly of a descriptive nature, experts in international humanitarian law will learn little that is new. But if it succeeds in highlighting one specific aspect of the well-known obligations and prohibitions set forth in the Geneva Conventions and their Additional Protocols—namely, the absolute and unconditional ban on terrorism—the objective will be attained. A few basic facts will then have been recalled which should make it somewhat easier to tackle the complex questions as to the essence and legal bounds of guerrilla warfare.

First of all, it is necessary to clarify once more the meaning of various terms—particularly because the discussions about the ratification of the Additional Protocols of 1977 have of late produced some strange pronouncements, such as: "Rights for terrorists—a 1977 treaty would grant them", "Law in the service of terrorism", "Protocol I as a charter for terrorism". One wonders whether the world is suddenly upside down.

Terminology

As already indicated, the purpose of this paper is to discuss the provisions of *international humanitarian law* which address the

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challenge of terrorism. It is therefore clear from the start that the analysis is restricted to situations of armed conflict, since only then does international humanitarian law become applicable. The term "armed conflict" as defined in international law covers any conflict, between states or within a state, which is characterized by open violence and action by armed forces.

International or internal situations which do not bear the essential characteristics of armed conflict, although marked by collective violence, consequently do not come within the range of this analysis—in particular, situations of internal strife, riots and violent repression, which are not covered by the humanitarian law instruments.

Defining the matter under consideration is of great importance, since it should be clearly understood that only terrorist acts committed in situations of armed conflict fall within the scope of application of international humanitarian law. Terrorism in "peacetime", that is, in situations which cannot be classified as armed conflicts, is not covered by international humanitarian law which, in such situations, is quite simply not applicable.

The second term which calls for explanation is *"terrorism"*.

Terrorism is a social phenomenon with far too many variables to permit a simple and practical definition. There seems to be no consensus among legal authors and other experts on its meaning and consequences. Even international law has failed to expressly define terrorism and terrorist acts. A glance at the only attempt to formulate an explicit definition having international legal authority may illustrate the difficulties involved. The Convention for the Prevention and Punishment of Terrorism (Geneva, 1937) indeed defines "acts of terrorism" as "criminal acts directed against a State or intended to create a state of terror in the minds of particular persons, or a group of persons or the general public". In our era, to restrict the definition of terrorism to offences against a State would quite obviously overlook the realities of contemporary life.

The various international conventions adopted over the last 25 years are all limited to some specific aspect of terrorism and therefore they are of no help in a search for a comprehensive definition. They are, in chronological order:

— Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 1963;

— Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), The Hague, 1970;

— Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Sabotage), Montreal, 1971;
— Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents 1973;
— International Convention against the Taking of Hostages, 1979; and
— Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

This paper will not attempt to give a new and comprehensive definition. It would be superfluous anyway, as the everyday usage of the term is sufficient for our purposes.

It seems that the term "terrorism" in everyday language covers the following aspects:

— without exception, terrorism is a crime;
— terrorism is the use or threatened use of violence, usually against human life;
— terrorism is a means to attain political goals which, in the view of those resorting to it, could not be attained by ordinary (lawful) means;
— terrorism is a strategy: it is usually brought to bear over a period of time by organized groups according to a set programme;
— terrorist acts are often directed at outsiders who have no direct influence on or connection with what the terrorists seek to achieve; terrorists often hit indiscriminately at their victims;
— terrorism is used to create fear which alone makes it possible to attain the goal;
— terrorism is total war: the end justifies *all* means.

These statements are intended to give a general outline of the phenomenon of terrorism. In occasional instances, one or the other element may be lacking; for instance, there may be no political goal whatsoever, or the crime may be perpetrated by an individual acting on his own.

One can presume that terrorist acts are prohibited without exception by internal legislation of all States and are subject to prosecution and punishment under national criminal law. Insofar as they are inspired by political motives, offenders may be granted immunity from extradition as provided for in extradition treaties or domestic legislation. In recent years, however, the trend has been to

exclude terrorist acts from such derogations (for example, see the European Convention on the Suppression of Terrorism, 1977).

Prohibition of terrorist acts in wartime

Terrorist acts committed in wartime have a different legal connotation. Violence—carried to its extreme—is inherent in war; it is also inherent in terrorism. This raises the question of the distinction to be made between two different types of violence: "licit violence" in armed conflicts governed by the laws of war, as opposed to "illicit violence" (which includes terrorism). On what criteria is the distinction based?

