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ARTICLES

Ruminations on Terrorism & Anti-Terrorism Law & Literature

CHRISTOPHER L. BLAKESLEY*

*They never forgot
That even the dreadful martyrdom must run its course
Anyhow in a corner, some untidy spot
Where the dogs go on with their doggy life and the torturer's horse
Scratches its innocent behind on a tree.
Only God can tell the saintly from the suburban,
Counterfeit values always resemble the true;
Neither in Life nor Art is honesty bohemian,
The free behave much as the respectable do.¹*

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1. W.H. Auden, *NEW YEAR LETTER* (1941).

*Violence shall synchronize your movements like a tune,
And Terror like a frost shall halt the flood of thinking.
Barrack and bivouac shall be your friendly refuge,
And racial pride shall tower like a public column
And confiscate for safety every private sorrow.²*

INTRODUCTION

General. When an atrocity like that of September 11, 2001, occurs, the rhetoric of those who conspired to cause it or who otherwise prompted it is so venomous that it generates similar rhetoric and possibly even similar conduct in reaction. Prior to September 11, we might have refused to believe that human beings could actually commit such acts upon others. How is it possible that leaders of nations or groups are able to inflame hatred and fear in people to the point that some become willing to destroy themselves along with those they see as infidels or enemies? We cannot fathom what can cause individuals to fly planes filled with innocent passengers as missiles into buildings also filled with innocents. This article will attempt to fathom why.

I also address the dangers that face us *because of* our “war” on terrorism. We must be vigilant against an event like September 11 ever happening again, but it is just as important to be vigilant in ensuring that we do not allow ourselves to overreact in a manner to commit terrorism in order to fight terrorism. Finally, we must be vigilant to protect against governmental overreaction on the home front that will erode our constitutional liberty in the name of fighting terrorism or protecting “the homeland.” Is it possible that some of the dangers from anti-terrorism measures are similar to the dangers of those who use “terrorism” to fight their “just cause,” such as their “war” to lift the yoke of oppression?

Thus, this article addresses the following questions, among others: What is terrorism? How does terrorism compare to war crimes or crimes against humanity? What is the proper response when terrorism occurs; when one is attacked with ferocious and indiscriminate³ force causing the slaughter of thousands? What is the proper response when one is part of a group that has been oppressed for ages? Is terrorism a matter of law? Sociology? Anthropology? Pathology? All of these and more? In sum, this article presents my views on what terrorism is: its nature, its character, its characteristics, and its causes. Most importantly for this study, I will try to provide a workable legal definition of terror-

2. W.H. Auden, *In Times of War*, in W.H. AUDEN & CHRISTOPHER ISHERWOOD, *JOURNEY TO WAR* (1939).

3. Perhaps it is more accurate to say “discriminate,” in that innocent civilians were targeted in the World Trade Center and in the airliners used as weapons.

ism and elucidate its constituent elements. To clarify the analysis, I will distinguish terror, war crimes, and crimes against humanity from terrorism.

In discussing terrorism, this article also attempts to determine what constitutes an improper (illegal) response to oppression and, similarly, what is an illegal response to terroristic atrocity. What is the legal way to rebel or break the yoke of oppression? What is the legal way to defend oneself against an atrocity such as that committed on September 11, 2001? What is legal rebellion and what is legal self-defense in this context? It must be possible to defend and protect the innocents of the world without purposefully or indiscriminately destroying other innocents.

Discussing terrorism in light of the September 11 atrocities is daunting. It requires one to wonder how to maintain an equilibrium in the face of a menace that wishes its own death as long as it flows from the slaughter of "the enemy." How is it possible to combat this menace without falling into a trap of hatred or blind fear that leads to the use of terror to fight terrorism? The overarching issues relating to September 11, terrorism, and counter-terrorism include: whether oppression can provide any justification for that atrocity; similarly, whether that attack calls for or allows self-defense under international law, and, if so, what constitutes a legal response in self-defense. I will elucidate and compare the crimes of terrorism, war crimes, crimes against humanity, and the parameters of self-defense.

It is important to define terrorism, a term that is overused today. It is applied over-inclusively to contain almost all acts of violence committed for political purposes by clandestine groups. It is also often used under-inclusively to exclude state terrorism.⁴ Some commentators see terrorism as the lower end of the warfare spectrum, a form of low-intensity, unconventional aggression.⁵ Walter Laquer defines terrorism as:

the use or threat of violence, a method of combat or a strategy to achieve certain goals, that its aim is to induce a state of fear in the victim, that it is ruthless and does not conform to humanitarian norms and that publicity is an essential factor in terrorist strategy.⁶

4. *But see* CHRISTOPHER L. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY* (1992) (2d ed. in process) [hereinafter BLAKESLEY, *TERRORISM*]; JOHN F. MURPHY, *STATE SUPPORT OF INTERNATIONAL TERRORISM: LEGAL, POLITICAL, AND ECONOMIC DIMENSIONS* (1989).

5. *See, e.g.,* Scott S. Evans, *The Lockerbie Incident Cases: Libyan-Sponsored Terrorism, Judicial Review, and the Political Question Doctrine*, 18 MD. J. INT'L L. & TRADE 21, 22-23 (1994).

6. Walter Laquer, *Reflections on Terrorism*, 65 FOREIGN AFF. 86, 88 (1986); *see also* CHRISTOPHER L. BLAKESLEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM: CASES & MATERIALS* 172 (5th ed. 2001) [hereinafter BLAKESLEY ET AL., *CASES*].

This definition is deficient from a legal point of view. It is both overinclusive and underinclusive. Its descriptive accuracy is not apt, since we now see terrorists whose purpose is to destroy and only to destroy. This article will address these points.

U.S. Response: The War on Terrorism

With regard to the current "war" on terrorism, U.S. officials have claimed that they are doing everything possible to avoid civilian casualties, and evidence seems to suggest that this generally may be true. Nevertheless, it is not uncommon to hear individuals in the public, even in the press, argue that since al Qaeda intended to slaughter innocents, why shouldn't we? Indeed, it is easy to fall into this evil desire. In the midst of our difficult times, we run a significant risk of participating in or condoning violence that also could include mass slaughter of innocents. Herman Melville, through Captain Ahab, brilliantly allows us to address some of our own least appealing tendencies:

All that most maddens and torments; all that stirs up the lees of things; all truth with malice in it; all that cracks the sinews and cakes the brain; all the subtle demonisms of life and thought; all evil to crazy Ahab, were visibly personified, and made practically assailable in Moby Dick. He piled upon the whale's white hump the sum of all the general rage and hate felt by his whole race from Adam down; and then, as if his chest had been a mortar, he burst his hot heart's shell upon it.⁷

Voltaire's "everyman" in *Candide* cynically assessed international law and the laws of war as consisting of righteous brutality on a grand scale and simple suffering on a human scale.⁸ Voltaire's assessment of international law, terror, and our own tendency to become barbaric can apply to our similar tendency to confuse justice with vengeance.⁹ Exploitation of human weakness by the few with power may be the actual culprit.¹⁰ Primo Levi drove himself to despair (and suicide) over the issue of why common, everyday, "civilized" people fall into a miasma of evil.¹¹ Sadly, many of us tend to distrust, denigrate, and dis-

7. HERMAN MELVILLE, *MOBY DICK* (1851).

8. Louis René Beres, *Straightening the "Timber": Toward a New Paradigm of International Law*, 27 VAND. J. TRANSNAT'L L. 161, 163 n.7 (1994).

9. BLAKESLEY, *TERRORISM*, *supra* note 4, at 5-31; Christopher L. Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 FLETCHER FOREIGN WORLD AFF. 77 (1994); Christopher L. Blakesley, *The Modern Blood Feud: Thoughts on the Philosophy of Crimes Against Humanity*, in 2 INTERNATIONAL HUMANITARIAN LAW: ORIGINS, CHALLENGES, AND PROSPECTS (2002); P.D. JAMES, *CERTAIN JUSTICE* 7 (1997).

10. See BLAKESLEY *TERRORISM*, *supra* note 4, at 5-89.

11. See PRIMO LEVI, *THE DROWNED AND THE SAVED* (Raymond Rosenthal trans., 1988); see also BLAKESLEY, *TERRORISM*, *supra* note 4, at 5-31; SIGMUND FREUD, *CIVILIZATION AND ITS*

criminate against those whom we perceive as being different. This tendency is often manipulated by "leaders" for their own nefarious purposes and by propagandists who proliferate the hatred, fear, and rage. We are made to believe that those "who are different" are dangerous and "evil."¹²

Of course, evil does occur, and did occur on September 11, 2001. It is pathetic, but probably true, that terrorism has become virtually banal.¹³ Certainly, one must defend one's self, family, and nation. On the other hand, the oppressed rightly seek to escape their oppression. How properly, legally, and morally to defend oneself or to escape oppression is not so simple (or, at least not that easy). Lofty rhetoric, religion or other philosophy, or principle are appropriated by those who wish to pervert it for their own uses. A people's deep-seated fears and hatreds are exploited often by those who retain a nefarious desire to prompt the people to commit acts of atrocity in the name of the ideal, but actually serve the prompters' purposes. A perversion of these same values and fears are also used to oppress.

Furthermore, fear and hatred can also prompt us to take or allow action that will cause the erosion of our civil liberties and human rights as an expedient to fight terrorism. In the face of terrorist attack, espe-

DISCONTENTS (James Strachey, trans.) (1961). For an interesting fictional musing on the subconscious, see IRVIN D. YALOM, *WHEN NIETZSCHE WEPT: A STUDY OF OBSESSION* (1992).

12. For example, in Rwanda, Georges Ruggiu, the infamous "Italian Hutu," who pleaded guilty before the Ad Hoc Tribunal for Rwanda (ICTR) in May 2002, of persecution and incitement to genocide and sentenced to twelve years imprisonment. *Prosecutor v. Kayishema & Ruzindana*, Int'l Crim. Trib. for Rwanda, Case No. ICTR-95-1-T, para. 53 (1999), available at 1999 WL 33268309 (noting that broadcast speeches, for example, "referred to the Tutsis and Hutus from the opposition parties as collaborators of the RPF. These speeches encouraged the militias to target Tutsis in their daily acts of vandalism"). Ruggiu, actually a Belgian national of Italian origin, is a former journalist who worked for *Radio Télévision Des Mille Collines* (RLTM). *Id.* Donald McNeil wrote an article in March on Rwanda's most famous musician, Simon Bikindi. Donald G. McNeil, Jr., *Killer Songs*, N.Y. TIMES MAG., Mar. 17, 2002, at 58. His songs were played on *Radio des Mille Collines* during the period of the genocide. The article quotes Alison DesForges, the Human Rights Watch Rwanda specialist:

Alison DesForges, the lead Rwanda specialist for Human Rights Watch, says that "Bikindi's songs are subtle, using poetic language and oblique references. There's a Rwandan proverb," she says. "A message is given to many, but those who are meant to understand, understand. There's always a subtext in Rwanda. You don't have to resort to brutal language. People understand."

See also Mercedeh Momeni, *Why Barayagwiza is Boycotting His Trial at the ICTR: Lessons in Balancing Due Process Rights and Politics*, 7 ILSA J. INT'L & COMP. L. 315 (2001); ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 71 (1999); Christine L. Kellow & H. Leslie Steeves, *The Role of Radio in the Rwandan Genocide*, J. COMM., Summer 1998, at 107-116; Ameer F. Gopalani, *The International Standard of Direct and Public Incitement to Commit Genocide; An Obstacle to U.S. Ratification of the International Criminal Court Statute?*, 32 CAL. W. INT'L L.J. 87 (2001).

13. See, e.g., Bill Keller, *The Monster in the Dock*, N.Y. Times.com Online News Report (Feb. 9, 2002), available at <http://dupagepeace.home.att.net/monster.html>.

cially one as senseless and atrocious as that of September 11, we are tempted to promulgate rules for "protection" and "security" that ultimately could erode protection, security, and the very values our troops fight for by leading us to a society that conforms more to what the perpetrators of terrorism may live under and would want us to suffer.¹⁴ We must, therefore, be vigilant to ensure that we are not manipulated by the terrorists or by our own overreactive leaders into taking action or acquiescing to action, terroristic in and of itself, that is destructive of our liberty and other important values.

In addition to the moral traps and dangers facing us, we have to address several very difficult legal, constitutional, and technical problems. One problem, for example, is to determine whether flying airliners into buildings constitutes an "armed attack" under domestic and international law. This question is important because under current international law, the nature of the legal response depends on it. Since September 11, however, the traditionalist position has been questioned.¹⁵ If it was not an "armed attack" as traditionally contemplated, did it constitute some other sort of attack that would allow violent action to be taken in response? If so, what responses does international law allow? Also, what protections does the law provide to those upon whom the response impacts? When prosecuting alleged participants, what protections and rights obtain for those captured or arrested pursuant to the response?¹⁶ These are very important and difficult questions that foster vigorous disagreement.¹⁷

When an "armed attack" is committed against a person or group, it may require, and both domestic and international law may permit, a reaction in self-defense.¹⁸ The September 11 attacks on the World

14. See, e.g., The USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter USA Patriot Act]. The so-called "Patriot Act" makes terrorism a predicate act for which a wiretap under Title III can be authorized. *Id.* § 201. The USA Patriot Act also authorized law enforcement to conduct wiretapping for crimes related to computer fraud and abuse. See *id.* § 202; see also Mark G. Young, Note, *What Big Eyes and Ears You Have!: A New Regime for Covert Governmental Surveillance*, 70 *FORDHAM L. REV.* 1017, 1064-65 (2001).

15. I am questioning it here, of course. See Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 *HARV. J.L. & PUB. POL'Y* 539, 540 (2002); Noah Feldman, *Choices of Law, Choices of War*, 25 *HARV. J.L. & PUB. POL'Y* 457 (2002); Cf. George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 *HARV. J.L. & PUB. POL'Y* 635 (2002).

16. See Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 *MICH. J. INT'L L.* 1, 1-9 (2002).

17. Cf. Ruth Wedgwood, *The Case for Military Tribunals*, *WALL ST. J.*, Dec. 3, 2001, at A18; Harold Honjgu Koh, Editorial, available at <http://www.time.com/time/nation/article/0,8599,186581,00.html>; Akhil Reed Amar, *Nation—War Powers: Is Bush Making History?*, *TIME*, Dec. 03, 2001, at 62. See *Yamashita v. Styer*, 327 U.S. 1, 8, 11-12 (1946).

18. Principles of necessity and proportionality, rather than issues of jurisdiction, may inform considerations of self-defense based military responses to terrorism. See, e.g., Robert J. Beck &

Trade Center (WTC), the Pentagon, and Pennsylvania airspace were acts of terrorism and crimes against humanity. Armed attack under international law is not required to be "military" in nature.¹⁹

To participate in or plan atrocities like those of September 11 is certainly criminal conduct. One response may be to attack the perpetrators or those who are protecting them, but whether this is "legal" under the circumstances and current international law is open to debate.²⁰ When the conduct that fits these crimes is prosecuted, is it correct to suggest, as the Bush Administration does, that participants may have no protection under international law, including the Geneva Conventions?²¹

The conduct of the perpetrators constituted at least terrorism and murder. It appears that the following elements of the crime occurred: (1) over three thousand human beings were killed; (2) the conduct on that day involved commission of multiple acts committed as part of a wide or systematic attack upon innocent civilians (in the WTC and in the airliners); and (3) at least some of the perpetrators (and their leaders) had the necessary *mens rea* of intending or at least knowing that they were part of a systematic attack on a civilian population.²² The armed attack does not have to be "military" in the traditional sense.²³

ON DEFINING TERRORISM: CONSIDERING ITS CAUSES

I will define terrorism, for purposes of this article, to be the use of violence against innocent individuals for the purpose of obtaining some

Anthony Clark Arend, *"Don't Tread on Us": International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153 (1994) (discussing the U.S. response to Iraqi government's attempt to assassinate former President Bush); Alberto Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 287 (1987) (discussing proposed responses to increases in terrorism against Americans); William V. O'Brien, *Reprisals, Deterrence, and Self-Defense in Counterterrorism Operations*, 30 VA. J. INT'L L. 421, 423 (1990).

19. See, e.g., Darryl Robinson, *The Elements of Crimes Against Humanity*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 74 (Roy S. Lee ed., 1999); Roy S. Lee, *How the World Will Relate to the Court*, 25 FORDHAM INT'L L.J. 750, 756-57 (2002). In fact, the use of non-military common modes of transportation and innocent civilians as weapons shows that, perhaps, the military/non-military distinction no longer makes sense.

20. See Glennon, *supra* note 15, at 540; Feldman, *supra* note 15, at 457; Fletcher, *supra* note 15, at 635.

21. See Wedgwood, *supra* note 17; Koh, *supra* note 17; Amar, *supra* note 17, at 62; see also *Yamashita*, 327 U.S. at 8, 11-12 (1946); Paust, *supra* note 16, at 1-9; Glennon, *supra* note 15, at 540; Feldman, *supra* note 15, at 451. Cf. Fletcher, *supra* note 15, at 635; Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 Hastings Const. L.Q. 373, 375, 434-38 (2002).

22. These seem to be the constituent elements of the crime against humanity of murder under customary international law which is reflected in the Rome Statute for the International Criminal Court, in art. 7(1)(a), U.N. Doc. A/CONF.183/9* (1998), available at <http://www.un.org/law/icc/statute/contents.htm> [hereinafter Rome Statute]. See Lee, *supra* note 19, at 755-57.

23. See Rome Statute *supra* note 22.

military, political, or philosophical end from a third-party government or group. The violence must be aimed at or must wantonly impact innocent civilians. In this way, it obviates any application of self-defense because, as we shall see below, innocents include non-combatants in war and non-attackers in a non-war setting. As such, one has no right to defend oneself against a person who is not threatening one's life or limb. Terrorism is political or ideological violence without restraint of law or morality. Terrorism may be fully domestic, but it is international terrorism only when the conduct transcends borders or is so massive or includes a use of weapons of mass destruction that it poses a threat to international peace and security. Later in this paper, I will provide a more detailed definition of terrorism, determine its constituent elements, and analyze them. We will consider whether a war crime or crime against humanity is a functional equivalent of terrorism, but which occurs during legally recognized or recognizable armed attack. It will be necessary in this process to distinguish both domestic and international self-defense and to distinguish the legal and illegal use of violence in war. It may be that the offenses relevant to this paper (war crimes, crimes against humanity, and terrorism) have equivalent elements and a similar harmful impact, but they occur in different factual and legal circumstances. The differing circumstances are crucial to an understanding of terrorism and to adopting any proper legal response to it.

On August 8, 1945, the London Charter declared certain conduct, including specifically the slaughter of civilian populations, even when committed during war, to be intolerable.²⁴ The rule of interconnecting irony, especially inherent in international law and reality, is emphasized once again when one notes that on that very day the United States dropped its second atomic bomb, this time on an "undefended town," Nagasaki, killing at least 70,000 of its mostly civilian population.²⁵ The juxtaposition of law, innocence, and military necessity could not have been manifest more starkly. Is a similar irony at work today? We face the unspeakable terrorism committed against innocent non-combatants going about their daily business on airplanes, only to become part of the weaponry that slaughtered thousands more innocents in the name of religious necessity and to escape "oppression." Reaction to this terror-

24. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 8 U.N.T.S. 279, at art. 6(c); Gerry J. Simpson, *War Crimes: A Critical Introduction*, in *THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES* 1, 4 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997).

25. The 70,000 souls were the least number of immediate deaths in Nagasaki. Within the next five years, at least another 130,000 inhabitants of Hiroshima and Nagasaki died as a result of the atomic bombings. Elliot L. Meyrowitz, *The Laws of War and Nuclear Weapons*, in *NUCLEAR WEAPONS AND LAW* 19, 32 (Arthur Miller & Martin Feinrider eds., 1984).

ism has been swift and violent, although it remains to be seen whether it has been sure. How one defines terrorism is obviously important.

