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Editor's Note

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The Evolution of International Law and the War on Terrorism

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- A country – whether it be Israel, or the United States in its fight with al-Qaeda – whose army is involved in fighting a terrorist organization which has no state and no boundaries, has to be able to carry out those acts necessary to deal with terror.
- What happens if the police see a suicide bomber who opens his jacket and shows his explosive belt? Can the Israeli police kill him? He hasn't done anything.
- There is a rich international legal literature covering war crimes of military forces, but no agreed international legal definition that covers all cases of terrorism. There is a basic asymmetry in international law with respect to terrorists and armies fighting terrorism that needs to be resolved.
- If we receive information about a terrorist bomber going to carry out a suicide attack and we can catch him en route, and shoot a missile into his car while he's trying to come into Israel, are we permitted to do so? The answer is definitely yes. The United States has now targeted combatants in the same way in its drone attack in Yemen.
- International law must recognize terrorists as combatants and not as civilians.

No Accepted Definition of Terrorism

Alan Baker: There are several international conventions that define war crimes, but there is no internationally accepted definition of terrorism. There is not one international convention that actually condemns terrorism.

One definition of terrorism was given by the Convention of the Organization of the Islamic Conference on Combating International Terrorism in 1999:

Terrorism means any act of violence or threat thereof, notwithstanding its motives or intentions, perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people, or threatening to harm them or imperiling their lives, honor, freedoms, security or rights, or exposing the environment or any facility or public or private property to hazards or occupying or seizing them or endangering a natural resource or international facilities or threatening their stability, territorial integrity, political unity, and sovereignty of independent states.

A terrorist crime “is any crime executed, started or participated in to realize a terrorist objective in any of the contracting states or against its nationals.” This is a very thorough definition; however, in Article 2 of this regional convention by the Conference of Islamic States, it says, “peoples’ struggle including armed struggle against foreign occupation, aggression, colonialism, hegemony, aimed at liberation in accordance with the principles of international law, shall not be considered a terrorist crime.”

In other words, attempts to define the attack on the World Trade Center or attacks in Israel as terrorism would be scuttled by the Conference of Islamic States. The Islamic states insist that fighting an occupation cannot be considered terrorism. Similarly, Hizballah in Lebanon claims that what they are doing today, or before Israel withdrew from Lebanon, is not terrorism. It is resistance, they claim, something that is permitted according to international law.

In fact, there is no such right of resistance to occupation in international law. When placing the question of terrorism opposite the question of international war crimes, we meet the difficulty that terrorism has not yet been defined as a war crime. The components of terrorism are war crimes, and the international community is working to develop a definition of the crime of terrorism.

Israel faces the dilemma of having bilateral commitments with the Palestinians, including commitments by the Palestinians not to engage in terrorism. In a letter signed on the eve of the first Oslo agreement in 1993 on the White House lawn, part of an exchange of letters between Yasser Arafat and Yitzhak Rabin, Arafat undertook not to carry out acts of terror, to bring to trial those who had been involved in terror, and to solve all future problems with respect to settling the questions between the two parties in a peaceful manner. There are very detailed provisions in the various agreements with the Palestinians requiring them to fight terror, collect illegal arms, fight incitement, and do all sorts of things.

How are we going to deal with the fact that there is terror being carried out on a daily basis in Israel? To explode a bus is very similar to exploding planes on the World Trade Center. How is the international community going to deal with this? Are we going to continue to see this double standard? While everybody acknowledges that there is terror and that Israel has the right to fight terror, when Israel does fight terror it is accused of carrying out war crimes.

A Country Must be Able to Defend Against Terror

The war crimes definitions fit the Geneva Conventions and international law up to World War II and immediately afterwards, when armies were fighting armies. Yet with the development of terrorism by groups that are not state entities, the whole concept of what a war crime is has changed. But the international community has not yet developed the legal texts in international law that fit these developments. A country – whether it be Israel, or the United States in its fight with al-Qaeda – whose army is involved in fighting a terrorist organization which has no state and no boundaries, has to be able to carry out those acts necessary to deal with terror. If this means using a helicopter or sending a drone to target terrorists, then this is perhaps what is necessary, and such actions should not be considered a violation of international conventions or a war crime.

Drafting an International Convention Against Suicide Terrorism

Given this clear legal necessity, Israel has decided on its own initiative to draft a new international convention against suicide terrorism to offer the international community. The convention would be directed against those elements who assist in financing, incitement, family support, or state support of such terrorists.

In Western European countries such as the Scandinavian countries, people are permitted to demonstrate wearing mock suicide belts. Such scenes are interpreted by Palestinians as approval and support for such actions. This is why there is a need for an international convention. Several countries, including Russia, India, and Germany, have expressed interest in the draft being prepared by Israel.

Who is a Combatant?

Col. Daniel Reisner. There are no books on international law and fighting terrorism, and no conventions on how to fight terrorism.

Classic international law deals with two generic situations: war and peace. There is a big rule book dealing with the laws of warfare, the laws of how to open war, how to end war, what weapons may be used, how to treat captives. Different rules apply to countries when there is peace.