The *first criterion* relates to the status of the person committing violence: members of the armed forces of a party to an armed conflict have a right to participate directly in hostilities. No other persons have that right. Should they nevertheless resort to violence, they breach the law. Their deeds may constitute acts of terrorism.

The rule is clear and is not likely to raise any significant problems in international armed conflicts. Difficulties arise in situations of non-international armed conflicts and wars of national liberation. We shall discuss these topics in greater detail further on.

The *second criterion* is derived from the rules governing the protection of specific categories of persons and the rules on methods and means of warfare in armed conflicts: to be licit, the use of violence in warfare must respect the restrictions imposed by the law of war. Consequently, even members of the armed forces legitimately entitled to the use of violence may become terrorists if they violate the laws of war.

Is it necessary to say that, in practice, it is not always easy to make a distinction between terrorist violence and legitimate acts of war?

We have now reached the point where we must examine the existing law applicable in armed conflicts with respect to the prohibition of terrorist acts. The main sources are the four Geneva Conventions of 12 August 1949 relating to the protection of victims of armed conflicts, and their two Additional Protocols of 8 June 1977. Although only approximately one third of the international community has ratified the 1977 Protocols to date (February 1986), for the purpose of this analysis they will nevertheless be deemed to have the force of law for the community of nations.

The fundamental principles of international law recognized in the Charter of the Nuremberg Tribunal (the "Nuremberg Prin-

ciples") must also be taken into consideration, since they too deal with terrorist acts in times of peace and of war and declare them to be international crimes.

Finally, the aforesaid conventions on specific offences, such as the Hostage Convention and the Convention on Hijacking, must also be consulted on particular issues.

Ban on terrorism under the law applicable in international armed conflicts

As already noted, the main body of international humanitarian law applies to *international armed conflicts,* which are hostilities between States. Since 1977—for States party to Protocol I—the term "international armed conflict" also covers "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination" (Art. 1, par. 4, Protocol I).

In the interest of clarity, it still is expedient to divide the prohibitions laid down in humanitarian conventions into two categories: (1) rules which restrict methods and means of warfare and (2) rules for the protection of persons in the power of the adversary against arbitrary acts and violence.

As far as the first set of rules is concerned—customarily referred to as the "Law of The Hague"—the innovative Article 51, par. 2, of Protocol I is particularly noteworthy. After a general reminder of the obligation to protect the civilian population against dangers arising from military operations, paragraph 2 stipulates: "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited". This provision confirms that terrorism is not an authorized method of warfare.

In view of its implications, the scope of the prohibition prescribed in the second paragraph of Article 51 calls for closer examination. The first sentence lays down that attacks against the civilian population as such and against individual civilians are prohibited—a clear and categorical prohibition probably covering most terrorist acts. But then the second sentence goes on to prohibit acts of violence the *primary purpose* of which is to *spread terror among the civilian population.* Such acts must not necessarily be directed against civilians; what matters is the intent to spread

terror among the civilian population. So, finally, even *threats of violence intended to spread terror are prohibited.*

The subjective factor of intent to spread terror among the civilian population is always an indispensable element. The fact that any military operation or indeed any threat of military measures is bound to have a terrorizing effect on unprotected civilians, e.g., military operations against a legitimate objective in the immediate vicinity of a residential area, cannot be eliminated. What is and remains prohibited, however, is the *intentional use of terror as a means of warfare.*

It follows that in international armed conflict, any recourse whatsoever to terrorist methods of warfare is absolutely inadmissible. Furthermore we must not forget that the prohibitions set forth in Article 51 may not be circumvented by means of reprisals. By implication, terrorist attacks against civilians causing death or serious injury are grave breaches under Article 85 of Protocol I and are to be regarded as war crimes.

Beyond all doubt, most victims of terrorist attacks are civilians. Cultural property, however, is also threatened by terrorism for the purposes of blackmail. Article 4 of the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict prohibits any act of hostility against protected property. But it is doubtful whether the mere threat of destroying such property with the purpose of terrorizing the population is prohibited.