Harvard Professor of Government Michael Ignatieff recognizes and accepts this irony. He writes in a New York Times Book Review essay²⁶ that: "Caleb Carr, a popular novelist and a military historian, makes two arguments in 'The Lessons of Terror.'"²⁷ The first is that punitive warfare by states against civilians amounts to terrorism.²⁸ The second is that terrorism never works.²⁹ Both of these arguments strike me as wrong. Ignatieff argues that

war against civilians has been a feature of the Western military tradition since the Romans razed Carthage. Carr argues that indiscriminate war against the Carthaginians, and then against the barbarians, helped bring about Rome's downfall. The slaughter of civilians, which was supposed to terrify and subdue, only incited further rebellion and, besides, taught the barbarians to be indiscriminate in return.³⁰

First, both Carr and Ignatieff are not correct that "war against civilians" has been a feature of "Western military tradition since [the razing of Carthage by the Romans]."³¹ First, even in the "West," that sort of barbarity was occurring long before Carthage. Furthermore, the "tradition" was close to worldwide, not only "Western." Carr's point that the razing of Carthage was "indiscriminate" is incorrect also, because it was *discriminate* in that the civilian population was intentionally slaughtered.³² This slaughter of innocents did "work." Indeed, the result for the Romans is ironically called the "Carthaginian Peace." Sadly, as Ignatieff correctly points out, it continues to work, at least in the short-term.

Ignatieff continues: "If Carr were saying only that warfare against civilians has perverse consequences, he would be pointing out something worth remembering. If he were saying only that when empires teach barbarians to be indiscriminate, they end up being victims of barbarism themselves, no one could object." But, the main weakness in Carr's analysis, according to Ignatieff, is that, "Carr persists in equating war against civilians with terrorism, and this leads to absurdity."³³ Ignatieff attempts to refute Carr's position with the following examples of historical depredation:

26. Michael Ignatieff, *Barbarism at the Gates: Warfare Against Civilians, Caleb Carr Argues, Should Always Be Viewed as Terrorism*, N.Y. TIMES REV. BOOKS, Feb. 17, 2002, at 8.

27. See generally CALEB CARR, *THE LESSONS OF TERROR* (2002).

28. *Id.*

29. *Id.*

30. See Ignatieff, *supra* note 26, at 8.

31. See *id.*

32. See *id.* at 8; CARR, *supra* note 27, at 85.

33. See Ignatieff, *supra* note 26, at 8.

Sherman's march through Georgia during the Civil War becomes terrorism. So does Jimmy Doolittle's raid on Tokyo and Nixon and Kissinger's bombing of Cambodia. The problem here is not to absolve Sherman, Doolittle or Nixon of responsibility for wreaking havoc on civilians [but that] it confuses everything to call them terrorists. Carr makes no distinction between conventional, if barbaric, acts of war committed by a state army under regular command, as part of a formally declared campaign to defeat another state, and violence against civilians by nonstate actors with the aim not of military victory but of causing panic or inflicting revenge.³⁴

At this point, Ignatieff has made a few correct technical points, but his implications are troublesome.

Ignatieff notes that:

[I]ntentions matter in judging consequences. Carr makes the valid claim that good causes can be undermined by the use of barbarous means. He then goes on to argue, mistakenly, that those who use such means are terrorists. But this ignores intentions and contexts. Sherman used barbarous means in the context of a just intention, to bring the Civil War to a speedy conclusion. He was a serving officer of the United States, not an irregular, like the abolitionist John Brown, whose raids on slaveholders should properly be counted as acts of *terror*³⁵

Ignatieff, therefore, is arguing that John Brown is a terrorist (for a good cause) and Sherman is a "regular" general committing war crimes (for a good cause).

The depredations committed by the likes of Sherman, Doolittle, Truman, Nixon, and Kissinger may not have been terrorism, although they were founded on the use of terror as a weapon. The conduct would fit more likely into the category of a war crime or a crime against humanity, depending on the circumstances. The key point is that the essential or constituent elements of this conduct have nothing to do with motive, purpose, or cause. Their legal essence or their gravamen is pretty much the same, but they fall into different legal categories.

Ignatieff argues that the indicated conduct by Sherman, Doolittle, Nixon, and Kissinger was extremely brutal war tactics, but not "terror."³⁶ Here, Ignatieff confuses terror and terror tactics with terrorism. He also suggests that this conduct may not have been criminal because the perpetrators represented "legitimate" governments or armies and committed the brutality for a just cause.

Ignatieff is correct to draw attention to distinctions between terror-

34. *Id.*

35. *Id.* (emphasis added).

36. *Id.*

ism and the other noted conduct. Those distinctions are legal niceties that are very important, but not for the reasons suggested by Ignatieff. They are important for jurisdictional, not moral, or even punishment, purposes. If, in an international war (as with Hitler in World War II) or in a civil war (as with Sherman in the United States, Ntkatimurana in Rwanda, or the French and the National Liberation Front in Algeria), a leader orders or a perpetrator intentionally or indiscriminately kills non-combatants in order to gain territory, shorten, win, or otherwise gain an advantage in a war by panicking a population or government, he commits a war crime or crime against humanity depending on circumstance. If a leader simply slaughters his own civilians during "peacetime" because he wishes to avoid or deflect any potential insurrection, then it is a crime against humanity once it reaches the level of threatening international peace or security. Otherwise, if it does not reach that level, then it is arguably terrorism against that population or, perhaps, even genocide. If a person or group flies an airliner into a building full of non-combatants to kill them and to undermine a regime or to cause chaos, then it is terrorism. Thus, the conclusion that Ignatieff draws is just as wrong and as that of Carr, and probably more dangerous. Both Carr and Ignatieff confuse or conflate *jus ad bellum* and *jus in bello*.

Ignatieff continues with what he considers to be Carr's essential mistake:

Carr has been misled, it seems to me, by what he calls "Vattel's law." Emmerich de Vattel, a Swiss pastor and jurist, published "The Law of Nations" in 1758. In it, he made the claim that in determining whether a war is just, it is as important to assess how combatants are actually fighting as it is to assess what they are fighting for. Just causes can be betrayed by unjust behavior on the battlefield, like killing civilians or prisoners, or employing disproportionate force to attain an objective.³⁷

Part of Ignatieff's error is that he reads international law (and Emmerich de Vattel) as a political scientist and not as a lawyer, or at least, so it seems. Vattel, however, is focusing on issues that implicate the law. The context and point of the entire discussion is to determine what legal consequences obtain after the commission of a war crime, a crime against humanity, or terrorism. So, Ignatieff states, "[t]o use the terms of art, Vattel was distinguishing between *jus ad bellum* and *jus in bello*. The former refers to the grounds that justify going to war, the latter to the rules that define just conduct of hostilities."³⁸ True. Ignatieff continues: "[b]ut the two, while distinct, need to be considered

37. *Id.*

38. *Id.*

together.”³⁹ Of course they do, but this does not mean that they are the same or that they implicate the same legal consequences. Ignatieff pretends.

Ignatieff states that “[i]ntentions matter in judging consequences.”⁴⁰ Of course they do, but the issue is what is meant by intentions. Ignatieff seems to think that intent equals motive. This is clearly not the case if one’s point is asking the question of whether the conduct constituted *the crime of terrorism*. In criminal law (even international criminal law), the intent that counts is the intent to kill or maim innocents (non-combatants). Motive may include an “intent” to cause panic. In a war, forces use terror to panic the enemy and to accelerate the end of the war. Motive and intent may overlap, but they are distinct. The distinction is important. Ignatieff seems not to understand this or simply chooses to ignore it.

Ignatieff notes correctly that “[a]ll the people slaughtered by Sherman and by Brown are dead [not surprisingly], and aggrieved descendants may not care whether they were killed by terrorists or armies pursuing a just cause by unjust means.”⁴¹ Quite true. He continues: “[t]here are those who equate the civilians killed by American bombing in Afghanistan with the civilians killed in the World Trade Center. All are dead, but death does not create any moral equivalency among them.”⁴² This is also quite true, as long as no evidence exists that innocent civilians in Afghanistan were intentionally slaughtered. On the other hand, an innocent Afghan, say a mother with her children, eating dinner, is no less innocent than those killed in the WTC. If proof were obtained that she were intentionally slaughtered by the United States or any troops, this would establish a moral and legal equivalency. After missing this obvious point, Ignatieff again falls into error. Ignatieff is correct to say that the distinctions are intensely important, but they are important *legally* because the elements that one must prove and the jurisdiction under which one will prosecute are dependant on the distinctions. This is only to say that one type of crime or one instance of a crime is more serious or egregious than another. But both (or all) are crimes, crimes of close to the highest magnitude.

Ignatieff continues:

In one case, civilians were massacred deliberately, and without warning, during a time of peace, by a nonuniformed group whose intention was to spread terror. In the other case, civilians were killed

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

during an exercise of legitimate self-defense by a state, in response to an act of war, and were killed unintentionally despite good-faith efforts, by targeteers and weaponeers, to avoid doing so.

If the actors and targeteers made legitimate and good faith efforts to avoid civilian casualties in a war (in effect, they did not intentionally or recklessly attack them), no crime was committed at all. No reasonable person makes this association. Thus, it seems that Ignatieff is setting up a "straw man." On the other hand, General Sherman, Doolittle, and Truman (at least in Nagasaki) *intentionally* attacked innocent civilians so as to cause panic and convince the opposition's military leaders to stop fighting the war. This was not only terror (but not terrorism), but a war crime. Thus, for Ignatieff to move from these examples to Afghanistan seems disingenuous, unless he has evidence that innocents were purposefully attacked in Afghanistan.

Another example that Ignatieff uses in an attempt to justify his points is the experience of the French in Algeria.⁴³ He states:

In their campaign to secure independence from France, the Algerian National Liberation Front resorted to terror. The ensuing nightmare is memorably captured in Gillo Pontecorvo's great film "The Battle of Algiers." As cafes and bus stations were bombed in order to drive the French out of Algeria, the French Army responded with raids, blanket arrests, bombing and torture. In this infernal cycle, the French disgraced themselves and finally lost even the will to disgrace themselves further. The F.L.N., fighting for their land, eventually triumphed. The message of Algeria hardly confirms that terror never works. It supports the different point that indiscriminately brutal acts of counterterror rarely succeed.⁴⁴

Does it make sense to claim that a group fighting for independence from colonialism commits terrorism, based solely on the fact that the group is not the "recognized" government? If the Algerian War is considered to be a civil war or a war of national liberation that takes on international aspects, then the laws of war obtain and the slaughter, torture, and other depravity that occurred on both sides constitute war crimes or crimes against humanity.

Here again, Ignatieff makes the mistake of equating terror with terrorism, but, I repeat, they are not the same. Ignatieff's confusion is much worse than Carr's. In Algeria, a war of national liberation was raging. It seems to me that it was an "internal" war with "international"

43. *Id.*

44. *Id.*

implications. Today, after Protocols I⁴⁵ and II,⁴⁶ additions to the Geneva Conventions of 1949, it would be clear that crimes against humanity were committed by both sides. I would even argue that customary international law that had developed around the 1949 Geneva Conventions also provided for criminal sanctions against acts performed by both sides. But some of the “terror” was legal, though brutal. If this is Ignatieff’s point, it is banal. Sadly, war is brutal, terror-bound and, of course, sometimes successful. Occasionally, war crimes, crimes against humanity, or terrorism also help one to succeed in one’s purpose for committing them. This argument, that terrorism sometimes succeeds, is Ignatieff’s next exercise in banality. He states:

As for the futility of terrorism itself, who could say with confidence that Jewish terrorism—the assassination of Lord Moyne and then of Count Bernadotte, the bombing of the King David Hotel, followed by selective massacres in a few Palestinian villages in order to secure the flight of all Palestinians—did not succeed in dislodging the British and consolidating Jewish control of the new state? Though terror alone did not create the state of Israel—the moral legitimacy of the claim of the Holocaust survivors counted even more—terror was instrumental, and terror worked.⁴⁷

Whether it worked or not, it still may or may not have been criminal, depending on whether the perpetrators committed the elements of terrorism, a crime against humanity, or a war crime. Success does not (or at least should not) have anything to do with the criminality of the conduct. Many criminals “get away with it.” So what? What they got away with was still criminal.

Motive or the “justice” of the “cause” may have relevance to *jus ad bellum*, but not to *jus in bello*. Ignatieff continues his attack:

Carr makes the valid claim that good causes can be undermined by the use of barbarous means. He then goes on to argue, mistakenly, that those who use such means are terrorists. But this ignores intentions and contexts. Sherman used barbarous means in the context of a just intention, to bring the Civil War to a speedy conclusion. He was a serving officer of the United States, not an irregular, like the abolitionist John Brown, whose raids on slaveholders should properly be counted as acts of terror.⁴⁸

45. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (*Protocol I*), Jan. 23, 1979, 1125 U.N.T.S. 3 [hereinafter *Protocol I*].

46. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (*Protocol II*), Jan. 23, 1979, 1125 U.N.T.S. 609 [hereinafter *Protocol II*].

47. Ignatieff, *supra* note 26, at 8.

48. *Id.*

Ignatieff's point here is correct insofar as it concerns the distinctions among terrorism, war crimes, and crimes against humanity. Yet, all of these are crimes of similar gravity. Ignatieff, nevertheless, claims that Carr equates barbarity with terror. Well, these do equate, but terror may not be terrorism; Ignatieff conflates the two.

Ignatieff's error here is that he equates terror with terrorism. He confuses terror and "terror tactics" with the crime of terrorism. Terror is part of terrorism and it may be a tactic in war. But, depending on the circumstances, terror or brutality may or may not constitute a war crime, a crime against humanity, or terrorism. Some brutality or terror in war is not a war crime or a crime against humanity. *A fortiori*, it is not terrorism in that case. So, Ignatieff is correct to say that brutality is not terrorism in some contexts,⁴⁹ but he ignores a whole range of criminal conduct where brutality against innocent civilians is terrorism or some other equally egregious crime. As far as barbarity to the level of criminality is concerned, it may be a war crime, crime against humanity, or terrorism. One's "cause" or motive is irrelevant, unless it somehow rises to the level of an excuse or justification, such as self-defense. Ignatieff seems to think that it is the essential element to distinguishing terrorism and non-terrorism.⁵⁰ Ignatieff has confused all or most of the legal elements of the problem of terrorism.

What, then, is terrorism? Ignatieff's confusion is based on a lack of understanding that the crime of terrorism, like all crime, including crimes against humanity and war crimes, must have express and provable constituent elements. Ignatieff seems to think that an attack to cause panic "guarantee[s] terrorism."⁵¹ If so, virtually every act of war (every attack on the enemy) is terrorism.⁵² Terror is an essential part of war. Terrorism is a crime. Some terror tactics in war rise to the level of crimes against humanity or war crimes. The same conduct committed against innocent civilians in peacetime would be terrorism.

Scott Shuger of *Slate* magazine challenges Professor Ignatieff, but Shuger, though much closer to a correct understanding, also misses the point.⁵³ Shuger notes how President Bush thinks it is obvious who is a terrorist, that Michael Kinsley thinks it is inscrutable.⁵⁴ Shuger consid-

49. This is a truism. It is like saying that non-terrorism is not terrorism.

50. See Ignatieff, *supra* note 26, at 8.

51. See Scott Shuger, *Off on a Terror: How to be Intellectually Honest About Terrorism*, SLATE, Feb. 19, 2002, available at <http://slate.msn.com/?id=2062267>. Scott Shuger is a Slate senior writer who spent five years in the U.S. Navy and served overseas as an intelligence officer.

52. See *id.*

53. *Id.*

54. See *id.*

ers it something easy to oversimplify, but scrutable, nonetheless. I agree with Shuger on these points. Shuger argues:

Michael Ignatieff . . . chastises Caleb Carr's book on terrorism for "blurring of the distinction between terror and war against civilians." By Ignatieff's lights, Carr's mistake is that he "makes no distinction between conventional, if barbaric, acts of war committed by a state army under regular command, as part of a formally declared campaign to defeat another state, and violence against civilians by non-state actors with the aim not of military victory but of causing panic or inflicting revenge." Ignatieff says, for example, that Carr fails to recognize that although Civil War Union General William Sherman used "barbarous means" against civilians in his march through Georgia, they were "in the context of a just intention," and he was "a serving officer of the United States, not an irregular, like the abolitionist John Brown, whose raids on slaveholders should properly be counted as acts of terror."⁵⁵

Shuger continues:

But (as Kinsley has observed) terrorism is inherently immoral, because it justifies any awful means. So to say with Ignatieff that a given act isn't terrorism because it has a just context is simply to assert, rather than argue, that it is not terrorism, and paradoxically also to accept the very paradigm of terrorism.⁵⁶

Shuger is absolutely right that to claim that a "just cause" or "just context" as the justifier is to accept the terrorist paradigm. Indeed, just about every group that commits such atrocities has a "just cause" or context upon which to claim justification. It is apparent (I believe that he actually admits it) that Ignatieff simply likes some terrorists and dislikes others. He impliedly adopts the aphorism: "One person's terrorist is another's freedom fighter." Of course, Ignatieff is correct that there are levels of culpability, but that is to state a legal truism, even a banality.

Shuger adds that "the idea that non-terrorism requires a formally declared campaign [is equally incorrect]."⁵⁷ I would suggest that it is equally silly in the current world because war has not been declared since the Korean conflict. Indeed, the United States never formally declared war on Afghanistan, and Shuger is correct that "there's less than meets the eye in Ignatieff's serving officer/irregular. The Nazi occupiers of France were serving officers and the French Resistance members were irregulars."⁵⁸ Indeed, some of our own Special Opera-

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

tions forces use civilian garb, as do our CIA and other agents.

In sum, it seems that either due to lack of space in the *New York Times Review of Books* or due to lack of understanding of the law of war, the law of humanity, or terrorism, Ignatieff's essay makes a shambles of proper understanding of terrorism or the law of war. Shuger again points out quite correctly, that:

What Ignatieff misses is that terrorism isn't about irregular armies or the absence of declarations or causing panic; it's about attacking the other side's noncombatants utterly without concern for them or provocation from them. ("Noncombatants" marks a different class than "civilians" because the former includes military members who've surrendered or who have been incapacitated by prior attacks and excludes civilian employees at military installations and war plants.)⁵⁹

Of course, the killing of "non-combatants" during a war would be a war crime, as would the killing of civilians other than those participating in the war effort at a war plant or a military installation (or it would be a crime against humanity). Shuger also states, though, that:

If the killing of noncombatants is accompanied by some *genuine* concern for the other side's noncombatant population—as there would be if a civilian population was attacked in order to shorten the war to save lives on both sides—and if the other side had attacked your non-combatant population first, then what you have is the bloodiest possible variant of permissible war, but not terrorism.⁶⁰

It seems to me that this is mostly incorrect. Certainly, killing innocent civilians while attacking military targets, if one does not intentionally or recklessly (with criminal negligence in the depraved heart sense) try killing civilians, is neither terrorism, a crime against humanity, nor a war crime. On the other hand, intentionally killing innocent civilians to "shorten the war" or doing so in retaliation for an attack on one's own civilian population is criminal. It is a war crime, crime against humanity, or terrorism, depending on the context described below.

Professor Michael Glennon illuminates and helps rectify one aspect of the confusion represented in Ignatieff's piece. Glennon discusses the unreality, illogic, and dysfunctional elements of traditional international law (what he calls the *de jure* system) relating to armed conflict, particularly relating to the law of self-defense.⁶¹ He contrasts the incoherent *de jure* system with the *de facto* system.⁶² He suggests that the United

59. *Id.*

60. *Id.* (emphasis added).