Where does a terrorist fit in to this structure? In peacetime, people are divided into two different categories. They are either law-abiding citizens or criminals, to be dealt with by the police and the courts.

In wartime, people are divided into two different categories. They are either civilians or combatants. Who is a combatant? is a big question in international law, but there is general consensus that anyone taking part in hostilities is a combatant, regardless of where he lives or whether or not he wears a uniform.

Where does a terrorist fit in, such as a suicide bomber? Is he a criminal offender? Are we supposed to send the police to catch him en route? What happens if the police see a suicide bomber who opens his jacket and shows his explosive belt? Can the Israeli police kill him? He hasn't done anything. If he is a criminal offender, he cannot be shot because he hasn't blown himself up yet. He's a potential terrorist but he hasn't done it yet. No country in the world has come up with a good response as to what should be done to a suicide bomber. This police matter actually occurs to policemen in Israel and some of them have died.

What is the main significance of the difference between combatants and civilians in warfare? The difference is that an army has the right to initiate fire and kill combatants. Must a combatant be given a chance to surrender? Absolutely not. An army can launch a missile from 25km away at a target which has no idea it is being targeted, and kill everyone inside a military base, because all soldiers are fair game in warfare, irrespective of their position. Those are the clear rules of warfare.

The law breaks down when civilians start taking up weapons because the law's main objective is to protect civilians in warfare. The idea is that armies can take care of themselves, but the civilians need help. The law says civilians may not be targeted and they and their property are not to be harmed. But what happens when a civilian picks up a rifle and shoots at an army vehicle and then drops the gun on the ground. What can be done to him? If he were a soldier I could kill him. If he surrenders, I have to accept his surrender. But with a civilian combatant, do I continue shooting, or because the danger has now passed I treat him as a criminal offender once again? Does he go back to being a civilian just because he put down his rifle? Let's say he didn't put down his rifle, he just ran out of ammunition; is he still a combatant?

Defending Against “Ticking Bombs”

For the past year and a half, Israel has had a policy relating to what we call “ticking bombs,” terrorists who we know are going to carry out very severe attacks in the near future and whom we are unable to arrest. Our policy is to “take them out.” However, they have a tendency to hide in populated civilian areas, which raises the problem of collateral damage. We want to minimize the effect on civilians.

When we started this policy, we took a lot of criticism from the international community, which said, “How dare you kill civilians?” We replied that they are not civilians. They cannot be civilians if they are fighting. If we receive information about a terrorist bomber going to carry out a suicide attack and we can catch him en route, and shoot a missile into his car while he’s trying to come into Israel, are we permitted to do so? The answer is definitely yes. Why? Because he is a combatant, so we may shoot him. We have actually convinced most of the international community that we can do this because it makes sense and complies with the old laws of war. These terrorists are genuine combatants, they are fighters, they are on their way to carry out attacks. The United States has now targeted combatants in the same way in its drone attack in Yemen.

Why are Palestinians Never Considered Combatants?

There is a basic asymmetry between an army and a terrorist organization that works in favor of the terrorist organization. The army has to wear uniforms and carry arms openly. The terrorists know where we are and where we can go, while they can hide. They can take out their weapons and shoot and then hide the weapons again. When the army shoots back, it is accused of shooting “civilians.” When anyone on the Palestinian side is killed, he is never considered a combatant.

The IDF has finished compiling its response to the Amnesty International report on Jenin. Amnesty reported that there were between 100 and 150 Palestinian combatants in the camp. The Palestinians themselves reported on their website that there were 250. Amnesty claimed that the army destroyed 3,000 buildings. Based on aerial photographs, there were 120. Amnesty claimed that the army did not allow medical transports to travel into Jenin. Then how did 257 people get to hospital in Jenin and another 70 to hospitals in Israel during the fighting? We have video footage of ambulances going in and out all day. It is very easy for the media to get carried away with stories of atrocities by armies, and it is very difficult to bring footage of the opposite.

International Law Must Adapt

International law does not address terrorism in any form or fashion, so Israel has come to the recognition that it is now in a situation of armed conflict against terrorism. The problem is that this is an armed conflict in which I cannot specifically tell you who my enemy is. I know him when I see him, but I can’t give you a total list in advance. Interestingly, U.S. President George Bush came to the same conclusion. He published a military order in his capacity as Commander in Chief of the U.S. Armed Forces, saying, the “United States is in an armed conflict against al-Qaeda.”

International law will have to evolve and adapt itself to the new reality. The countries which have no terrorism committed against them are the most disinclined to change the law, and there is a bloc of Arab countries with an interest in leaving the law in relation to terrorism empty. Yet if international law wants to survive this new period, it must give countries and armies the tools to fight terrorism instead of requiring those who must do so to adapt by ourselves and then hope people will agree with what we’re doing.

Terrorism is no longer just a theoretical issue. It affects every one of us in this part of the world. We need to adapt our thinking and find a way to reach the correct balance between protecting human rights, protecting civilians, and allowing governments the freedom to deal with those terrorists, because people who are fighting without reference to the rules don't deserve any protection.

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