Attacks against other objects for the purpose of spreading terror among civilians are prohibited by special rules. At this stage one need only mention Article 56 of Protocol I which prohibits attacks against works or installations containing dangerous forces (such as dams, dykes and nuclear plants) or Article 53 which protects cultural objects and places of worship.

Civilians are protected by law against terrorist acts. But what about members of the armed forces? Are they similarly protected? The answer is undoubtedly negative because, within recognized limits, terror is a weapon which may be used in combat against the armed forces of the adverse party. Indeed, the common methods of material and psychological warfare include an extremely wide range of activities which would otherwise be considered "terrorist". Yet in this respect, too, the law of war has set certain restrictions. There is, first and foremost, the long-standing legal principle according to which "the right of the Parties to the conflict to choose methods and means of warfare is not unlimited" and "it is prohibited to

employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering" (Art. 35, Protocol I).

The practical applications of this general principle include, for example, the prohibition to use poisonous gases, the prohibition of perfidy (Art. 37), the prohibition to refuse to give quarter (Art. 40)—a provision which is particularly relevant to our analysis, since the threat of random murder is a common enough feature of terrorist activity. Even in an armed conflict, members of the armed forces may not be *threatened* in such manner (carrying out the threat would be prohibited anyway, by virtue of the provisions governing the protection of the wounded and prisoners).

After this review of the law directly circumscribing the conduct of military operations, one must examine the legal provisions relative to the protection of individuals in the hands of the adverse party against arbitrary acts and violence. Here we shall briefly examine the various categories of protected persons.

By virtue of the First, Second and Third Geneva Conventions of 1949 members of the armed forces of an adverse party must be respected and protected as soon as they surrender or their resistance is overcome. Any attempts upon their lives, or violence to their persons, are strictly prohibited (First and Second Conventions, Art. 12, par. 2), and they must be protected against acts of violence or intimidation (Third Convention, Art. 13, para. 2). In this context, the restrictions relative to the questioning of prisoners spelt out in the Third Geneva Convention are of paramount importance: "Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind" (Art. 17, par. 4). These provisions are tantamount to a comprehensive ban on acts of terrorism against overpowered enemies.

The Fourth Geneva Convention, relative to the protection of civilian persons in time of war, is the only Geneva Convention of 1949 in which the term "terrorism" is explicitly used. Its Article 33, one of the provisions common to the territories of the parties to the conflict and to occupied territories, stipulates that "all measures of intimidation or of terrorism are prohibited". This provision complements the general rule that belligerents shall treat humanely the civilians of the adverse party who are in their power (Art. 27). Thus, no terrorist act can ever be justified.

These general rules are supplemented by special prohibitions; for instance, the taking of hostages is prohibited (Art. 34) and so is

pillage (Art. 33, par. 2). In addition, Article 75 of Protocol I prohibits violence against all persons who are in the power of the adverse party and who are not already protected by some other rules. Thus, Article 75 fills gaps existing in the Geneva Conventions of 1949.

Under certain circumstances the violation of several of the aforementioned provisions governing the protection of the civilian population is a grave breach of the Conventions or of Protocol I and has to be repressed as such. Such acts of terrorism may therefore be *war crimes*. And alleged war criminals have to be brought to trial by the authority in whose power they are, be it a party to the conflict or be it any other State party to the Geneva Conventions or to Protocol I—unless the said authority prefers to extradite the alleged offender to another concerned State Party. This far-reaching obligation to prosecute or to extradite is a particular aspect of the humanitarian law instruments.

To conclude, one can say that civilians in the power of the adverse Party to the conflict are protected against wanton acts of violence by an elaborate set of legal provisions. All these provisions are applicable totally and unconditionally, under any circumstances whatsoever: in particular they may not be circumvented by recourse to reprisals.

Prohibition of terrorist acts in non-international armed conflicts

The provisions of international humanitarian law applicable in internal armed conflicts are far less detailed than those applicable in international conflicts. What is the situation with respect to terrorist acts in civil war?

Any answer to that question must necessarily proceed from Article 3 common to the four Geneva Conventions. However short and succinct the wording may be, it leaves absolutely no doubt as to the fact that, in internal armed conflicts too, terrorist acts of any kind against persons not taking part in the hostilities are absolutely prohibited.