61. *Id.*

62. See Glennon, *supra* note 15, at 540.

Nations' (U.N.) "Charter's use-of-force regime has all but collapsed."⁶³ Glennon argues that U.N. Charter article 51 and interpretive jurisprudence are incoherent, at least insofar as that article and jurisprudence counsel that "any use of force against a safe-haven government is per se disproportionate."⁶⁴ This counsel, says Glennon, "turns the principle of proportionality inside out," and is based on a maladroitness conflation of *jus ad bellum* and *jus in bello*.⁶⁵

Traditional international law on the law of war has been careful to maintain "the complete disjunction of *jus ad bellum* from *jus in bello*, i.e., upon keeping the rules concerning when force can be used completely separate from the rules concerning what force can be used."⁶⁶ Glennon's point is that,

rules concerning how a war can be fought can, and must, be honored even though the war is fought for illicit ends, and wars fought for permissible ends still cannot be fought by illicit means. The plain illogic of this second corollary derives from conflating the two, from supposing that an impermissible object necessarily renders impermissible any amount of force employed in its pursuit.⁶⁷

This conclusion, notes Glennon, cannot follow or the principle of proportionality would be rendered empty.⁶⁸

Glennon's argument deflates Ignatieff's position, at least in the obverse. Ignatieff conflates *jus ad bellum* and *jus in bello* in order to claim that conduct by a legitimate regime or by insurgents with military garb cannot be terrorism. The obverse point to Glennon's analysis is that even when a nation acts in legitimate self-defense, it must conform to the rules of *jus in bello*. Glennon's proposition that legitimate self-defense allows or ought to allow an attack against a non-state-actor who has committed or is about to commit terrorism, such as that committed on September 11. This is obvious if one accepts the proposition that terrorism is a crime because it violates the basic, primordial rule that one cannot intentionally attack an innocent, no matter how lofty one considers his purpose to be. By the same token, counter-terrorism is criminal when it targets civilians. I will elaborate on this point throughout this article.

Al Qaeda, on September 11, 2001, targeted the civilian population in the WTC and used innocent civilians as weapons in the airliners that it "militarized" to do its nefarious work. Al Qaeda members clearly

63. *Id.*

64. *Id.* at 549-52.

65. *Id.* at 550-51.

66. *Id.* at 551.

67. *Id.*

68. *Id.*

manifested the *mens rea* or intent required to commit terrorism, as they not only demonstrated their utter disregard for the U.S. noncombatant population, as Shuger noted, but they also used innocents as weapons and actually targeted other innocents.⁶⁹ Their commission of the *actus reus* is just as self-evident, as they flew the planes into the towers.

Shuger continues, arguing that “since the 9/11 attacks were not a response to a U.S. attack on any noncombatant population, those attacks count as terrorism.”⁷⁰ Here, Shuger is incorrect. Having had one’s innocent civilians attacked cannot be a justification or an excuse for attacking the innocent civilians related to the perpetrators. His position on this point, though I doubt that he means for it to do so, would justify or excuse al Qaeda’s attack, if there had been evidence that the United States had attacked innocent civilians. This cannot be and is not correct.

On the scope of the term terrorism, one must ask whether the Pentagon was a legitimate military target. Shuger correctly notes that it was. The attack was atrocious, but it was not terrorism because of or on the basis of the nature of the Pentagon as a target. On the other hand, it was the means of attacking the Pentagon that rendered it terrorism.⁷¹ Flying an airliner into the Pentagon was a manifestly wanton and gratuitous attack on noncombatants.⁷² Perhaps the civilian employees of the Pentagon were not “non-combatants”—they were engaged in keeping our military effective and they were attacked at their posts, but the clearly innocent passengers on the hijacked plane used in the attack certainly were non-combatants.⁷³ If “al-Qaida had attacked the Pentagon not with airliners full of innocents, but with a truck bomb driven by suicidal jihadists, that would have been war, not terrorism.”⁷⁴ The same is true of the attacks on the Khobar Towers barracks in Saudi Arabia in 1996, and on the *USS Cole* in Yemen in 2000.⁷⁵ These were attacks on

purely military targets without intentionally endangering civilians—were horrible, *but not terrorism*. And yes, these attacks were sneaky, but so what? War is not fencing, where the rules require the prior issuance of an “En Garde!” If there were such a requirement, then for instance the nighttime U.S. special ops raids last October on a Taliban airbase and on a Mullah Omar compound were terrorism too, since our troops attacked without warning.⁷⁶

69. See Shuger, *supra* note 51.

70. *Id.*

71. *Id.*

72. *Id.*

73. See *id.*

74. *Id.*

75. *Id.*

76. *Id.* (emphasis added).

Ignatieff, on the other hand, seems to want to define terrorism in the same way as every group that wants to commit it. I agree with Shuger on his important point: "Let's face it: We cannot define terrorism so that only the other side's military can be destroyed or so that only our weapons can be used."⁷⁷ Terrorism can be committed by a group, nation, or government.

Professor Bassiouni has recently entered this fray.⁷⁸ He has noted what he considers to be the root causes and characteristics of terrorism, and, thereby, provides or hints at his definition, though he avoids calling what he provides a definition.⁷⁹ Indeed, he states that "'[t]errorism' is a value laden term. Consequently it means different things to different people, a characteristic that perhaps is best expressed in the saying, '[w]hat is terrorism to some is heroism to others,' and has never been satisfactorily defined."⁸⁰ Yet, Bassiouni calls for prosecution of terrorist perpetrators.⁸¹ Without a definition, this would be prosecuting one's enemy's heroes, because they are one's enemy's heroes. On the other hand, Bassiouni's statement of terrorism's characteristics comes close to providing a definition.

Terrorism is a strategy of violence designed to instill terror in a segment of society in order to achieve a power-outcome, propagandize a cause, or inflict harm for vengeful political purposes. That strategy is resorted to by state actors either against their own population or against the population of another country. It is also used by non-state actors, such as insurgent or revolutionary groups acting within their own country or in another country. Lastly, it is used by ideologically motivated groups or individuals, acting either inside or outside their country of nationality, whose methods may vary according to their beliefs, goals, and means.⁸²

One of Bassiouni's main purposes in writing his recent thoughts on terrorism seems to be to debunk the ideologically and statist approach currently in vogue, which provides that only non-state-actors can commit terrorism.⁸³ He points out correctly that the common usage of the term terrorism (which is state generated and state biased), excludes state actors.⁸⁴ This common usage allows that only "small, ideologically

77. *Id.*

78. See M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83, 84-85 (2002).

79. *Id.* at 101.

80. *Id.*

81. See generally *id.*

82. *Id.* at 84.

83. *Id.* at 101-03.

84. *Id.* at 86.

motivated groups” can commit terrorism.⁸⁵ Bassiouni is absolutely right in attacking this pernicious, state biased approach. It should be self-evident, as Bassiouni notes, that application of a double standard that accommodates the same or similar terror-violence by state actors, yet condemns it when committed by non-state actors, only leads to more of the same conduct by both types in a horrible dialectic of terror.⁸⁶ Yet, Bassiouni’s own analysis seems to be manipulable by those who would oppose it. It is subject to being turned on its head by “statists” who wish to commit terror-violence on their “enemy’s heroes.”⁸⁷ It is absolutely necessary to define terrorism and to provide specific constituent elements if one is going to have a legal principle upon which to prosecute perpetrators or to attack perpetrators in self-defense.

Although Bassiouni’s approach is appropriate for some purposes, such as understanding some of the reasons why some terrorists commit some types of terrorism, it leaves some important elements out if one is going to prosecute those who commit terrorism or attack the perpetrators in self-defense. My thoughts in this article are aimed at providing a definition and approach that will not only allow for legal integrity in prosecution or action in self-defense, but will reply both to Professors Bassiouni and Ignatieff.⁸⁸

Why is Terrorism Perpetrated?

Sometimes, the perpetrator of terror or terrorism is motivated by a fundamentalist vision: having the truth and the concomitant obligation to apply any means, including violence against innocents to enunciate, establish, and maintain it. This is a zealot’s vision of how to establish a world of “good order.” Terrorism is committed in a claimed attempt to establish or maintain some favored political order, such as theocracy, socialism, or democracy.⁸⁹ Sometimes it is used by the group in power simply to maintain power and wealth.⁹⁰ For example, the former South African Government terrorized and oppressed its non-white population to maintain its power and the wealth of the white minority. The Mougabe Regime in Zimbabwe, 2001-2002, seemed to have run amuck to

85. *Id.*

86. See discussion *infra* notes 105-31.

87. For example, Professor Ignatieff’s position is the classic statist position attacked by Professor Bassiouni.

88. Compare Ignatieff, *supra* note 26, with Bassiouni, *supra* note 78.

89. See, e.g., the crimes committed by the Soviets or its allies incident to the so-called “Brezhnev Doctrine,” and those committed by the United States or its “allies” under the “Reagan Doctrine.” BLAKESLEY, *TERRORISM*, *supra* note 4, at 1185-86.

90. For a wonderful novel on this and other pertinent points, see MARIO VARGAS LLOSA, *LA FIESTA DEL CHIVO* [THE FEAST OF THE GOAT] (2000).

maintain its power.⁹¹ Sadly, one could mention so many other tragic examples and episodes. Sometimes terror is a tool that is used in an attempt to win a war (to intimidate the enemy into capitulating).⁹² Arguably, the United States may have helped to precipitate the Cambodian atrocities or, at least, set the stage for them, by insisting that Prince Sihanouk not be neutral and by saturation bombing. Are these examples of terror-tactics the same as terrorism? We will attempt to distinguish between the terms "terrorism" and "terror."⁹³

WHY TERRORISM? VIEWS FROM HISTORY: PUNISHMENT,
POWER, WAR, AND EXPIATION

It may be helpful in our attempt to understand terrorism and some of its causes to analyze briefly the history of the "laws of humanity." We have seen the importance of and confusion over *jus ad bellum* and *jus in bello*, to understanding terrorism and its placement in the jurisprudential construct. We will now consider the role that notions of expiation and redemption have played in the law of justifying violence, including war, punishment, and terrorism.

Palliating the depredations of war has been considered an important aspect of warfare since at least the sixth century B.C.⁹⁴ As early as the sixth century B.C., the great Chinese General Sun Tzu wrote *The Art of War*, which provided many humanitarian protections and limitations on the conduct of his warriors during war.⁹⁵ In fact, one might say that since antiquity there have been war crimes and crimes against humanity that were forbidden in law and conscience. For example, the Code of Hammurabi (1728-1686 B.C.), the Laws of Eshnunna (2000 B.C.), and the even earlier Code of Ur-Nammu (2100 B.C.).

In the very early "modern era," Jean Bodin, Hugo Grotius, and Emerich de Vattel all called for the rule that punishment was necessary for those who commit serious offenses, in their requirement that there be no sanctuary for the criminal. Each nation has an obligation to "prose-

91. CNN Online News Report, *Fiery Face of Mugabe Shock Troops*, Mar. 6, 2002, available at http://www.zimbabwesituation.com/mar7a_2002.html.

92. For example, the carpet bombing of London, Dresden, and Tokyo, and the use of the atomic bomb on Nagasaki, especially because it was an undefended city and, thus, not subject at all to the claim that it was a military target. Hence, terror was the essential purpose of the bombing.

93. For now, one might say that terror is used in all war and is part of warfare. It is also part of terrorism, of course, but as terrorism it is its own genre.

94. See Timothy L.H. McCormack, *From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime*, in *THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES*, *supra* note 24, at 31, 32.

95. See generally SUN TZU, *THE ART OF WAR* (Samuel Griffith trans., 1963); SUN TZU, *THE NEW TRANSLATION* (J.H. Huang trans., 1993); Timothy L.H. McCormack, *supra* note 94, at 32-33.

cute or extradite.” The ascendancy of “positivism” in the nineteenth century created the perception that international law was binding only on states and could not impose obligations or impose punishment directly on individuals; that was solely for states to do.

For centuries military commanders—from Henry V, under his famous ordinances of war in 1419, [to the American military prosecutions of soldiers involved in] the My Lai Prosecutions . . . under the U.S. Code of Military Justice—have enforced such laws against violators. In other cases, states have tried prisoners of war for offenses committed against the customary laws of war. Thus, both the accused’s own state and the captor state (for POWs) have standing to prosecute.

Neither of these systems, however, has functioned with any degree of efficiency.⁹⁶

Telford Taylor in his classic, *Nuremberg and Vietnam*,⁹⁷ continued the history, noting that the “laws of war” are of ancient origin, following two main developmental streams.

The first flowed from medieval notions of knightly chivalry. Over the course of the centuries the stream has thinned to a trickle; it had a brief spurt during the days of single-handed aerial combat, and survives today in rules (often violated) prohibiting various deceptions such as the use of the enemy’s uniforms or battle insignia, or the launching of a war without fair warning by formal declaration.⁹⁸

Taylor further noted that,

the second and far more important concept is that the ravages of war should be mitigated as far as possible by prohibiting needless cruelties, and other acts that spread death and destruction and are not reasonably related to the conduct of hostilities. The seeds of such a principle must be nearly as old as human society, and ancient literature abounds with condemnation of pillage and massacre. In more recent times, both religious humanitarianism and the opposition of merchants to unnecessary disruptions of commerce have furnished the motivation for restricting customs and understandings. In the 17th century these ideas began to find expression in learned writings, especially those of the Dutch jurist-philosopher Hugo Grotius.⁹⁹

Professor Taylor continued the history as follows:

96. Jack Landman Goldsmith III, Rapporteur, *Challenges to International Governance Theme IV - The Internationalization of Domestic Law: The Shrinking Domaine Reserve, The Year of International Law in Review*, American Society of International Law Proceedings, 87 ASISPROC 575 (1993).

97. TELFORD TAYLOR, *NUREMBERG & VIETNAM: AN AMERICAN TRAGEDY* 20 (1970) [hereinafter TAYLOR, *NUREMBERG*].

98. *Id.* at 20.

99. *Id.*

The formalization of military organization in the 18th-century brought the establishment of military courts, empowered to try violations of the laws of war as well as other offenses by soldiers. During the American Revolution, both Captain Nathan Hale and the British Major John André were convicted as spies and ordered to be hanged, the former by a British military court and the latter by a "Board of General Officers" appointed by George Washington. During the Mexican War, General Winfield Scott created "military commissions," with jurisdiction over violations of the laws of war committed either by American troops against Mexican civilians, or vice versa. Up to that time the laws of war had remained largely a matter of unwritten tradition, and it was the United States, during the Civil War, that took the lead in reducing them to systematic, written form. In 1863 President Lincoln approved the promulgation by the War Department of "Instructions for the Government of Armies of the United States in the Field," prepared by Francis Lieber, a German veteran of the Napoleonic wars, who emigrated to the United States and became professor of law and political science at Columbia University. These comprised 159 articles, covering such subjects as "military necessity," "punishment of crimes against the inhabitants of hostile countries," "prisoners of war," and "spies." It was by a military commission appointed in accordance with these instructions that Mary Surratt and the others accused of conspiring to assassinate Lincoln were tried.¹⁰⁰

Professor Taylor shows how the idea of war crimes and their punishment evolved after the Civil War, noting that the horrific violence of the Crimean War, the Civil War, and the Franco-Prussian War of 1870 prompted an increasing belief, in Europe and America, in the need for codification of the laws of war and their embodiment in international

100. *Id.* at 21; see also generally TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992); see also Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 *FOREIGN AFF.* 122, 123 (1993); Christopher L. Blakesley, *Autumn of the Patriarch: The Pinochet Extradition Debacle & Beyond—Human Rights Clauses Compared to Traditional Derivative Protections such as Double Criminality*, 90 *J. CRIM. L. & CRIMINOLOGY* 1 (2000) [hereinafter Blakesley, *Autumn of the Patriarch*]; Christopher L. Blakesley, *The Modern Blood Feud: Ruminations on Political Violence*, in 2 *GLOBAL DIALOGUE* 128 (2000) [hereinafter Blakesley, *The Modern Blood Feud*]; Christopher L. Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 *FLETCHER FOREIGN WORLD AFF.* 77 (1994) [hereinafter Blakesley, *Obstacles*]; Georg Schwarzenberger, *The Problem of an International Criminal Law*, in *INTERNATIONAL CRIMINAL LAW* 3, 10, 16 (Gerhard Mueller & Edward Wise eds., 1965); Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 *CAL. L. REV.* 530, 553-56 (1943) (noting that international law provides for some offenses as criminal, though enforcement is undertaken by domestic courts); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537 (1991); Cherif Bassiouni, *The Proscribing Function of International Criminal Law in the Process of International Protection of Human Rights*, 9 *YALE J. WORLD PUB. ORD.* 193 (1982); Quincy Wright, *The Outlawry of War and the Law of War*, 47 *AM. J. INT'L L.* 365 (1953).

agreements. That movement precipitated the series of treaties, the modern foundation of the laws of war, known as the Hague and Geneva Conventions. These include the extremely important Fourth Hague Convention of 1907, and the Geneva Prisoner of War, Red Cross, and Protection of Civilians Conventions of 1929 and 1949.

Taylor summarized some of the major points of these conventions. "[T]he right of belligerents to adopt means of injuring the enemy is not unlimited."¹⁰¹ Notably, the ensuing articles specify a number of limitations to what is allowed in warfare and how the Geneva Conventions expand these principles. This article discusses these rules in the sections on war crimes and crimes against humanity.

Taylor makes the very important point that these conventions articulate laws of war as general principles of conduct; the conventions specify neither the means of enforcement nor the penalties for violations.¹⁰² Nevertheless, Taylor explains, the rules and principles have become domestic law in most nations, as their essence has been adopted by the military law of many countries.¹⁰³ One can find these in the general orders, manuals of instruction, or other official documents. For example, in the United States,

the Lieber rules of 1863 were replaced in 1914 by an army field manual which, up-dated, is still in force under the title "The Law of Land Warfare." It is set forth therein that the laws of war are part of the law of the United States, and that they may be enforced against both soldiers and civilians, including enemy personnel, by general courts-martial, military commissions, or other military or international tribunals.¹⁰⁴

These principles and rules have become *jus cogens* principles and customary international law.

EXPIATORY VIOLENCE

Societies since antiquity have exhibited, for good or for ill, a deep need for expiation and redemption when crime has been committed in their midst or against them. This seems to have been true whether the attack arose from within or without the group. When the crime was committed by an external source, war usually was the expiatory means

101. See Taylor, Nuremberg, *supra* note 97, at 22. The Hague Convention IV, art. 22 (1907).

102. Taylor, Nuremberg, *supra* note 97, at 23.

103. *Id.*

104. See TAYLOR, NUREMBERG, *supra* note 97, at 20; Meron, *supra* note 100, at 123; Blakesley, *Autumn of the Patriarch*, *supra* note 100, at 10-13; Blakesley, *Modern Blood Feud*, *supra* note 100, at 45; Blakesley, *Obstacles*, *supra* note 100, at 77; see also Schwarzenberger, *supra* note 100 at 10, 16; Kelsen, *supra* note 100, at 553-56 (noting that international law provides for some offenses as criminal, though enforcement is to be undertaken by domestic courts).

of choice.¹⁰⁵ Punishment, of course, was the tool when the crime was committed internally. Redemption is good. On the other hand, occasionally groups have been prompted to take action for expiation that seems in retrospect to be antagonistic to the actual well-being or healing of the group.