Following the initial general rule that persons not or no longer taking an active part in the hostilities shall be treated humanely, the second paragraph of Article 3 prohibits, *inter alia*, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and "the taking of hostages". Article 3 of the four Geneva Conventions therefore leaves no latitude for terrorist acts against persons in the power of the adverse Party to the conflict.

Article 4 of Protocol II reaffirms the aforementioned prohibitions and in various respects extends and improves the system of protection. For our purposes the express ban on terrorist acts in par. 2, (d), is particularly interesting. This is the second time that the word "terrorism" appears in a humanitarian treaty. What is entirely new in Protocol II (compared with Article 3 of the Conventions) is the introduction of provisions designed to protect civilians by influencing the very conduct of hostilities. In this respect, Article 13 entitled "Protection of the civilian population" is of paramount importance: paragraph 2 stipulates that "acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited". This provision is identical to the prohibition of terrorist acts in international conflicts enunciated in Article 51, par. 2, of Protocol I.

The implications of this innovative provision in the law governing non-international armed conflicts are portentous. The notion may well have been implied in the general principles—applicable to civil war too—governing methods and means of warfare. What is important, though, is the reaffirmation of this principle by the representatives of the international community and its incorporation into international treaty law. The ban on terrorist activities in internal armed conflicts is henceforth firmly anchored.

The section of the population protected under Article 3 of the Geneva Conventions and Article 4 of Protocol II is very comprehensive, since the law applicable in non-international armed conflicts makes no distinction between various categories of persons (combatants, civilian population, etc.).

Article 13 expressly prohibits terrorist acts against the civilian population. The prohibition of course applies to both sides, that is to governmental and dissident armed forces. Conversely, only little protection is afforded to persons taking part in the hostilities on the government's side (usually members of the armed forces) or on the dissidents' side.

Methods of warfare may be permissible which in peacetime would amount to terrorist acts. Some restrictions may result from general uncodified principles of law. Protocol II merely stipulates that it is prohibited to refuse to give quarter (Art. 4, par. 1, last sentence).

As already observed, terrorist acts are subject to criminal prosecution by the competent state authorities in accordance with national law, though these should avoid prosecuting and convicting

dissidents for terrorism merely on account of their participation in the conflict.

Thus, in non-international armed conflicts too, any terrorist act whatsoever against civilians who take no active part in the hostilities is prohibited.

This outline of the international prohibitions on terrorism which are applicable in internal armed conflicts raises the question as to whom these prohibitions are addressed.

The Geneva Conventions, the 1977 Additional Protocols and, for that matter, international public law in general are primarily addressed to States. States are bound (1) to refrain from resorting to terrorism and (2) to do everything in their power to prevent terrorist acts from being committed by individuals or in territory under their jurisdiction. This puts a direct obligation on the persons who act on behalf of the State, including—and this is particularly important for us—members of the armed forces, of the police and of similar organizations.

International humanitarian law does not put a direct obligation on individuals who do not in some way represent the State. But States are under obligation to enact pertinent domestic legislation to ensure respect for the rules of international public law. The Nuremberg Principles, however, are a different matter: some acts branded as crimes against humanity also definitely constitute acts of terrorism. The prohibitions against committing such acts are addressed to each and every individual.

In non-international conflicts, the approach has to be different, since one party to the conflict does not qualify as a State. But Article 3 and Protocol II nevertheless put a legal obligation on dissidents too: all members of armed groups must heed the ban on terrorism. Commanders of dissident forces are under the obligation to enforce the prohibition and to repress violations by members of their organization, should they occur. Dissidents are liable as a group. Like governmental authorities, dissidents must also take all necessary measures to prosecute and punish terrorist acts which are committed not only by members of their armed forces but also by individuals acting on their own and living in territory under their control. Thus it is clear that in civil war the dissident party too is conclusively bound by the ban on terrorism. This is extremely important, since civil wars are particularly prone to breed terrorist acts.

The special status of wars of national liberation

The legal status granted to wars of national liberation by the First Additional Protocol of 1977 calls for some comments in connection with this analysis. It would seem that the new law is often misunderstood. Some claim that this innovation legitimizes terrorism. That is not so, as will be shown further on. Yet this erroneous conclusion may be traced to a certain extent to some of the terminology used in anti-colonialist rhetoric. In particular, to say that oppressed peoples are allowed to use *any* means to attain independence is liable to be misconstrued. Does it mean that methods and means of combat banned under other circumstances are authorized in wars of national liberation? This question must be answered.

It is not the purpose of this paper to go into a detailed interpretation of what is meant by "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination" (Art. 1, par. 4, Protocol I). It is not relevant to this study. What we are interested in are the legal consequences of such conflicts: they remain the same, regardless of the interpretation of the various conditions of application.

If a people is involved in a war of liberation—as defined in the aforementioned article—against "colonial domination and alien occupation and against racist régimes", that conflict, under the new law, qualifies as an international armed conflict. This means that the entire code of international humanitarian law applicable to international conflicts enters into force, along with all its attendant rights and obligations.

The above analysis has established that the law of international armed conflicts is characterized by an elaborate set of prohibitions of terrorist acts. It follows quite clearly that *these prohibitions also apply,* in toto, *to wars of national liberation.* No other conclusion is tenable from a legal point of view. Anyone claiming that, with the adoption of Article 1, par. 4, of Protocol I, the legal instruments for the fight against terrorism have become weaker, has misunderstood the new situation. The new law should be seen rather as an attempt to achieve stricter, humanity-oriented control over wars of national liberation, such wars being, as experience shows, characterized by particularly severe outbreaks of violence.

Article 44: a licence for terrorism?

Article 44 of Protocol I lays down new conditions for combatant status in international armed conflicts. At this point, the only issue of interest is whether Article 44 in any way weakens the ban on terrorism and consequently encourages recourse to terrorist acts.

As mentioned previously, Article 44 modifies the conditions to be fulfilled for a person to qualify as a legitimate combatant. The requirements have become less stringent in that, by virtue of Article 44, some persons can now claim, under certain circumstances, the privileges accorded to combatants which they would not have been entitled to under the old law. Consequently, Article 44 has slightly enlarged the group of persons entitled to participate in hostilities.

However, Article 44 in no way modifies the concomitant obligations of combatant status. Anyone entitled to engage in combat must abide by the rules of the law of war, including the ban on terrorism. Under Articles 43 and 44, no distinction is made between two categories of combatants, namely "regular combatants" bound by all the obligations of the law of war, and "guerrilleros" whom some consider partly absolved from those obligations. *All* combatants belong to the same class, all must abide by the same rules, and *all* are faced with the same consequences if they violate the law of war: they are liable to prosecution for violation of the law of war and, under certain specified circumstances, for war crimes. Therefore, guerrilla fighters committing a terrorist act against civilians also have to face criminal proceedings. Article 44 does not condone disregard for traditional obligations under humanitarian law, and it does not grant immunity against the consequences of committing any terrorist act.

At the most, one may wonder whether recognition of certain aspects of guerrilla warfare by international humanitarian law could not lead to an increase in terrorist acts by combatants. The question is a difficult one. What is established is that, under the new law, the perpetrators of such acts and their instigators can now be called to account for their conduct in a different way, since they are now subject to the whole body of international humanitarian law.

This short reference to Article 44 must be related to the comments on Article 1, par. 4, on wars of national liberation. In the opinion of some, it is the very combination of these two innovations that could weaken the protection of the civilian population against terrorist acts. Both innovations are meant to correct situ-

ations considered inequitable and subject them to the jurisdiction of the law of international armed conflicts, since this body of law is endowed with strict and particularly well-developed regulations. Neither of the two provisions—whether individually or jointly—in any way undermines the ban on terrorist acts. Guerrilla fighters engaged in a war of national liberation who unlawfully terrorize civilians are terrorists and must answer for their conduct.

Final remarks

Within the scope of international humanitarian law, terrorism and terrorist acts are prohibited under all circumstances, unconditionally and without exception. The authorities of the parties to the conflict—and all States party to the humanitarian instruments—are obliged to prosecute any alleged offender against the prohibition of terrorism.

The law of armed conflicts is particularly well developed and can provide guidance to the legal approach to terrorism in peacetime. Any act forbidden to combatants by the law of armed conflicts because it amounts to terrorism should equally be prohibited and prosecuted under the law applicable in peacetime—regardless of the perpetrator.

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