Anciently, the social cell, tribe, or group would require vengeance against those who were found to have committed a crime, caused certain harm, or perceived harm against the social cell or its leader. When crime occurred, society was required to purge itself of the taint, to avoid the wrath of the god or gods. Some metaphysical dangers could only be avoided through spilling the blood of the perpetrator or his proxy. When a person who had committed an act that put the group at this sort of metaphysical risk escaped, the group had to seek that person's return to expiate itself. If the person's return was not possible, the group had to purge the taint by proxy, often through the attack and wholesale slaughter of those who represented the fugitive.¹⁰⁶ When Jericho fell to Israel, the warriors utterly destroyed all that was in the city, both man and woman, young and old, and ox, and sheep, and ass, with the edge of the sword.¹⁰⁷

There have been war crimes, crimes against humanity, and terrorism since antiquity.¹⁰⁸ The *Lex Talionis*, or law of exact retaliation, is found in the Jewish *Torah* or biblical *Pentateuch*.¹⁰⁹ *Lex Talionis*

105. See, e.g., *Joshua* 6:21; *Judges* chs. 19-21; 1 *Kings* 2:28-34.

106. See, e.g., 1 *Kings* 2:28-34.

107. *Joshua* 6:21.

108. *Exodus* 21:24; Yoram Dinstein, *International Law as a Primitive Legal System*, 19 N.Y.U. J. INT'L L. & POL. 1, 11 (1986). See CODE OF HAMMURABI (1728-1686 B.C.); LAWS OF ESHNUNNA (2000 B.C.); CODE OF UR-NAMMU (2100 B.C.).

109. See *Deuteronomy* 19:21. "Do not look on such a man with pity. Life for life, eye for eye, tooth for tooth, hand for hand, and foot for foot!" *Leviticus* 24:17-20; *Exodus* 22:20, 22:1, 22:6; JOHN SMITH, ORIGIN AND HISTORY OF HEBREW LAW (1960). In addition, see GODFREY DRIVER & JOHN MILES, THE BABYLONIAN LAWS (1952), which applies both the *lex talionis* and compensation. Rule 196, for example, decrees that "[i]f one destroys the eye of a free-born man, his eye shall one destroy," but Rule 198 requires, "[i]f the eye of a nobleman he has destroyed or the limb of a nobleman he has broken, one mine of silver he shall pay." Translation by L.W. King can be found on the Internet in the Avalon Project of Yale University Law School, at <http://www.yale.edu/lawweb/avalon/medieval/hamcode.htm>. Cf. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 1, sc. 3, lines 157-67 (Randal Martin ed., Theatre Books 2001) (1600). Note that the exacting of a mutilating fine is contrary to Jewish law. Compare Rabbi Hertz's comment on the *lex talionis* ("eye for eye"):

In the Torah, . . . this law of "measure for measure" is carried out literally only in the case of murder. . . . [O]ther physical injuries which are not fatal are a matter of monetary compensation for the injured party. Such monetary compensation, however, had to be equitable, and as far as possible equivalent. This is the significance of the *legal technical terms*, "life for life, eye for eye, and tooth for tooth."

J.H. HERTZ, THE PENTATEUCH AND HAFTORAHS 309 (2d ed. 1960); see also Jules Gleicher, *Three*

“requires” an eye for an eye¹¹⁰ to benefit the punished individual as much as to protect the punishers.¹¹¹ In virtually all ancient cultures, metaphysics and law were merged;¹¹² the social cell felt obliged to purge itself of the threat of destruction by the wrath of God or gods. There was a sense that when the group was tainted by crime committed by one of its own or by another against the group, the taint had to be removed to make the group whole again. Punishment of the wrongdoer, combined with religious ceremony, was the cleansing or expiating mechanism. The Code of Manu¹¹³ provided that rest and happiness for the wrongdoer and society are obtained only by soul-purging punishment of the perpetrator. “Blood atonement” was required by the Israelites for heinous offenses.¹¹⁴ The Cheyenne banished the one who tainted the food or water supply and followed with the ritual of the “breaking of the arrows,” to cleanse the group.¹¹⁵

In many societies, the cleansing qualities of fire made it a favored method of capital punishment. Nero used burning at the stake to propitiate Vulcan, the god of fire.¹¹⁶ Punishment has been the mechanism to rid the society of crime’s destructive plague.¹¹⁷ If the perpetrator became a fugitive, it was necessary to obtain his person or a proxy to purge the taint.¹¹⁸ Although some of the forms of ancient punishment are repugnant to us today, the mystical need to seek retribution, to make

Biblical Studies on Politics and Law, 23 OKLA. CITY U. L. REV. 869, 890-99 (1998). Could it not be said that Shylock’s troubles begin with his deviation from Jewish law? Compare SHAKESPEARE, *supra*, at act 1, sc. 3, lines 31-35, with *id.* at act 2, sc. 5, lines 11-16; Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001).

110. Exodus 21:24; Dinstein, *supra* note 108, at 11.

111. See, e.g., I Kings 2:28-34 (discussing blood atonement).

112. See BLAKESLEY, *TERRORISM*, *supra* note 4, at 5-31, 171-288.

113. INDIAN HISTORY SOURCEBOOK: THE LAW OF MANU, Bk. VII, 18, 23-24; bk. VIII, 17 (G Buhler trans., 2002), available at <http://www.fordham.edu>. The Code of Manu (or Manusmriti) is an anonymous brahmanic collection of teachings or rules, which, united or compiled significantly older principles and rules referencing the legendary law-giver Manu, “the wise one.” The Code is usually dated to have been written in the first centuries A.D. “The ‘Code of Manu’ was translated into English for the first time in 1794, THE LAWS OF MANU (George Buhler trans., 1886).

114. See I Kings 2:28-34.

115. See Robert A. Fairbanks, *A Discussion of the Nation-State Status of American Indian Tribes: A Case Study of the Cheyenne Nation*, AM. IND. J., Oct. 1977, at 6 (vol. 3, no. 10); Robert Fairbanks, *A Discussion of the Nation State Status of American Indian Tribes: A Case Study of the Cheyenne Nation* 31 (1976) (LL.M Thesis, available in the Columbia University Law Library).

116. GRAEME NEWMAN, *THE PUNISHMENT RESPONSE* 43 (1985).

117. See, e.g., FOLKE STRÖM, *ON THE SACRAL ORIGIN OF THE GERMANIC DEATH PENALTIES* 14, 208 (Donald Burton trans., 1942) (Ph.D. thesis published in Stockholm); see also, HANS VON HENTIG, *PUNISHMENT, ITS ORIGIN, PURPOSES, AND PSYCHOLOGY* 83, 84 (1973).

118. See, e.g., Judges 15, 19, & 20. When the perpetrator was not obtainable, sometimes the village believed to be where the perpetrator was hiding or at least was from had to be utterly destroyed. See *id.* This caused many blood feuds. BLAKESLEY, *TERRORISM*, *supra* note 4, at 5-31.

society whole again after it has been tainted, continues. Dostoyefsky made the point in *Crime and Punishment*.¹¹⁹ We will also consider the thoughts of a few other luminaries who address the conundrum.

Still today, oppression or perceived oppression by one group against another is the impetus for retaliation by the oppressed against the oppressors and then counter-retaliation by the original oppressors. Any member of the opposing group (call it the family, clan, tribe, people, nation-state) is fairly subject to retaliation. The retaliator is not viewed by his or her own group as a criminal or a terrorist, because he or she is an instrument of the group's need to avenge or expiate itself. Once this occurs, the other group feels justified in a counter-reprisal and the vendetta rages. No doubt, violence is justified under certain circumstances, but never when intentionally or recklessly applied to non-combatants or innocent civilians.

This section will study some examples of attempts at expiation through punishment of the "evil-doers." We will consider the relationship between the authority to punish and sense of expiation. We will see how this relationship was well understood and exploited by leaders, who used the idea that the good of the group and the individual were promoted by punishment of the wrongdoer. Both the wrongdoer and the people needed the wrongdoer to be punished.¹²⁰ If the wrongdoer was a foreigner and had taken refuge abroad, it was necessary to capture him to accomplish this expiation; sometimes this required going to war.¹²¹

Thus, a mystical relationship between punishment, or war, and cleansing atonement applied (applies) in the domestic systems of punishment, and in warfare, to obtain retribution for wrongs. This idea has proved useful to leaders who wanted either to establish or protect their own sovereign power from trouble within or without the group.¹²² I will

119. See generally FYODOR DOSTOYEVSKY, *CRIME AND PUNISHMENT* (Constance Garnett trans., 1947) (1866).

120. See BLAKESLEY, *TERRORISM*, *supra* note 4, at 5-31, 171-288.

121. See, e.g., I *Kings* 2:28-34; *Judges* chs. 19-21 (especially 21:10-14).

122. MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 1-69 (Vintage Books ed., Alan Sheridan trans., 1977) (1975). Foucault and his authorities prompted the ideas that follow on this issue; see also John W. Ragsdale, Jr., *Some Philosophical, Political, and Legal Implications of American Archeological and Anthropological Theory*, 70 *UMKC L. REV.* 1, 35-36 (2001) (discussing the recent work of the iconoclastic physical anthropologist Christy Turner, noting that she dealt a shuddering broadside to the paradigm of an integrated, egalitarian harmony among the prehistoric and contemporary Pueblo when she proposed, in part, that the external facade of Pueblo pacifism and equanimity hides internal episodes of raw and loathsome terrorism—including violence, mutilation, and cannibalism practiced within the group). Beyond this, Ragsdale's work suggests that the apparent cooperation and common vision of the prehistoric Chacoan nirvana was produced by force and fear, rather than the internalized precepts of balance and harmony. See CHRISTY G. TURNER & JACQUELINE A. TURNER, *MAN CORN: CANNIBALISM AND VIOLENCE IN THE PREHISTORIC AMERICAN SOUTHWEST* 459-84 (1999).

attempt to establish that connection and show how terrorism and anti-terrorism are often cut of the same cloth. Then, I will move from my attempt to understand why we tend to take such action, applying the principles discerned, resulting in a definition of terrorism. Although redemption and cleansing of the soul are good things, the tendency of group leaders to exploit this need or instinct is troublesome.

*Medieval Abuse: Terror in the French Middle Ages, the Revolution,
and Destroying the Rule of Law*

The theoreticians and technicians of punishment in the French Middle Ages used the symbol of the *bourreau* (the executioner) to represent the king's power.¹²³ Contemplate the playing card king. A person condemned to be "expiated" for attempted regicide was the bottom half: the inverted figure of the king. This perfect opposite of the king simultaneously represented the powerlessness of the condemned and the people. According to the history, the perpetrator represented the people. So the king was omnipotent; the people had no power. Naturally, the omnipotent king had control over the life and death of his subjects. Indeed, he had power over their very souls. Terror and power interrelated in a very significant and horrifically symbolic way.

One who would challenge that power, the traitor who attempted regicide or even parricide, the analogue to regicide, must be shown to be absolutely without power or hope. He must be symbolized to the people in the most powerful way as the opposite of the sovereign. The sovereign must be seen as omnipotent; the *régicide* utterly powerless. Indeed, he must be shown not even to have the power to die. The king had power over that person's very soul, over the very soul of the people. In fact, the people's soul must be seen as being born of the punishment available to them.

Thus, it followed that the traitor must die a thousand deaths. It would not do simply to execute him. The executioner, therefore, was to take that person up to the very edge of death by torture, but bring her back again. Then, up to death and back again, up and back, up and back, a thousand times. The *bourreau* was "the man of a thousand deaths."¹²⁴ Finally, the individual was "allowed" to die when it suited the king.

It seems natural and right that people should revolt against such power, even if that power represented "law." Revolution eventually

123. See FOUCAULT, *supra* note 122, at 11-13, 28-30 (analyzing ERNST KANTOROWITZ, *THE KING'S TWO BODIES* (1959)).

124. *III Pieces Originales et Procédures du Procès fait à Robert-François Damiens*, 372-374 (1757); ANONYMOUS, *HANGING IS NOT PUNISHMENT ENOUGH* (1701); Foucault, *supra* note 122, at 1, 12, 28-29.

ensued. The French *révolutionnaires* applied tactics of terror learned from their former masters in the *Ancien Régime*. The people turned on their former masters with a vengeance and the Reign of Terror followed.

Violence is certainly justified in some circumstances: in rebellion and revolution to escape oppression. John Stuart Mill wrote: "Political liberties or rights which it was to be regarded as a breach of duty in the ruler to infringe, specified resistance, or general rebellion, was held to be justifiable."¹²⁵ So-called modern revolution and related violence may be culminations of the Enlightenment philosophy and considered justified, even noble. Violence and terror against innocents, though, are neither noble nor justified. When revolution takes that turn, it descends to a self-destructive reign of terror.

Murder was murder and terror was terror under the *Ancien Régime* and under the Reign of Terror, no matter how it was rhetorically glorified at the time or afterward. In Charles Dickens's *Tale of Two Cities*, Madame DeFarge is an interesting literary symbol of this truth. She certainly had good reason to wish to avenge herself and the French people. She knit, and registered, all who would be executed to avenge and "free" her people. Once the wave of violence and concomitant power takes hold, they consume her as she embodies them. Similarly, Évariste Gamelin in Anatole France's *Les Dieux Ont Soif* portrays a sensitive artist interested in rectifying injustice, who becomes a paranoid monster as he is consumed with the need and desire to execute all who might have been connected with the *Ancien Régime*.

When violence explodes with its ferocious and relentless intensity against those who "represent" or "symbolize" the enemy, it consumes those who wield it as well. Righting wrongs in Madame DeFarge's and Gamelin's cases destroyed not only the original oppressors (who wielded violence first), but also those who used it second to avenge the former evil. Thus, violence consumes the good that prompted it. It always consumes even its own. Gamelin, who was finally decapitated by his beloved Guillotine, makes the point:

Until recently it was necessary to seek out the guilty to try to uncover them in their retreats and to wrench confessions from them. Today it is no longer a hunt with packs of hounds, no longer the pursuit of a timid prey. From all sides the victims surrender themselves. Nobles, virgins, soldiers, prostitutes flock to the Tribunal to extract their delayed condemnations from the judges, claiming death as a right, which they are eager to savor.¹²⁶

Today we seem no different. Whenever violence moves from

125. JOHN STUART MILL, ON LIBERTY 2 (1865).

126. ANATOLE FRANCE, *Les Dieux Ont Soif* [THE GODS ARE ATHIRST] 1987 (1978).

being applied to combatants or their leaders to strike down innocents, it is murder, even if rhetorically glorified. Violence against innocents for whatever end, however glorified, is immoral and criminal. We saw the oppression and terror of the *Ancien Régime* overcome by revolution and evolve into the *directorat*, a regime that was worse than the one it replaced.¹²⁷ A balance and relative end to the violence eventually developed as a result of the rule of law. Today, the rules of life are no different. Violence is immoral and criminal when perpetrated against innocents. The excuse given is meaningless.

The Very Early "Modern Era" and "Post-Modern" Reality

Jean Bodin, Hugo Grotius, and Emerich de Vattel all called for the rule that punishment was necessary for those who commit serious offenses, with no sanctuary for the criminal.¹²⁸ Each nation has an obligation to "prosecute or extradite."¹²⁹ The ascendancy of "positivism" in the nineteenth century created the perception that international law was binding only on states and could not impose obligations or punishment directly on individuals.¹³⁰

Our *mal du siècle* continues to accelerate in the new millennium. Crimes against humanity form part of a nauseating modern equivalent of the ancient blood feud. There are so many others; it is nearly impossible to keep track, but now it has occurred on U.S. territory. The problem is that we are facing a vicious threat to use terrorism against us by a group that feels a moral-religious right to kill innocent people in order to obtain vengeance, to throw off oppression, and, as they see it, to make the world safe for their god.

Other times, it is simply the wronged person or group looking to right wrongs or to obtain retribution. Sometimes, it is the nihilist simply looking to destroy the status quo with terror. Even the nihilist seems to have an almost metaphysical vision of the need to destroy. Perhaps many of these are pretend nihilists, using crimes against humanity simply as his or her way of gaining power and becoming a statist functionary, using terror to maintain his or her power.

127. SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* 746-819 (1989).

128. See, e.g., HUGO GROTIIUS, 2 DE JURE BELLI AC PACIS 526-29 (Francis Kelsey trans., 1925) (1646); JEAN BODIN, *THE SIX BOOKS OF A COMMONWEALTH* 100-11 (Kenneth D. McRae ed., Harvard Political Classics 1962) (1576); EMERICH DE VATTTEL, *LE DROIT DES GENS* 311-13 (Carnegie Inst. 1916) (1758).

129. HUGO GROTIIUS, *ON THE LAW OF WAR AND PEACE* chs. 18 (sec. 6), 21 (sec. 3), 25 (sec. 8) (Francis Kelsey trans., 1925). BODIN, *supra* note 128, at VIII; DE VATTTEL, *supra* note 128, at 289.

130. CHRISTOPHER L. BLAKESLEY ET AL., *THE INDIVIDUAL IN THE FACE OF INTERNATIONAL COOPERATION IN CRIMINAL MATTERS* [hereinafter BLAKESLEY ET AL., *INDIVIDUAL*].

On Opposing any Definition of Terrorism

Defining terrorism has almost been anathema. The U.N. General Assembly attempted on several occasions to convene an international conference to define terrorism and distinguish it from legitimate acts in furtherance of struggles for national liberation, but such a conference never occurred.¹³¹ The Cold War caused confusion in the realm of defining terrorism and distinguishing it from wars of national liberation. During the Cold War, many believed that defining terrorism would cause more problems than it solved. Some wars of national liberation utilized terrorism as their major tactic or strategy. Some argued, and some continue to argue, that terrorism in this context was justifiable; it was the only means that could provide an escape from colonial or post-colonial domination.¹³²

Thus, many felt that providing an international definition lent dignity to terrorists and placed their acts in the context of acceptable international behavior. The so-called "Reagan Doctrine" called for vigorous intervention to promote and protect democracies. This doctrine went as follows:

[A] particular socialist state, staying in a system of other states composing the socialist community, cannot be free from the common interests of that community. The sovereignty of each socialist country cannot be opposed to the interests of the world of socialism, of the world revolutionary movement Discharging their internationalist duty toward the fraternal peoples of Czechoslovakia and defending their own socialist gains, the U.S.S.R. and other socialist states had to act decisively . . . against the anti-socialist forces in Czechoslovakia.¹³³

In 1985, President Reagan said: "Freedom movements arise and

131. See, e.g., G.A. Res. 46/51, U.N. GAOR, 46th Sess. U.N. Doc. A/46/654 (1991); Michael P. Scharf, *Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law?*, 7 ILSA J. INT'L & COMP. L. 391 (2001).

132. See, e.g., Jean-Paul Sartre, *Preface to FRANTZ FANON, THE WRETCHED OF THE EARTH* 7-31 (Constance Farrington trans., 1963) (1961).

133. BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 1170 (3d ed. 1999) (citations omitted); T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT'L & COMP. L. REV. 1, 1-2, 9-18 (2002) (discussing the debate over humanitarian intervention); see also Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 FORDHAM INT'L L.J. 794 (1995); Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984); Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984); Malvina Halberstam, *The Copenhagen Document: Intervention in Support of Democracy*, 34 HARV. INT'L L.J. 163 (1993); BLAKESLEY ET AL., *INDIVIDUAL*, *supra* note 130, at 1185-86 (discussing the Reagan and Brezhnev Doctrines); Thomas Franck, *The Emerging Right of Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); Jean Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights, and International Law*, in *RIGHT V. MIGHT* 19-20 (1991).

assert themselves. They're doing so on almost every continent populated by man in the hills of Afghanistan, in Angola, in Kampuchea, now Cambodia, in Central America . . . They're our brothers, these freedom fighters, and we owe them our help."¹³⁴ Others have noted that

[t]he Reagan Doctrine, as we understand it, is above all concerned with the moral legitimacy of U.S. support—including military support—for insurgencies under certain circumstances: where there are indigenous opponents to a government that is maintained by force, rather than popular consent; where such a government depends on arms supplied by the Soviet Union, the Soviet block, or other foreign sources; and where the people are denied a choice regarding their affiliations and future.¹³⁵

Refusal to Define & Propagandist Abuse of the Term "Terrorism"

We delude ourselves if we think that terrorism is committed only by our "enemies." Our "enemies" think the same way. Thus, each of us may commit the exact same acts, but consider them justified when we do them, and terrorism when done to us. Terrorism must be defined in a neutral manner and not by what conduct or ends the government or group deems to be justified. We, the people on each side, must choose whether we will support our own terrorism while condemning that of our "enemies." If we do not differentiate, our anti-terrorism rhetoric and action actually becomes pro-terrorism.

An objective, neutral definition of terrorism sinks in only with difficulty. Indeed, one has never really been accepted. The problem is that denizens of nearly every nation or group are bombarded continually with the propaganda that "terrorism" is committed only by loathsome enemies. Moreover, people often are ideologically, perhaps naturally, predisposed to dismiss any suggestion that terrorism is a phenomenon that all parties to a conflict, including themselves, could commit.

The late Professor Richard Baxter articulated the commonly felt sense of futility in trying to define terrorism: "We have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose."¹³⁶ With deference to the esteemed professor, some sort of

134. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, in RIGHT v. MIGHT *supra* note 133, at 24, 26 n.13.

135. Kirkpatrick & Gerson, *supra* note 133, at 20.

136. Richard Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON L. REV. 380 (1974); JOHN MURPHY, PUNISHING INTERNATIONAL TERRORISTS: THE LEGAL FRAMEWORK FOR POLICY INITIATIVES 3-5 (1985); Jordan Paust, *A Definitional Focus*, in TERRORISM: INTERDISCIPLINARY PERSPECTIVES 18 (Yonah Alexander & Seymour Finger eds., 1977); Goeff Levitt, *Is Terrorism Worth Defining?*, 13 OHIO N.U. L. REV. 97 (1986).

working definition is needed if we are going to be prosecuting people for terrorism. No legal definition makes any sense except in terms of the purpose for which it applies. If our purpose is preventing the violence that most people fear and instinctively think of when they use the term terrorism, we will have the working definition we need.

I will provide at least a limited definition of criminal terrorism, which establishes the elements necessary to convict someone of the crimes it comprises. We will consider whether a war crime covers the same or similar conduct as terrorism; it is an international crime when a state allows, or ignores, purposeful or criminally reckless killing of innocents—those *hors du combat*,¹³⁷ or of the peacetime equivalent of those *hors du combat*. Crimes against humanity¹³⁸ such as genocide,¹³⁹ torture,¹⁴⁰ or apartheid¹⁴¹ are also conduct that could fit within the idea or crime of terrorism.¹⁴²

137. For the definition of war crime, see Nicholas R. Doman, *Aftermath of Nuremberg: The Trial of Klaus Barbie*, 60 U. COLO. L. REV. 449, 455 (1989). For a discussion of the relation between terrorism and war crimes, see *infra* notes 222-249, and *United States v. Calley*, 48 C.M.R. 19 (1973).

138. For the definition of crimes against humanity, see *infra* notes 249-271.

139. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

140. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987), *reprinted in* 23 I.L.M. 1027 (1984). Also note the 1993 Alien Tort Claims Act and Torture Victim Protection Act, in which individuals and women's groups of Bosnian Muslim and Croat survivors of Serbian sexual atrocities sought international justice for genocide. *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994), *rev'd*, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

141. International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, art. III, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR, Supp. No. 30, U.N. Doc. A/9030 (1974), *reprinted in* 13 I.L.M. 50.

142. For example, it may be said that hijacking and sabotage of civil aircraft are international crimes. See Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, I.C.A.O. Doc. 9518, 27 I.L.M. 627. See International Convention Against the Taking of Hostages, Dec. 17, 1979, TIAS 11,081, 1316 U.N.T.S. 205. See also International Convention for the Suppression of Terrorist Bombings, GA Res. 52/164, U.N. GAOR, 52nd Sess., 72d Mtg., (1997), 37 ILM 249 (1998) [hereinafter *Terrorist Bombings Convention*]; Christopher L. Blakesley, *Jurisdiction as Legal Protection as Protection Against Terrorism*, 19 CONN. L. REV. 895, 911-18 nn.47-77 (1987) [hereinafter *Blakesley, Jurisdiction as Protection*] and accompanying text for more authority and extensive analysis; Robert Friedlander, *The Crime of Hijacking*, in 1 INTERNATIONAL CRIMINAL LAW 455 (M. Cherif Bassiouni ed., 1986). This is true, although the world community has been strangely reluctant straightforwardly to declare it such. Friedlander, *supra*, at 462. Nevertheless sabotaging an aircraft in flight, hijacking a transnational commercial airliner, and attacking international airline terminals are all proscribed acts made punishable by the domestic law of most nations. See, e.g., 49 U.S.C. § 46501 et seq. 1974; The Antihijacking Act of 1974 was enacted to fulfill the United States' responsibilities

What we call this terror-violence is important for jurisdictional purposes, but, no matter what category the conduct falls into, it is all illegal, immoral, and criminal terror-violence. Its *actus reus* is the application of violence against innocents. Its *mens rea* is the intent to harm innocents, the knowledge that the conduct will harm innocents, or the wanton disregard of that high degree of risk, all with the intent to intimidate or influence a third party group or government.

It may well be true, as some commentators suggest, that the most efficient way to deal with terrorism is to prohibit specific conduct rather than to have some generic, mega-crime called terrorism. The latter would cover too wide a range of conduct. Nevertheless, for now we live in a world where terrorism is a reality and where the term is utilized indiscriminately to apply only to "enemy conduct." Thus, if we wish to maintain any sort of intellectual, moral, or legal integrity, it is necessary to wrestle with the term and its conceptualization, to come to grips with what makes some conduct terrorism, for example, hijacking, hostage taking, killing diplomats, bombing a civilian neighborhood, blowing-up Pan Am 103, and attacking the World Trade Center with loaded airliners.

To say that it is punishable because it is proscribed, and that it is proscribed because states agreed that it is terrorism, obviously begs the analytical question contemplated in this article. The problem with the inductive approach by itself, without analysis, is that unless we distill the essential principles of the conduct condemned by international (and domestic?) law to see what makes an act terroristic, we have gained no conceptual insight. Some may know it when they see it, but we have no standards. In the arena of terrorism and the anarchy that abides in international criminal law, we are trying to function with a dialectical system of principle and rule development like that which existed in the mists of ancient England. In very early common law England, the dialectical

under the Convention for the Suppression of Unlawful Seizure of Aircraft which requires signatory nations to extradite or punish hijackers 'present in' their territory. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, art. 4, para. 2, Dec. 16, 1970, 22 U.S.T. 1643, 1645, T.I.A.S. No. 7192. 18 U.S.C. § 1201 (1994); The International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83-, 99 Stat. 219 (1985) (codified at 22 U.S.C. 2349aa-4 (Supp. 1987)); The Aircraft Sabotage Act of 1984, also called the Anti-Hijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 49 (1974) (codified at 18 U.S.C. 1301; *loi du 5 Juillet* 1972, No. 72-623, 92 *Gazette du Palais* (Lég.) 360 (1972); Blakesley, *Jurisdiction as Protection*, *supra*, at 918-19; Paul Stephen Dempsey, *Aerial Piracy and Terrorism: Unilateral and Multilateral Responses to Aircraft Hi-Jacking*, 2 CONN. J. INT'L L. 427, 450 (1987). Moreover, the nation that obtains jurisdiction over the person of the alleged perpetrator has a duty under international law to extradite or prosecute. Friedlander, *supra*, at 462; JOHN MURPHY, *STATE SUPPORT OF INTERNATIONAL TERRORISM: LEGAL, POLITICAL, AND ECONOMIC DIMENSIONS* 3-5 (1990). The international crime status of the conduct and the obligation to prosecute or extradite are established by international treaty and customary international law.

process began with fixed rules and principles received by Romans after Caesar's conquest.¹⁴³ These rules were fixed and, when applied rigidly, became troublesome and unjust as new situations came before judges. The next phase was for the rules to be expanded to apply to new situations, providing the judges more power. This, in turn, allowed corruption to be insinuated, so a new "Code" was promulgated to control the discretion of the judges. In Rome, the dialectical development was the same.

Thus, in the international criminal law arena, we begin by applying a treaty, such as the Rome Statute or the Hague Convention IV (though they have been applied quite rarely in the history of international law). Judges would decide a case often pursuant to vague or undeveloped principles or policy. Thus, coherency and conceptual integrity have been hard to come by.

Analysts must discern principles, policy, coherency, or conceptual integrity, including those behind legislation, treaties, or judicial decisions. We must consult our underlying principles.¹⁴⁴ Certainly, agreements among nations condemning certain conduct are of some moment of themselves, but they must be based on some essential principles; these, we must scrutinize. Otherwise, we give in to the tendency so evident in the so-called war against terrorism: Law degenerates into nothing other than an epithet, a propagandistic exercise in or by which

143. What I mean by this is that when the common law courts began to decide cases, they obviously had scant, vague precedent, if any. Thus, as they found cases that were similar to those they decided previously they would expand the rule or principle to include the new instance in question. Of course, England was an imperial province of the first order. At one time it had a garrison of 30,000 Roman soldiers. Edward Re, *The Roman Contribution to the Common Law*, 29 FORDHAM L. REV. 447, 455-56 (1961); CAESAR'S COMMENTARIES ON THE GALLIC WAR, Bks. I-IV at Bk. IV (1870). See Christopher L. Blakesley et al., *Family Autonomy*, in CONTEMPORARY FAMILY LAW: PRINCIPLES, POLICY, AND PRACTICE 4-8 (1984); Peter Stein, *Logic and Experience in Roman and Common Law*, 59 B.U. L. REV. 437, 437-41 (1970) (discussing that when Roman and Anglo-American Common Law each were reaching maturity they adopted similar mechanisms of development, each subject to a tension deriving from the contrasting forces of logic and experience); Lawson, *The Contribution of Roman Law to Western Civilization*, 4 EUR. STUDIES IN LAW: MANY LAWS 124, 125-36 (1977); see also, e.g., VACARIUS, A SUMMARY OF LAW FOR POOR STUDENTS (F. de Zulueta ed., 1927) (circa 1149); Ambrosina, 2 IL GLOSSATORE VACARIO POLEMISTA ANTIERETICALE (nota bibliografica), in RIVISTA ITALIANA PER LE SCIENZE GIURIDICHE 415-20 (1950); Glanville, THE TREATISE ON LAWS AND CUSTOMS (1189) OF THE RELAM OF ENGLAND; HENRY DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND (Samuel C. Thorne trans., 1968) (1898); JOHN BURY, HISTORY OF THE LATER ROMAN EMPIRE 142 (1923); Hans WOLFF, ROMAN LAW: AN HISTORICAL INTRODUCTION 18 (1978); SIR HENRY MAIN, ANCIENT LAW 140 (10th ed. 1884); Ernest Young, *The Anglo-Saxon Family Law*, in ESSAYS IN ANGLO-SAXON LAW 151-52 (1905); Cyril ROBINSON, A HISTORY OF ROME FROM 753 B.C. TO 410 A.D., at 338 (2d ed. 1941); PERCY H. WINFIELD, THE CHIEF SOURCES OF ENGLISH HISTORY 55 (1925); CHARLES P. SHERMAN, *The Romanization of English Law*, 23 YALE L.J. 318 (1914).

144. DANIEL PATRICK MOYNIHAN, ON THE LAW OF NATIONS 109 (1990).

the one with the power almost always wins. Ultimately, terrorism is fostered, not eliminated.

Some commentators' fixation on the difficulty of coming up with "a generic definition" misses the point.¹⁴⁵ It is not as important to develop a generic definition as it is to capture the essence of the social evils and legal wrongs that terrorism represents. If we are going to sanction conduct, we must understand the nature of the social harm we are sanctioning and why we are sanctioning it. Most commentary on the international law of sanctions is deficient from a legal standpoint because penalties are discussed as if they were mere politics. This loses sight of the basic principle of penal jurisprudence: *nulla poena sine lege* ("no punishment without a law"). Imposing punishment or sanction obviously is penal in nature, although many politicians claim otherwise. For application of a legal penalty to be appropriate, proof of elements constituting a prohibited social harm is required. The basis for sanction must be principled and articulated. If the purpose is not legal, but political—if law and sanctions are tools to be used against one's enemies to manage them politically—we should recognize that and not implicate "the rule of law."

To refer to political management of others as the rule of law is to debase the latter. It is not surprising that this deficiency hampers many writers' analyses, when we see that international criminal law is likewise deficient. There are at least twenty-two categories of international crimes, representing some 314 international instruments enacted since 1815, none of which has properly defined the offenses proscribed nor provided the rudimentary elements of "guilt."¹⁴⁶ Of course, most of these instruments have left definition to the process of domestic incorporation into national law, which is done by promulgating laws that proscribe the relevant conduct. This, of course, will include explicit penal elements to be proved. This process rectifies the deficiency domestically. But, it leaves international law insufficient, invigorating the claim that international law is not law at all. It is also a problem when one prosecutes individuals in international tribunals.

Yet, many internationalists are willing to accept this exercise in vagary (and futility), or perhaps they just do not notice. Mere agreement among nations to sanction some nebulous conduct is not sufficient. If we accept it as law, then we admit that international law is a baser type. Certainly, law has its promotional qualities, but it must have more. If

145. Levitt, *supra* note 136, at 97; MURPHY, *supra* note 142, at 3-26 (1990).

146. See Christopher L. Blakesley, *Introduction to Draft Convention for an International Criminal Tribunal* (1990) (transcript on file with author); M. Cherif Bassouni, *INTERNATIONAL CRIMES: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS 1815-1985* (1986).

we are talking about a rule of law, it is not appropriate to punish an individual, a group, or nation for vague, undefined conduct. We must determine and promulgate beforehand the concrete *actus reus*, *mens rea*, and proscribed social harm. Failure to address the essential and specific evil of terrorism (in both a generic and a specific sense) prevents most commentators from developing any original thesis that would help us understand what it is about certain conduct that makes it not only terroristic, but punishable as a crime.

Although many traditional commentators believe that it is futile to define terrorism generically, they also admit that it would be wise to proscribe "major forms of terrorist acts currently neglected by international treaty law"¹⁴⁷ One wonders how this can be done without coming to grips with what it is that makes such conduct terroristic and what elements must be proved to penalize it. If theft of nuclear material, for example, is terroristic activity, we must determine why and when this is so. Would theft of nuclear material be criminal terrorism if done during a war or to prevent an enemy from using it militarily? Some suggest that

support for wars of national liberation and repressive responses by target governments themselves raise profound issues of law and morality-issues that deserve a great deal more analysis than they have received to date. But [that] clear analysis of these issues is hindered rather than helped by treating them as part of the problem of terrorism.¹⁴⁸

Such a suggestion without analyzing why existing offenses ought to be punished as terroristic offenses, other than just because nations have agreed to do so, belies what is really a simple reiteration of a positivistic and status quo policy orientation. For example, the common justification for approving the United States' interception of the Egyptian airliner carrying the hijackers of the *Achille Lauro* and equivocation over whether the bombing of Libya was legal indicate an assumption of a particular political perspective or orientation. It belies any in-depth analysis of these events¹⁴⁹ and contradicts any attempt to provide a test if illegality is based on the means rather than the goal of prohibited conduct.

Nevertheless, the sense or essence of Baxter's statement of regret and frustration as to a legal definition of terrorism seems correct and apt. His statement seems to provide that it is bad to have a legal definition of

147. MURPHY, *supra* note 142, at 29.

148. *Id.* at 22.

149. Analysts must determine, for example, the facts and establish whether there was intentional or reckless bombing of civilian targets.

terrorism if its use is merely legalistic epithet or propaganda, quibbling and obfuscation, or if it is used as a rhetorical device to achieve ulterior ends or even to justify one's own conduct that may itself be criminal terrorism or otherwise violate international or domestic law. For example, consider the so-called Schultz Doctrine, revived by President Bush II, applying military force to preempt terrorism or to retaliate against terrorists or states supporting, harboring, or training terrorists.¹⁵⁰ Former Secretary of Defense Caspar Weinberger opposed such responsive military strikes because they "kill women and children."¹⁵¹

The term terrorism and even the notion of law itself can be appropriated for ulterior, even illegal and terroristic, purposes. So, Baxter may be correct in that perhaps the abuse of the term "terrorism" may be so serious that the term should be abandoned. Abandoning the term would be helpful as long as the conduct that constitutes it, as presented here, is universally condemned anyway.¹⁵²

In the *Letelier vs. Chile*¹⁵³ murder case, the court noted:

[T]here is no discretion to commit, or to have one's officers or agents commit an illegal act. . . . Whatever policy options may exist for a foreign country, it has no "discretion" to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.¹⁵⁴

This is true regardless of how efficient or advantageous the violation of

150. See George S. Schultz, *Current Policy No. 783*, U.S. Department of State Bureau of Public Affairs 1-3 (delivered Jan. 15, 1986) [also reprinted as George S. Schultz, *Low-Intensity Warfare: The Challenge of Ambiguity*, 25 I.L.M. 204, 206 (1986)] see also Jordan J. Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 WHITTIER L. REV. 711 (1986) (citing "Task Force Supports U.S. Policy on Global Terrorism, Official says," Hous. POST, Mar. 2, 1986, at A13). On the issue of self-defense, see YORAM DINSTEIN, *WAR AGGRESSION AND SELF-DEFENCE* (1988), where Professor Dinstein eloquently distinguishes anticipatory and interceptive self-defense: "Interceptive, unlike anticipatory, self-defence takes place after the other side has committed itself to an armed attack in an ostensibly irrevocable way. Whereas a preventive strike anticipates an armed attack which is merely foreseeable . . . an interceptive strike counters an armed attack which is 'imminent and practically unavoidable.'" DINSTEIN, 187-91 (2d ed. 1994) (arguing that an armed attack may begin before the force is actually used). Professor Dinstein supports the notion of "interceptive" self-defense. He also argues that the use of "inter-State" force is permitted only in self-defense or as a matter of collective security. *Id.*; see also Istvan Pogany, Book Review, 38 INT'L & COMP. L. 435 (1989).

151. Paust, *Responding*, *supra* note 150, at 712; see also Christopher L. Blakesley, *The Evisceration of the Political Offence Exception to Extradition*, 15 DEN. J. INT'L L. & POL'Y 109 (1986); Christopher L. Blakesley, *An Essay on the Executive Branch Attempts to Eviscerate the Separation of Powers*, 1987 UTAH L. REV. 451.

152. See Robert A. Friedlander, *The Enforcement of International Criminal Law: Fact or Fiction*, 17 CASE W. RES. J. INT'L L. 79, 88 (1985).

153. 488 F. Supp. 665 (D.D.C. 1980).

154. *Id.* at 673 (citations omitted); see also Eric H. Singer, *Terrorism, Extradition, and FSIA Relief: The Letelier Case*, 19 VAND. J. TRANSNAT'L L. 57 (1986).

innocents seems to be. No matter what goal is seemingly promoted by such violence, it is neither legally nor morally justified.

International and domestic law equip us to extricate ourselves from the "infernal dialect" of violence; they provide the means whereby we may avoid accepting or participating in the oppression or the slaughter of innocents, even by our own acquiescence. It is error of the highest order to accept the ideologue's argument that, because some nations or rebel groups participate in oppression or other terror-violence, it is inevitable and therefore necessary to combat it with like conduct. It is practical and necessary to alter this vision. To commit evil acts because of perceived or even actual evil acts perpetrated by the object of our acts is to accept the evil as ours and to become evil. Self-defense under the rule of law does not include the use of innocents as tools. We must reestablish the vision of a world made up of human beings controlled by the rule of law and morality, not by raw power.

Definitions of Terrorism

Attempts to suppress terrorism have proved far from satisfactory.¹⁵⁵ At the Rome Conference for the creation of the International Criminal Court in 1998, at least fourteen national representatives argued for inclusion of terrorism in the Rome Statute,¹⁵⁶ but it was ultimately not included. The major reason for the refusal to include terrorism was the fear of politicizing the tribunal.¹⁵⁷ Since September 11, 2001, momentum has developed toward inserting terrorism into the statute as one of the offenses.¹⁵⁸ Algeria, India, Sri Lanka, and Turkey have proposed

155. See KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* 227 (2001).

156. *Id.* (referring to Algeria, Armenia, Congo, India, Israel, Kyrgyz Republic, Libya, Macedonia, Russia, Sri Lanka, Tajikistan, and Turkey). These seem to be the constituent elements of the crime against humanity of murder, under customary international law which is reflected in the Rome Statute for the International Criminal Court, in article 7(1)(a), U.N. Doc. A/CONF.183/9* (1998), available in BLAKESLEY ET AL., *supra* note 6, at 54. See Lee, *CASES*, *supra* note 19, at 755-57.

157. KITTICHAISAREE *supra* note 155, at 227.

158. See, e.g., UN News Centre, *Robinson says establishment of International Criminal Court Key to Fighting Terror* (Mar. 5, 2002); Jean Pierre Stroobants, *Trois questions a . . . Federico Andreu*, LE MONDE, *SECTION: International*, Feb. 18, 2002.[] Cf. Jennifer Schense, *Necessary Steps for the Creation of the International Criminal Court*, 25 *FORDHAM INT'L L.J.* 717 (2002); David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 *CORNELL INT'L L.J.* 47 n.7 (2001-2002):

The United States expressed serious reservations about the inclusion of crimes of international terrorism and drug-trafficking in the ICC Treaty, speculating that a court of this nature would not be able to investigate complex terrorist cases as precisely as national governments do and that if such cases are drawn within the ICC's jurisdiction there would be an investigative overload. See Comments of the United States of America Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, Report of the

that terrorism be included as one of the crimes against humanity.¹⁵⁹ To do this, of course, it would be necessary to define terrorism and to elaborate its elements. Defining terrorism has proved more than difficult.

One of the problems has been that although nations, governments, legislatures, scholars, and others are willing to consider terrorism or other offenses as generic, universal crimes that transcend time and space limitations,¹⁶⁰ suppression or prosecution of these offenses, though on a foundation of universalism, is usually limited to a specified time and place.¹⁶¹ This appears to be because the prosecutors do not wish their own to be subject to similar actions, which would occur if the offenses were general.¹⁶² States adopt universalist rhetoric based on international law and principles of universality to legitimize their own actions, but will rarely apply these principles in a general way or in a way that might apply to them.¹⁶³ Similarly, legislation or treaties calling for universal jurisdiction will adopt an aura of racial, cultural, ethnic, or religious stereotyping (if not included in the acts) applied by action, such as in trials, arrests, or deportations of the "exotic foreigner"—for example, the "Islamic terrorist"—thus incorporating bias and discrimination and excluding "one's own kind."¹⁶⁴

Secretary-General, at 10-13, U.N. Doc. A/AC.244/1/Add.2 (1995) [hereinafter 1995 Report]. During the deliberations [w]e said that while we had an open mind about future consideration of crimes of terrorism and drug crimes, we did not believe that including them will assist in the fight against these two evil crimes. To the contrary, conferring jurisdiction on the Court could undermine essential national and transnational efforts, and actually hamper the effective fight against these crimes. The problem, we said, was not prosecution, but rather investigation. *Id.*; Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Subcom. on Int'l Operations of the Senate Comm. on Foreign Relations, 105th Cong. 10, 15 (1998) (statement of David Scheffer, former Ambassador-At-Large for War Crimes Issues, U.S. Dept. of State). . . . The U.S. view, however, did not deny the possibility that a crime of terrorism could also qualify as a crime against humanity, a war crime, or genocide and thus fall within the ICC's subject matter jurisdiction.

159. KRITICHASAREE, *supra* note 155, at 227.

160. *See, e.g.*, War Crimes Act 1945 (Austl.) (as amended by War Crimes Amendment Act of 1988 §§ 5, 9 (Austl.)); Simpson, *supra* note 24, at 9.

161. *See, e.g.*, Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. SCOR, 48th Sess., 3217th mtg. at 1-2, U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1203. *See* Statute of the International Tribunal, 32 I.L.M. 1159, 1193 (1993), available at <http://www.un.org/icty>; [hereinafter ICTY Statute] Statute of the International Tribunal for Rwanda, U.N. SCOR, 49th Sess., 3453rd mtg., Annex, art. 2, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598, 1602 [hereinafter ICTR Statute], available at <http://www.un.org/icttr> [hereinafter ICTR Statute].

162. This, it would appear, is the main reason for United States opposition to the ICC.

163. Simpson, *supra* note 24, at 10.

164. *See id.*; Anne Marie Prevost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 HUM. RTS. Q. 303, 305 (1992) (discussing race); Kathleen M.

Is it possible to define terrorism in a manner that accommodates its prosecution or other attempts to control or eliminate it? A neutral definition of terrorism is necessary if we are to have moral and intellectual integrity in proscribing, prosecuting, and waging war against it. This has not always been easy, as defining terrorism requires recognition that sometimes one's own group may fall into the trap of thinking that the end justifies the means. Almost daily we hear comments along the lines of: "The terrorists did not care about innocent civilians, so why should we?" It is easy to decide that using terror-tactics "to fight terrorism" is justified. Certainly, this is a problem, as most, if not all, groups that use terrorism to further their goals believe that their goals are more important than the damage done by their terrorism.¹⁶⁵ True believers in a "just cause" rationalize their own conduct as just, even when they would consider that same conduct committed against them to be terrorism. I will attempt to provide a model of terrorism and a reaction to it that will suffice morally and legally. We must develop a neutral and specific definition if we are going to consider terrorism our justification for going to war or taking the lives or liberties of individuals whom we find to have committed terrorism. If conduct is justified or excused, it must be justified or excused for everyone. Also, perhaps defining terrorism will help us avoid the trap and terror lived by Captain Ahab quoted at the beginning of this article, above fn 7.

Inasmuch as the United States is planning to prosecute individuals for terrorism and since it is possible that the International Criminal Court will govern terrorism, we must come to grips with its legal definition and parameters. This section will attempt to fashion a meaningful and useful definition of, and legal response to, terrorism. To do this, terrorism must be defined in neutral terms, with the rules of law and morality as the keys.

Melville is helpful in this exercise. He helps us sense our own potential for destructive rage. He makes us look at what we have become. Melville's insight penetrates to the core of the major danger facing virtually all societies. He allows us to sense how values, morals, and "the law" can be manipulated to cause actions that actually erode those values, producing bile and hatred in their place. This, in turn, causes a group to feel a certainty of having all the truth, right, justice, or God on their side. Indeed, even the sense that one must act in certain

Pratt & Laurel E. Fletcher, *Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia*, 9 BERKELEY WOMEN'S L.J. 77 (1994) (discussing gender); see also Roger Normand & Chris Jochnick, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 HARV. INT'L L.J. 387 (1994).

165. I suppose that even nihilists believe that the chaos they wish to create is better than the status quo.

ways to protect his or her group can be manipulated. Evil erupts if the opportunity arises.

Those who attacked on September 11 perverted religion or had it perverted for them, as a means to prompt and then to veil the evil of their conduct. It is not uncommon for groups or national leaders to do the same with a religion, ideology, or philosophy of life. They are easily used as justifications or excuses. Descent into demonization of "enemies" seems to prompt one to commit demonic acts.¹⁶⁶ Captain Ahab surely seems to represent those who attacked or conspired to attack on September 11, who thereby self-destructed or who are now in the process of self-destructing or being destroyed. Yet, I think that it is more important to use Captain Ahab as a mirror into our own souls and sensibilities. I am going to ruminate on Ahab as a type for our terrorist enemies, but I also pose the question to myself and to you: Does Ahab represent us, as well?

To address the terrorism committed on September 11 and to challenge the approaches taken by Professors Bassiouni and Ignatieff (which incorporate the classic statist position), I will provide a working definition. I will define terrorism as: serious violence committed by any means; causing death, great bodily harm, or serious property damage; to innocent individuals; with the intent to cause those consequences or with wanton disregard for those consequences; and for the purpose of coercing or intimidating some specific group, or government, or otherwise to gain some perceived political, military, religious, or other philosophical benefit; without justification or excuse. The element of "justification or excuse" is essentially the key to defining terrorism in criminal law terms. It must be asked whether there may ever be any justification or excuse for the intentional or wanton killing or doing great bodily harm to innocent persons. For me, the core concept of terrorism is the use of

166. See BLAKESLEY ET AL., CASES, *supra* note 6, at 648-52, 694-703, 1324-30, 1389-90. Even Jean Bodin fell into this trap. See JONATHAN L. PEARL, THE CRIME OF CRIMES: DEMONOLOGY AND POLITICS IN FRANCE, 1560-1620 112, 121 (1999) (quoting JEAN BODIN, ON THE DEMON-MANIA OF WITCHES 1580, at 204 (Jonathan L. Pearl & Randy Scott eds. & trans., 1995)). Robert Mandrou, author of *Magistrats et Sorciers en France*, remarked of Jean Bodin's *Demonomanie*: "this vehement appeal to pitiless repression was understood by the magistrates of higher justice who were charged with the repression of all crimes, of which witchcraft constituted a good part." *Id.* Jean Bodin and other French authors might have had an impact on the perpetuation of witch-hunts. *Id.*; see BARBARA L. BERNIER, *The Praxis of Church and State in the Underdevelopment of Women's Religion from France to the New World*, 7 WM. & MARY J. WOMEN & L. 659, 660-61, 674 (2001); LUCIEN FEBVRE, THE PROBLEM OF UNBELIEF IN THE SIXTEENTH CENTURY: THE RELIGION OF RABELAIS 423-32 (Beatrice Gottlieb trans., 1982); ROBERT MANDROU, INTRODUCTION TO MODERN FRANCE, 1500-1640: AN ESSAY IN HISTORICAL PSYCHOLOGY 56-57 (R.E. Hallmark trans., 1976); Bernard J. Hibbitts, "Coming to Our Senses": Communication and Legal Expression in Performance Cultures, 41 EMORY L.J. 873, 923-24 (1992).

innocents (i.e., innocent civilians, non-combatants, those "*hors du combat*") to gain some military, political, religious, or philosophical (including nihilistic) advantage. This definition, therefore, brings up issues of military necessity, self preservation, and the like.

Obviously, for conduct to be punished the principle of *legalité* or the principle of *nulla poena sine lege* must be satisfied. The elements of the proscribed conduct must be spelled out in advance of prosecution. In the United States, this is required or the proscription will be "void for vagueness."¹⁶⁷ Scholars and governments have long maintained that it is neither possible nor useful to define terrorism.¹⁶⁸ Proscribed conduct must have a mental element (*mens rea*) and a material element (*actus reus*).¹⁶⁹

In 1937, the League of Nations adopted a Convention on the Prevention and Punishment of Terrorism.¹⁷⁰ This Convention, moribund at birth, defined terrorism to be "[c]riminal acts directed against a State and intended to or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public."¹⁷¹ In recent years, the U.N. General Assembly has focused on terrorism, noting that it is never justified, and reiterating that terrorism is "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes"¹⁷² In 1998, the United Nations, in its Convention for the Suppression of Terrorist Bombings, provided that:

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation to ensure that

167. One reason courts invalidate statutes determined to be "vague" is because such laws "may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)); *Forbes v. Napolitano*, 236 F.3d 1009, 1013 (9th Cir. 2000) (holding that the statute, which prohibited the therapeutic use of fetal tissue, was void for vagueness). See generally ROLAND M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 1-13 (3d ed. 1982); Ralph W. Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923); Rex A. Collings, Jr., *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L. REV. 195 (1955); Ernst Freund, *The Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437 (1921); Austin W. Scott, Jr., *Constitutional Limitations on Substantive Criminal Law*, 29 ROCKY MTN. L. REV. 275 (1957).

168. See, e.g., Baxter, *supra* note 136, at 300; Levitt, *supra* note 136, at 97. See also GEOFFREY M. LEVITT, *DEMOCRACIES AGAINST TERROR* 73.9 (1988).

169. See, e.g., WAYNE LAFAYE, *CRIMINAL LAW* 7 (3d ed. 2000); PERKINS & BOYCE, *supra* note 167, at 1-13.

170. The League of Nations adopted a Convention on the Prevention and Punishment, signed November 16, 1937, League of Nations Pub. C. 94. M. 47. V; see KITTICHAISAREE, *supra* note 155, at 227.

171. League of Nations Terrorism Convention, *supra* note 33, at art. 1(2). The Convention never entered into force.

172. Geneva Convention on Measures to Eliminate Terrorism, Dec. 11, 1995, U.N. Doc. A/RES/50/53; see KITTICHAISAREE, *supra* note 155, at 228.

criminal acts within the scope of this Convention, in particular where they are *intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons*, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature¹⁷³

The U.N. Security Council on September 12, 2001, unanimously approved Resolution 1368, stating that any act of international terrorism was a threat to international peace and security.¹⁷⁴ While calling on all states to bring the perpetrators, organizers, and sponsors of these terrorist acts to justice, it stressed that those responsible for aiding, supporting, or harboring them would be held accountable, and pointedly recognized the right to individual and collective self-defense under the Charter.¹⁷⁵ This measure does not expressly authorize the use of force. Still, it is sufficiently broad to be relied on by the United States to employ force against any or all of these parties.¹⁷⁶

On track to be passed is the International Convention for the Suppression of the Financing of Terrorism.¹⁷⁷ The U.S. approach to these terrorism financing and related problems is found in various portions of the Patriot Act. For example, that a person:

[i]n an individual capacity or as a member of an organization, . . . "[engages] in terrorist activity," when he or she, . . . (I) commit[s] or . . . incite[s] to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; (II) prepare[s] or plan[s] a terrorist activity; (III) gather[s] information on potential targets for terrorist activity; (IV) solicit[s] funds or other things of value for B (aa) a terrorist activity; (bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or (cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity; (V) solicit[s] any individual B (aa) to engage in conduct otherwise

173. International Convention for the Suppression of Terrorist Bombings of 1998, at art. 5, adopted by U.N. GA Res. 52/164, U.N. GAOR, 52d Sess., Supp. No. 49, UN Doc. A/52/49 (1997) (emphasis added); KITTICHAISAREE, *supra* note 155, at 229.

174. See S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., at 1, U.N. Doc. S/RES/1368 (2001); see also S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

175. S.C. Res. 1368, *supra* note 174.

176. *Id.*; see Robert K. Goldman, *Certain Legal Questions and Issues Raised by the September 11th Attacks*, 9 HUM. RTS. BRIEF 2 (2001).

177. The International Convention for the Suppression of the Financing of Terrorism, reprinted in G.A. press release, Sept. 5, 2000, U.N. Doc. GA/5627, available at <http://www.un.org/millennium/law> (last visited Jan. 5, 2001).

described in this clause; (bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or (cc) for membership in a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity; or (VI) commit[s] an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training B (aa) for the commission of a terrorist activity; (bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity; (cc) to a terrorist organization described in clause (vi)(I) or (vi)(II); or (dd) to a terrorist organization described in clause (vi)(III), unless the actor can demonstrate that he did not know, and should not reasonably have known, that the act would further the organization's terrorist activity. This clause shall not apply to any material support the alien afforded to an organization or individual that has committed terrorist activity, if the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, concludes in his sole unreviewable discretion, that this clause should not apply.¹⁷⁸

U.S. Definitions of Terrorism in 2002

In 2002, terrorism was also defined by the U.S. government as "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."¹⁷⁹ President

178. See 8 U.S.C. § 1182(a)(3)(B)(i)(V) (2000) (establishing "membership" in certain organizations as grounds for inadmissibility); § 1182(a)(3)(B)(iv)(IV)-(V) (defining to "[e]ngage in terrorist activity" as including solicitation of funds or recruitment of personnel); see also *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 491-92 (1999) (rejecting challenge to deportation of Palestinian activists based on speech and associational activities). This is part of the U.S., *Uniting and Supporting America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act*, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of U.S.C.).

179. See OFFICE OF THE COORDINATOR FOR COUNTER-TERRORISM, U.S. DEPT. OF STATE, *PATTERNS OF GLOBAL TERRORISM*: 1998, at 6-7 (1999). The U.S. Department of Defense defines terrorism as "the calculated use of violence or the threat of violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological." See The Terrorism Research Center, *The Basics of Terrorism*, at <http://www.terrorism.com/terrorism/bpart1.html> (last visited Oct. 15, 2001). The United States Department of State adheres to the definition provided in 22 U.S.C. § 2656f(d) (1994), which defines it as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience." That definition is further refined by the description of "international terrorism" as "terrorism

Bush's Executive Order of September 23, 2001, prohibiting the financing of terrorism and blocking property of Specially Designated Global Terrorists (SDGTs), defines terrorism as an activity that involves violence or acts dangerous to human life, property, or infrastructure and appears intended to intimidate or coerce a civilian population, influence government policy by intimidation or coercion, or affect conduct of a government by mass destruction, assassination, kidnapping, or hostage taking.¹⁸⁰ The phrase "otherwise associated with" is not defined, but the Executive Order does provide that "[b]efore designating such persons the Secretary may consult with foreign authorities but is not required to do so."¹⁸¹

This Executive Order is quite amazing if it was intended to proscribe criminal conduct, which it appears to do. Amazingly, no *mens rea* requirement is included at all.¹⁸² The intent of the Order was to make the proscribed conduct criminal, as it applies to anyone who has ever "aid[ed] or abet[ed]" terrorists "or act[ed] in preparatio[n] for" terrorism.¹⁸³ Did the Administration intentionally or unintentionally provide for punishment of the listed conduct in a strict liability manner? In effect, a foreign national who "threaten[s] . . . injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy"¹⁸⁴ may be prosecuted. What do these terms mean? Their vagueness is breathtaking. Does a foreign person who writes an article in opposition to the United States' position on the International Criminal Court subject himself to potential prosecution before a U.S. Military Commission? Apparently so, if the President's Attorney General has "reason to believe" that the writer's writing caused the noted effects. Or, what if a person rents a car for a friend who has unknowingly donated to a charity that turns out to have been a front for a "terrorist organization"?¹⁸⁵

involving citizens or the territory of more than one country." See U.S. Dep't of State, *2000 Patterns of Global Terrorism*, available at <http://www.state.gov/s/ct/rls/pgtrpt/2000/> (last visited Oct. 15, 2001).

180. See Blocking Property and Prohibiting Transactions with Persons who Commit, Threaten to Commit, or Support Terrorism, Exec. Order No. 13,224, 64 Fed. Reg. 49,079 (2001), available at <http://www.ustreas.gov/terrorism.html>.

181. *Id.*

182. See Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1263 (2002) (citations omitted).

183. See Exec. Order No. 13,224, *supra* note 180; Katyal & Tribe, *supra* note 182, at 1263.

184. See Executive Order *supra* note 183; Katyal & Tribe, *supra* note 182, at 1263.

185. See Exec. Order No. 13,224, *supra* note 180; Katyal & Tribe, *supra* note 182 at 1263.

Legislative Definitions¹⁸⁶

Legislation does not improve the vagueness significantly. The Executive Order of September 3, 2001, does not cover prosecution for

186. Primarily in response to several high-profile terrorist acts, President Clinton, on April 24, 1996, signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 221, 110 Stat. 1214, 1241 (1996). 18 U.S.C. § 3071 (1994) provides rewards for information concerning terrorist acts. 18 U.S.C. § 3077 defines an 'act of terrorism' as an activity that:

(A) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and (B) appears to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping.

Similar definitions include: 18 U.S.C. § 921(a)(22) (1994) (defining "terrorism" for purposes of regulation of firearms transactions); *id.* § 3077(1) (1994) (defining "act of terrorism" in connection with rewards for information); 50 U.S.C. § 1801(c) (Supp. 1995) (defining "international terrorism" for purposes of foreign intelligence surveillance). See Gerald L. Neuman, *Terrorism, Selective Deportation, and the First Amendment After Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 323-25 (2000) (noting that the U.S. Code contains a variety of express or implied definitions of terrorism). For example, Title 18 on Crimes includes Chapter 113B, labeled "Terrorism." Section 2331(1)(B) defines "international terrorism" as noted above. 18 U.S.C.A. § 2332 (2002), Criminal Penalties, provides:

(a) Homicide.—Whoever kills a national of the United States, while such national is outside the United States, shall—

(1) if the killing is murder (as defined in section 1111(a)), be fined under this title, punished by death or imprisonment for any term of years or for life, or both; (2) if the killing is a voluntary manslaughter as defined in section 1112(a) of this title, be fined under this title or imprisoned not more than ten years, or both; and (3) if the killing is an involuntary manslaughter as defined in section 1112(a) of this title, be fined under this title or imprisoned not more than three years, or both.

(b) Attempt or conspiracy with respect to homicide. Whoever outside the United States attempts to kill, or engages in a conspiracy to kill, a national of the United States shall—

(1) in the case of an attempt to commit a killing that is a murder as defined in this chapter, be fined under this title or imprisoned not more than 20 years, or both; and (2) in the case of a conspiracy by two or more persons to commit a killing that is a murder as defined in section 1111(a) of this title, if one or more of such persons do any overt act to effect the object of the conspiracy, be fined under this title or imprisoned for any term of years or for life, or both so fined and so imprisoned.

(c) Other conduct. Whoever outside the United States engages in physical violence—

(1) with intent to cause serious bodily injury to a national of the United States; or (2) with the result that serious bodily injury is caused to a national of the United States; shall be fined under this title or imprisoned not more than ten years, or both.

(d) Limitation on prosecution. No prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.

Congress has required the State Department to prepare annual reports on terrorism, including terrorist groups, foreign countries financing terrorist groups, and cooperation by foreign countries

crime in the traditional sense, but calls for prosecution of alleged foreign terrorists before a Military Commission on the basis of “rules,” such as they might be or become, promulgated by the executive branch. Thus, a legislative definition of terrorism, albeit not very coherent or clearly drafted, is helpful only by analogy or as suggestive of concepts or principles. U.S. legislation provides for prosecution of terrorists and even goes so far as to include both a *mens rea* and an *actus reus* in proscriptions of terrorism.

So, for purposes of this article, it may be helpful to consider the more recent legislation on terrorism.¹⁸⁷

[T]he term “international terrorism” means activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

(2) the term “national of the United States” has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act;

(3) the term “person” means any individual or entity capable of holding a legal or beneficial interest in property; and

(4) the term “act of war” means any act occurring in the course of—

(A) declared war;

(B) armed conflict, whether or not war has been declared, between two or more nations; or

(C) armed conflict between military forces of any origin; and

(5) the term “domestic terrorism” means activities that—

in the prevention or punishment of terrorism. See 22 U.S.C. § 2656(d) (Supp. 2002), which defines terrorism:

as used in this section [international terrorism is] —(1) terrorism involving citizens or the territory of more than 1 country; (2) the term “terrorism” means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents; and (3) the term “terrorist group” means any group practicing, or which has significant subgroups which practice, international terrorism.

187. 18 U.S.C.A. § 2331 (2002).

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.¹⁸⁸

Working Definition of Terrorism

Terrorism, for purposes of this article, will be defined, then elaborated, as the use of violence against innocent individuals for the purpose of obtaining thereby some military, political, or philosophical end from a third-party government or group. The violence must be aimed at or must wantonly impact innocent civilians. Terrorism is political or ideological violence without restraint of law or morality. It is terrorism even if it is fully domestic, but it is international terrorism only when the conduct transcends borders or is so massive that it poses a threat to international peace and security or includes a use of weapons of mass destruction. This definition obviates any application of self-defense because innocents include non-combatants in war and non-attackers in a non-war setting. One has no right to "defend oneself" with violence against a person who is not threatening one's life or limb, in either context.

Later, I will provide a more detailed definition of terrorism, and I will determine its constituent elements and analyze them. We will consider whether a war crime or crime against humanity is a functional equivalent of terrorism, when occurring during a legally recognized or recognizable armed attack. It will be necessary in this process to distinguish both domestic and international self-defense and to distinguish the legal and illegal use of violence in war. It may be that the offenses relevant to this article (war crimes, crimes against humanity, and terrorism) have equivalent elements and similar harmful impact, but they occur in different factual and legal circumstances. The differing circumstances are crucial to an understanding of terrorism and to adopting any proper legal response to it.

This definition of terrorism, at least, provides for determining what sort of conduct clearly constitutes the crime.¹⁸⁹ Regardless of whether

188. See USA Patriot Act, *supra* note 178, at § 2331.

189. For further discussion of the definition of terrorism, see Richard Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON L. REV. 380 (1974); John Dugard, *International Terrorism: Problems of Definition*, 50 INT'L AFF. 67 (1974); Thomas Franck and Scott Senecal, *Porfiry's Proposition: Legitimacy and Terrorism*, 20 VAND. J. TRANSNAT'L L. 195 (1987); Walter Laqueur,

terror-violence occurs in a setting where it should be called a war crime, a crime against humanity, state, or group terrorism, it is proscribed terror-violence. Terrorism from this point of view is a form of especially violent crime, and so it has traditionally been considered by Anglo-American, Continental, Islamic, and other systems of jurisprudence.¹⁹⁰ International law condemns this conduct and provides for universal jurisdiction to be asserted over each of these types of terrorism on the basis of at least three legal theories.¹⁹¹ Prosecution is appropriate under each of these theories. Most, if not all, people consider violence against their own people, innocents or noncombatants to be evil and illegal, whether done by powers within their nation or by outsiders. Governmental violence against innocents may provide justification for revolution,¹⁹² but it does not excuse or justify violence by proxy against those of the nationality, ethnicity, or group from which the "evil-doers" came.¹⁹³ If conduct is illegal when committed against one's own, it is illegal to commit the same conduct, even if committed against the innocent civilians of the original "evil-doers" co-nationals or the innocent civilians of countries that harbor them. To target these innocents is a crime, whether committed by a soldier or other government agent during

Reflections on Terrorism, 64 FOREIGN AFF. 86, 88 (1986); Levitt, *supra* note 136; Ali Khan, *A Legal Theory of International Terrorism*, 19 CONN. L. REV. 945 (1987).

190. MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 102 (1955); Robert Friedlander, *Mere Rhetoric is Not Enough*, 7 HARV. INT'L REV. 4, 6 (1985) (noting that the acts that go into what is called terrorism are crimes and have been recognized and punished as such in Anglo-American and continental jurisprudence).

191. The universality theory, the protective principle, and the territorial theories all would suffice to provide jurisdiction to prosecute or extradite a person who committed the acts presented as terrorism. See generally Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in 2 INTERNATIONAL CRIMINAL LAW 33, 70-81 (M. Cherif Bassiouni ed., 2d ed., 1998); Christopher L. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1110 (1982); Patrick Moser, *Mexican Authorities to Extradite Argentine Ex-Officer to Spain*, AGENCE FRANCE PRESS, Feb. 3, 2001, available at 2001 WL 2334111; George P. Fletcher, *On Justice and War—Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL'Y 635, 636 (2002); Edward C. Synder, *The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973-1995*, 2 TULSA J. COMP. & INT'L L. 253 (1995); Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROB. 153, 166 (1996); see generally *The Threat Posed by the Convergence of Organized Crime, Drug Trafficking, and Terrorism: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong. D1214-15 (2000) (statement of Raphael F. Perl). But see Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840, 855-56 (2002); Alfred P. Rubin, *Dayton, Bosnia, and the Limits of Law*, 46 NAT'L INT. (1996).

192. See discussion of history *supra* notes 95-132 and accompanying text.

193. With the heightened warnings issued by the Bush Administration in May 2002, talk shows on television and radio are rife with comments that a pre-emptive nuclear strike would be appropriate against a nation such as Saudi Arabia, from which several of the al-Qaeda operatives came.

a war or civil insurrection, or by a member of a political or guerilla group.

Constituent Elements of Terrorism

The elements of terrorism, therefore, are: (1) violence committed by any means; (2) causing death, great bodily harm, or serious property damage; (3) to innocent individuals; (4) with the intent to cause those consequences or with wanton disregard for those consequences and for the purpose of coercing or intimidating some specific group, or government, or otherwise to gain some perceived political, military, or other philosophical benefit; (5) without justification or excuse.

The element of "justification or excuse" is essentially pro-forma, to round out the definition in criminal law terms: there is no justification or excuse for the intentional or wanton killing or doing great bodily harm to innocent persons. The core concept of this definition is the use of innocents (innocent civilians, non-combatants) to gain some military, political, religious, or philosophical (including nihilistic) advantage.

This conduct is universally condemned in the sense that it is recognized as criminal in virtually all nations and even among all groups, at least in the sense that if the conduct is perpetrated against someone in the group or nation, the nation or group considers itself to have been attacked.¹⁹⁴ Whether the conduct occurs during war (war crime) or during relative peacetime (terrorism), the conduct is considered to be egregious and criminal. The end or goal sought to be obtained by the conduct does not provide an excuse or a justification. It does not matter what ideology, philosophy, or religious ideal it arguably promotes. The conduct is criminal no matter what it is designed to accomplish. This is true even if it is aimed at combating terrorism or at combating oppression.

If the terroristic conduct occurs during warfare, it is called a war crime or crime against humanity. If it is committed during "peacetime" or what seems today to be merely relative peacetime, it is terrorism. The conduct is the same and the proscription is the same. For example, if a group kidnaps and murders an infant child of a head of state or head of a terrorist organization for the purpose of coercing that head of state or terrorist group to provide some benefit, like releasing a hostage or prisoner, then the kidnapping and murder constitute terrorism. This may be contrasted to killing or taking an enemy combatant captive during a war (which is justified). It may also be contrasted to the common crimes of kidnapping or murder for gain or revenge. The essential difference is

194. It has been so since the beginning of recorded time.

the political nature of the terroristic conduct: it has a tactical or strategic military or political purpose. It is also terrorism for a government to torture, "disappear," or murder a cultural, religious, or ethnic minority, its own citizens or non-citizens within their territory for the purpose of intimidation, quelling dissent, or eliminating the group. This conduct is subject to universal jurisdiction, so all nations have the right and the obligation to prosecute or to extradite its perpetrators. The ultimate manifestation of terrorism, of course, is genocide, such as that committed in Rwanda.¹⁹⁵

Thus, a war crime or crime against humanity¹⁹⁶ occurs when a state agent or official allows or ignores the purposeful or criminally reckless

195. See generally, e.g., Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73 (2001-2002) (discussing Mark Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221 (2000)). Speaking at "Genocide and the Rwandan Experience: A Rwanda-South Africa Dialogue," sponsored by the Institute for Justice and Reconciliation on February 5-7, 2001, at Cape Town, Mark Drumbl provided an alternative metaphor: "Individuals must peel off the layers of their own prejudice and involvement." Mark Drumbl, *Sclerosis: Retributive Justice and the Rwandan Genocide*, 2 PUNISHMENT & SOC'Y 288, 295 (2000). Special Representative of the United Nations Commission on Human Rights Report on the Situation of Human Rights in Rwanda, submitted by the Special Representative on the Situation of Human Rights in Rwanda, Michel Moussalli, U.N. Doc. E/CN.4/2000/41/(2000) 197 [hereinafter Moussalli 2000]. Moussalli concludes that "[r]econciliation of this kind is a lesson for the whole world. It belies the image of Rwanda as a country riven by ethnic hatred." *Id.*

196. See, e.g., Nicholas R. Doman, *Aftermath of Nuremberg: The Trial of Klaus Barbie*, 60 U. COLO. L. REV. 449, 455 (1989) (defining crime against humanity).

The paradigm of justice established at Nuremberg and its vocabulary of international law, despite its shortcomings, continue to frame the successor justice debate. As a result, "Nuremberg" has become the shorthand term for reliance on criminal prosecution as a primary mechanism for dealing with those responsible for wrongs committed during a prior dispensation. Although the Nuremberg trials were conducted internationally, the term is equally applied to intranational situations. Since the handover of power was negotiated, it was not considered a realistic option to have Nuremberg-type criminal trials where perpetrators, or at least the main perpetrators, of human rights abuses would be punished for their crimes.

Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73 n.3 (2001) (citations omitted). Belgium has tried people accused of participating in the Rwandan genocide for crimes against humanity. *Rwandan Nuns on Trial for Genocide*, CAPE TIMES, Apr. 18, 2001, at 4 (noting that "Belgium's eagerness to stage the £1.4 million trial reflects its failure to prevent the genocide in its former colony"). Last year in Belgium, the former colonial power, two Rwandan nuns were convicted of murder for their roles in the massacre of 7,000 Tutsis who sought protection at a Benedictine convent. See Emily Wax, *Islam Attracting Many Survivors of Rwanda Genocide*, WASH. POST, Sept. 23, 2002, at A10; *Belgian Court: Nuns Guilty of War Crimes in Rwanda*, NEWSDAY, June 8, 2001, at A22; NY Times on extraterr. juris by U.S. Dan Eggen, *Ashcroft Pushes Senate on Judicial Nominees: Speech Fuels Battle Over Confirmations*, WASH. POST, Aug. 8, 2001, at A04; Robert O'Harrow, Jr., *N.Y. Bank Probe Finds No Proof of Mob Links; Lawmakers Still Plan Hearings, Legislation*, WASH. POST, Sept. 21, 1999, at E01, 1999WL 23304718. See also *Style: Spying*, WASH. POST, July 23, 2002, at C14, available at 2002 WL 23855452.

killing of innocents (*hors du combat*), or the peacetime equivalent of those *hors du combat* (innocent civilians).

The justifications for international criminal liability for perpetrators of the international crimes of genocide, war crimes, and crimes against humanity have remained essentially unchanged in the half century since World War II's Nuremberg and Tokyo trials. Despite the vast literature on those famous prosecutions, including extensive critiques leveled at what they accomplished, there is a remarkable degree of consensus among international lawyers in favor of international criminal accountability for mass murderers, rapists, and torturers.¹⁹⁷

The universal criminal nature of these offenses is seen in the laws of each nation and customs of each group. The conduct we are discussing is even seen as criminal when done between youth gangs. When the act is perpetrated against "me" or "us," it is criminal. When one group commits the act, it invariably tries to hide that fact. This again proves its knowledge of the criminal nature of the act. Cover-up occurs even when a group commits such conduct in retaliation or to "obtain justice" for crimes committed against it. No doubt, such conduct is universally condemned as criminal.

Insight from Protocols I & II to the 1949 Geneva Conventions

On June 8, 1977, the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted two protocols supplementing these conventions: the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), with annexes, and the Protocol Additional to the Geneva Conventions of August 12, 1949,¹⁹⁸ and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).¹⁹⁹ The protocols entered into force December 7, 1978.²⁰⁰

197. Jose Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 365-66 (1999) (citations omitted).

198. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Ronald Reagan, *The U.S. Decision Not to Ratify Protocol I to the Geneva Convention on the Protection of War Victims*, 81 AM. J. INT'L L. 910 (1987), 16 I.L.M. 1391 (1977).

199. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

200. Protocol I, *supra* note 198, at preamble. The text of the protocols also appears at 72 AM. J. INT'L L. 457 (1978), 16 I.L.M. 1391 (1977) (Protocol I), and 16 I.L.M. 1442 (1977) (Protocol II).

Protocol I still has not received the advice and consent of the U.S. Senate.

The debate over Protocol I provides insight into the difficulties in defining terrorism. President Reagan, in January 1987, transmitted Protocol II to the Senate for its advice and consent, stating:

[The protocol] is essentially an expansion of the fundamental humanitarian provisions contained in the 1949 Geneva Conventions with respect to non-international armed conflicts, including humane treatment and basic due process for detained persons, protection of the wounded, sick and medical units, and protection of noncombatants from attack and deliberate starvation. If these fundamental rules were observed, many of the worst human tragedies of current internal armed conflicts could be avoided. In particular, among other things, the mass murder of civilians is made illegal, even if such killings would not amount to genocide because they lacked racial or religious motives. Several Senators asked me to keep this objective in mind when adopting the Genocide Convention. I remember my commitment to them. This Protocol makes clear that any deliberate killing of a noncombatant in the course of a non-international armed conflict is a violation of the laws of war and a crime against humanity, and is therefore also punishable as murder.

While I recommend that the Senate grant advice and consent to this agreement, I have at the same time concluded that the United States cannot ratify a second agreement on the law of armed conflict negotiated during the same period. I am referring to Protocol I addition to the 1949 Geneva Conventions, which would revise the rules applicable to international armed conflicts. Like all other efforts associated with the International Committee of the Red Cross, this agreement has certain meritorious elements. But Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. One of its provisions, for example, would automatically treat as an international conflict any so-called "war of national liberation." Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves.

These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form, and I would invite an expression of the sense of the Senate that it shares this view. Finally, the Joint Chiefs of Staff have also concluded that a number of the provisions of the Protocol are militarily unacceptable.²⁰¹

Whether one agrees or disagrees with President Reagan's reasons for not becoming party to Protocol I, one may ask whether these reasons retain their validity after the demise of the Soviet empire and the end of the Cold War. Protocol I, article 51(2) prohibits "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population."²⁰² Is it appropriate to refuse ratification of this and other salutary rules in Protocol I because it would provide "national liberation movements" a "rhetorical and political victory"? Would the United States be in a stronger or weaker legal position in its current "war on terrorism" if it were party to Protocol I?

There may be other reasons for opposing Protocol I. For example, did it go far enough? Professor Michael Reisman suggests that Protocol I represents a shift away from the status quo in international affairs.²⁰³ He notes that Protocol I does not allow an existing state that has suffered low intensity incursions or aggression to attack another state in which the original low-intensity attackers have found haven, an innovation contrary to self-defense in customary international law.²⁰⁴ This is a valid criticism. One can also criticize Protocol I for a basic confusion between humanitarian rules for protecting victims during armed conflict (*jus in bello*) and rules aimed at determining the status of parties to conflict (*jus ad bellum*). To the extent that Protocol I makes *jus in bello* dependent on *jus ad bellum* it is unfortunate. *Jus in bello* originally was undertaken as a matter of self-interest, but had the effect of protecting victims within the embattled state, no matter what "morality" was seen to reside with their "side." *Jus in bello* in Protocol I is viewed as applying only in certain "acceptable" wars. Protocols I and II made the humanitarian rules applicable to more conflicts but, unfortunately, Protocol I limits their applicability on the basis of an ideological litmus

201. Reagan, *supra* note 198, at 910-11. BLAKESLEY ET AL., CASES, *supra* note 6, at 1185-86, 1310-12.

202. Protocol Additional to the Geneva conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 1(2), opened for signature June 8, 1977 16 I.L.M. 1391 (1977) (entered into force Dec. 7, 1978; restating the same principle) [hereinafter Protocol I].

203. Michael Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE J. INT'L L. 171, 175-80 (1988).

204. *Id.*

test.²⁰⁵

Terrorism Distinguished from Domestic Common Crime

Generally, it seems that U.S. domestic law has incorporated international treaties on some specific offenses that are considered terroristic, proscribing the conduct. Classic examples of this are airline hijacking and sabotage offenses.²⁰⁶ If a common crime such as murder is committed in a manner that conforms to terrorism, it appears that the terror element functions as an aggravating factor, enhancing the punishment.²⁰⁷

It may be worthwhile to consider the conceptual relationship between terrorism and basic substantive criminal law, including the constituent elements of murder, self-defense, and other justifications for violence. This allows us to consider terrorism in the context of basic principles of culpability and innocence.

Defining Innocent: Justifiable and Unjust Violence Distinguished

No doubt, the term "innocent" is value loaded²⁰⁸ and difficult to define. It is true that the term is a difficult one that, like the term terrorism, has often been appropriated by propagandists. The difficult part relates to what makes a person innocent. Still, it is necessary to define the term if killing or violence during war or even individual self-defense is going to be justified or excused. In the domestic law of all countries,

205. See *id.* at 193-97; Alfred P. Rubin, *International Law and the Use of Force by National Liberation Movements*, 13 FLETCHER FOREIGN WORLD AFF. 410, 414 (1989). President Reagan's position with respect to Protocol I was vigorously rebutted by the Legal Adviser to the Directorate of the International Committee of the Red Cross in an article entitled, Hans-Peter Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912 (1987).

206. See, e.g., Montreal Convention for the Suppression of Unlawful Acts Against Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205; Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, Feb. 24, 1988, S. Treaty Doc. No. 100-19; Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; see also Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11; Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, G.A. Res. 49/59, U.N. GAOR, 49th Sess., Supp. No. 49, at 299, U.N. Doc. A/49/49 (1994); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. Treaty Doc. No. 101-1, 27 I.L.M. 668; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, S. Treaty Doc. No. 101-1, 27 I.L.M. 685.

207. See, e.g., USA Patriot Act of 2001, *supra* note 14.

208. Jordan Paust, *An Introduction to and Commentary on Terrorism and the Law*, 19 CONN. L. REV. 97, 704, 721 (1987).

when one human being intentionally kills another human being it is murder or another form of criminal homicide unless the perpetrator is justified or excused.²⁰⁹ Justification exists when a person is defending himself or another,²¹⁰ or when he or she is required to commit the act by law, for example, during war. When the line is drawn between justifiable or excusable homicide and criminal homicide, one necessarily defines who is innocent. The perpetrator commits criminal homicide if he intentionally or recklessly kills a person who is innocent; that is, so long as the victim was not attacking the perpetrator with deadly force. An equivalent principle exists for an individual who is not an enemy combatant with whom he is at war.²¹¹

209. See generally JOSEPH CONRAD, LORD JIM (1925); PERKINS & BOYCE, *supra* note 167.

210. See, e.g., GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* (1978); George Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, in *STUDIES IN COMPARATIVE CRIMINAL LAW* 123, 123-27 (Edward Wise ed., 1975).

211. It seems a rather enormous deduction to make on the basis that men and boys of military age were massacred. Can there not be other plausible explanations for the destruction of 7,000 men and boys in Srebrenica? Could they not have been targeted precisely because they were of military age, and thus actual or potential combatants? Would someone truly bent upon the physical destruction of a group and cold-blooded enough to murder more than 7,000 defenseless men and boys go to the trouble of organizing transport so that women, children, and the elderly could be evacuated? It is certainly striking that another Trial Chamber, in Sikirica, dismissed the "significant part" argument after noting that the common denominator of the victims was that they were men of military age and nothing more, as if this were insufficient. William A. Schabas, *Was Genocide Committed in Bosnia & Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia*, 25 *FORDHAM INT'L L.J.* 23 n.115 (2001); Krstic, Case no. IT-98-33-T, para. 595 (citation omitted).

Finally, the Trial Chamber has concluded that, in terms of the requirement of Article 4(2) of the Statute that an intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively, the military aged Bosnian Muslim men of Srebrenica do in fact constitute a substantial part of the Bosnian Muslim group, because the killing of these men inevitably and fundamentally would result in the annihilation of the entire Bosnian Muslim community at Srebrenica.

Id.; see also, e.g., Kader Asmal et al., *When the Assassin Cries Foul*, in *LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA* 94 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000). Some have considered the possible origins and implications of this restriction on self-help:

[T]he mythology of females as essentially non-violent grew out of a profound impulse to give special protection to the bearers of future generations—a sort of gender version of the non-combatant status of medics and Red Cross workers. But the problem is the same for all non-combatants, whether in wartime or danger-ridden peace: You can still get hurt, but you're not allowed to fight back.

Kathryn Kahler, *Penalty: Death*, GREENSBORO NEWS & REC. (N.C.), May 2, 1993, at F1, available at 1993 WL 7535364. U.S. ARMY, CENTER FOR LAW & MILITARY OPERATIONS (CLAMO) THE JUDGE ADVOCATE GENERAL'S SCHOOL, *CLAMO Report*, 2001 ARMY LAW. 29. These views do not necessarily reflect the views of the Judge Advocate General, the Department of the Army, or any other government agency. Preparation Tips for the Deployment of a Brigade Operational Law Team (BOLT) Law of War (LOW) matters are often paid lip service by brigade leaders, under the assumption that a good soldier intuitively understands the line between criminal and lawful acts. *Id.* The LOW, however, raises issues that conflict or appear to conflict with

Culpability and Innocence

The term “innocent” is essential to any useful definition of terrorism, but the term must be specific and limited. Again, basic concepts of criminal law and the laws of war provide clarity. In this context an “innocent” means a non-attacker, a noncombatant during hostilities, or his relative peacetime equivalent.²¹² There is no justification for killing individuals *hors du combat*.²¹³ One may analogize to the law of war, to the concept of self-defense in domestic criminal law,²¹⁴ and to self-defense in international law.²¹⁵ Oppression may be analogized to an attack, allowing for justified revolutions based on a theory of self-defense. “Self-defense” attacks, however, must be against individuals holding the status of original attackers. To apply this test to the farmer growing food ultimately used by the army would result in a murder or

mission accomplishment, such as the duty to evacuate friendly and enemy casualties in triage order, as opposed to all friendly casualties first. *Id.* Brigades must not neglect LOW training during pre-deployment preparations, and the BOLT should ensure that the training addresses the “gray areas” of LOW combatant obligations not rising to the level of willful criminal acts.

212. For the rules in substantive criminal law, see, for example, PERKINS & BOYCE, *supra* note 167, at 1119-1137; WAYNE R. LAFAYE, CRIMINAL LAW 491-503 (3rd ed. 2000); FLETCHER, *supra* note 210, at 123-27; George Fletcher, *Proportionality and the Psychotic Aggressor*, *supra* note 210, at 123, 123-27. For the rules in public international law, see, for example, Burrus Carnahan, *Lincoln, Lieber, and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 215, 219 (1998); LESLIE C. GREEN, CONTEMPORARY LAW OF ARMED CONFLICT, 197-243, 252-54, 347-54 (2d ed. 2000) (1993); Oscar Schacter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259 (1989); DINSTEIN, *supra* note 150; FRITS KALSHOVEN, BELLIGERENT REPRISALS 26 (1971); see also Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAVAL L. REV. 217, 20 (1998) (discussing the *Caroline* case of 1837, where U.S. Secretary of State Daniel Webster asserted that self-defense may be exercised only when the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation”) (citations omitted); Andrew D. Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, 170 MIL. L. REV. 155 (2001); Lt. Col. Mark S. Martins, *Deadly Force is Authorized, but also Trained*, 2001 ARMY LAW. 1; Edward Kwakwa, *Belligerent Reprisals in the Law of Armed Conflict*, 27 STAN. J. INT'L L. 49, 50 (1990); William V. O'Brien, *Reprisals, Deterrence, and Self-Defense in Counterterror Operations*, 30 VA. J. INT'L L. 421, 423 (1990).

213. A person not taking direct part in the hostilities is *hors du combat*. One is also *hors du combat* upon surrender, when sick or wounded, or when serving as medical personnel. See INT'L COMM. OF THE RED CROSS, BASIC RULES OF THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS (1987); KITTICHAISAREE, *supra* note 155, at 129-39; Legality of the Threat or Use of Nuclear Weapons, ICJ Advisory Opinion of 8 July 1996, I.C.J. Rep. 1996, para. 78; GREEN, *supra* note 212, at 347-54; Carnahan, *supra* note 212, at 215, 219.

214. See, e.g., PERKINS & BOYCE, *supra* note 167, at 1119-37; LAFAYE, *supra* note 212, at 491-503; FLETCHER, *supra* note 210, at 855-75; Fletcher, *Proportionality and the Psychotic Aggressor* *supra* note 210, at 123-27.

215. See generally Carnahan, *supra* note 212, at 215, 219; GREEN, *supra* note 212, at 2, 6-7, 9-10, 58, 73, 124, 130, 192, 340-54; Schacter, *supra* note 212, at 259; DINSTEIN, *supra* note 150, at 180; KALSHOVEN, *supra* note 212, at 26; see also Clemmons & Brown, *supra* note 212, at 243; Mitchell, *supra* note 212, at 155; Martins, *supra* note 212, at 1; Kwakwa, *supra* note 212, at 50; O'Brien, *supra* note 212, at 423.

terrorist murder conviction if the farmer were executed to gain military advantage. As in domestic law, self-defense matters; the determination of whether the person killed is an attacker may be difficult in a given case, but line drawing and categorization is the job of the judiciary. In most cases it is not difficult.

It is suggested that it is inappropriate to determine what international conduct is criminal by focusing on the object or the purpose of the conduct. Generally, crime is defined by an act and a mental element, not by its motive or object.²¹⁶ It is argued that one should delineate a crime by what was done, not why it was done or to whom.²¹⁷ Although this argument is generally true, it is misleading. Proof of crime requires a *mens rea* as well as an *actus reus*. Culpability is based on the *mens rea* (intent to kill or wanton disregard for human life) that concurs with the *actus reus* (shooting) to cause the prohibited result (death of an innocent human being). Motive may or may not be relevant to proving the culpable mental state, but motive is not the culpable mental state. The perpetrator's intent, knowledge, or other culpable mental state regarding the object and the act done to the object are precisely what must be proved to establish guilt. For example, if one kills, reasonably believing he is killing a deadly attacker, he acted in self-defense. If he has no such reasonable belief, he is not justified or excused. If a person kills knowing he is killing a person rather than a deer, he has a mental state that may establish criminal homicide when he acts to fulfill that end. Moreover, if one kills a deer, sincerely believing it is a person, one may not be convicted of a criminal homicide. Similarly, a war crime is committed when violence is perpetrated, intentionally or wantonly, against noncombatants (innocents), even though the same conduct is not criminal if committed against combatants. A homicide will be justified if committed against a person attacking the killer with deadly force, but the killing will be murder if one intentionally or knowingly kills an innocent. Killing an innocent will be criminal homicide, even if the killing is committed to save one's own life. It is criminal homicide to shoot an innocent person, even if to fail to do so would cause oneself or a relative to be killed by a third person. It is substantively necessary, therefore, to consider the object of an allegedly criminal act and the object's status or conduct toward the criminal. Culpability is based on the object's action or status in conjunction with the perpetrator's mental state vis-à-vis that object and its action or status. Thus, it is perfectly appropriate, even

216. See discussion and writings cited in Thomas Franck & Scott Senecal, *Porfiry's Proposition: Legitimacy and Terrorism*, 20 VAND. J. TRANSNAT'L L. 195, 197 (1987).

217. See *id.*

necessary, to define criminal terrorism by taking the object and the mental state into account.

Self-defense, like self-determination, often is asserted improperly as a justification for killing. It is not difficult to determine the validity of a self-defense claim.²¹⁸ It is not self-defense to attack an innocent who is not attacking the person raising the defense, even if killing the innocent will preserve the life of the defendant. Self-preservation is not self-defense.²¹⁹ Self-defense does not apply unless the victim/attacker forced a choice on the killer to kill the victim/attacker or be killed.²²⁰ This defense, along with its limitations, applies to individuals or groups.

Terrorism Distinguished from War Crimes

Today, war, or what might be called war, has changed to the point that making sense of distinctions among terrorism, crimes against humanity, and war crimes is difficult. Yet, making the distinctions is important and possible. One problem seems to be that "war" in the traditional sense of formal declared belligerency rarely, if ever, occurs today. It may be that we have moved into a phase of world history in which the people of the world are in a continual state of eruption into internecine strife or war. That is, not strife that is not full blown civil war or insurgency, but strife among or between members of the same state; take, for example, the wars in Rwanda, the former Yugoslavia, and Palestine. These situations may not have been declared formally to be belligerency, but they seem like war to those involved. Perhaps we have devolved into a situation similar to that which existed prior to the birth

218. See *supra* note 214.

219. *United States v. Holmes*, 26 F. Cas. 360 (Wall Jr.) (C.C.E.D. Pa. 1842) (No. 15,383); *Regina v. Dudley & Stephens*, 14 Q.B. 273 (1884); BENJAMIN CARDOZO, *LAW & LITERATURE* 110-14 (1931) ("[T]is not right on the art of one to save the lives of some by the killing of another. There is no rule of human jettison."); Joseph J. Simeone, *Survivors' of the Eternal Sea: A Short True Story*, 42 ST. LOUIS U. L.J. 1123 (2001). German law may excuse the killing of a person under a circumstance such as that in *Dudley & Stephens*. In former German Penal Code 35, a person acts without culpability (*das Schuld*) if he does an act to avert an imminent, otherwise unavoidable, risk to his life. The killing, however, would be *rechtswidrig* (wrongful; unlawful, violative of the overall social order, though not culpable). The killing clearly does not fit the German notion of self-defense, to kill the approaching, would-be cannibals. Fletcher, *Proportionality and the Psychotic Aggressor* *supra* note 210, at 130-31; see also FLETCHER, *supra* note 210, at 857-864. David Wasserman argues convincingly that the peculiar force of self-defense as a justification is the "fact that the aggressor is forcing a choice between lives at the moment he is killed." David Wasserman, *Justifying Self-Defense*, 16 PHIL. & PUB. AFF. 356, 357 (1987).

220. "'Good Skipper' use him truly, For he is ill and sad 'Hush! Hush!' he cried, then cruelly He kill'd the little lad." F. Morgans, *Ballad of the Mignonette*, reprinted at A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW* 253-54 (1984); *Regina v. Dudley & Stephens*, 14 Q.B. 560, 52 L.T.R. 107, 111 (1885); see also Wasserman, *supra* note 219, at 357. For a discussion of self-defense in international law, see generally DINSTEIN, *supra* note 150.

of the nation-state.²²¹

Conventional and customary international law have proscribed certain conduct even during war: war crimes, genocide, and crimes against humanity. Certain conduct will violate international humanitarian law governing an armed conflict.²²² Indeed, war crimes are grave offenses against the laws of war (*jus in bello*).²²³ Every offense against the laws of war is not a war crime, but grave breaches are.²²⁴ The Geneva Conventions of 1949, for the protection of war victims, provide a listing of these grave breaches, which proscribe certain conduct against certain persons and property protected under the Conventions.²²⁵ Protocol I Additional to the Geneva Conventions of 1949, lists other grave breaches.²²⁶ These listings are not exhaustive.²²⁷

Some Specific Crimes as Examples

War crimes, like any other crime, require an *actus reus* and a *mens rea*. Thus, for “grave breaches” of the Geneva Conventions, the *mens rea* includes intent or recklessness, which may include what the common law called “depraved heart conduct” or criminal negligence, to use Model Penal Code terminology.²²⁸ For the ICC Statute, the Preparatory

221. For an interesting philosophical discussion of these issues, see MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2000).

222. See KITTICHAISAREE, *supra* note 155, at 227; GREEN, *supra* note 212, at 197-243; MARCO SASSÒLI & ANTOINE A. BOUVIER, *HOW DOES LAW PROTECT IN WAR: CASES, DOCUMENTS, AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW* 161-62, 231, 444-50 (1999); *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* (Dieter Fleck ed., 1995); *WAR CRIMES IN INTERNATIONAL LAW* (Yoram Dinstein & Mala Tabory eds., 1996).

223. Yoram Dinstein, *The Distinctions Between War Crimes and Crimes Against Peace*, in *WAR CRIMES IN INTERNATIONAL LAW*, *supra* note 222, at 1, 3.

224. *Id.*; see also *Trial of Hagendorf* (U.S. Military Court, Dachau, 1946), 13 *Law Reports of Trials of War Criminals* 146, 148 (1949); Hersh Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 *BRIT. Y.B. INT'L L.* 58, 77 (1944); Bernard Victor Aloysius Röling, *The Law of War and the National Jurisdiction Since 1945*, 100 *RECUEIL DES COURS* 323, 340 (1961).

225. See generally Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

226. See generally Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977); see also DINSTEIN, *supra* note 150, at 4.

227. *Id.*

228. See discussion of this in the Celebici Judgment, *Prosecutor v. Zejnil Delalic*, Case No. IT-96-21-A, 782, Judgment at the Int'l Crim. Trib. former Yugoslavia, App. Chamber (2001) [hereinafter Celebici Judgment]; see also KITTICHAISAREE, *supra* note 155, at 142.

Committee has deemed the general *mens rea* to be intent or knowledge, or both.²²⁹

The *actus reus* for murder, or what the ICC calls “willful killing,” is satisfied by establishing that the accused’s conduct (acts or omissions) caused the deaths of “protected persons” by whatever means.²³⁰ Protected persons include prisoners of war or captured persons of the opposing military, or an innocent civilian.²³¹ Thus, causing death by starvation, execution without a fair trial, or torture or ill-treatment of POWs or innocent civilians in violation of the laws and customs of war would satisfy the *actus reus*.²³² The *mens rea* is satisfied if this conduct is performed intentionally, with knowledge or reckless disregard for human life.²³³

The term “terrorism” is generally applied to circumstances of relative peacetime; when there is no belligerency or armed conflict in the legalistic sense. It may be, however, that the same conduct would constitute a war crime, a crime against humanity, or terrorism, with the differentiating feature being only the factual-legal context. Intentional killing of a human being is murder in domestic law.²³⁴ In common law systems the intentional part for murder is deemed to be killing “with malice aforethought” to distinguish it from justifiable or excusable killing.²³⁵ On the other hand, the exact same conduct, killing a human being with intent to do so, is considered justifiable if done in self-defense or during war as long as that human being is an attacker or an enemy combatant not *hors du combat*.²³⁶ Killing a human being (soldier) who is *hors du combat* is a war crime during international or internal armed conflict.²³⁷ This same conduct, killing of a human being, may be a crime against humanity if the person is an innocent civilian; the line

229. KITTICHAISAREE, *supra* note 152, at 142.

230. See, e.g., *id.* (citing Celebici Judgment).

231. *Id.*

232. See, e.g., *id.*

233. See, e.g., the Celebici Judgment, *supra* note 228, at 437-439; Prosecutor v. Blaskic, Case No. IT-95-14, 788, Judgment at the *Int'l Crim. Trib. for the Former Yugoslavia* (2000), available at <http://www.un.org/icty> [hereinafter Blaskic Judgment]. These types of *mens rea* are also roughly part of common law malice aforethought. See, e.g., PERKINS & BOYCE *supra* note 167, at 125-38; see also FLETCHER, *supra* note 210, at 235-391; LAFAYE, *supra* note 212, at 651-87.

234. Regina v. Dudley & Stevens, 14 Q.B. 273, 285-86 (1884); see also Regina v. Howe, 1 App. Cas. 417 (H.L. 1987); United States v. Holmes, 26 F. Cas. 360 (C.C. Pa. 1842); GLANVILLE WILLIAMS, TEXTBOOK OF THE CRIMINAL LAW 604 (2d ed. 1983); JOHN SMITH, JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW (1989). On the moral problem of choosing one's victim, see Andrew Ashworth, *Justifications, Necessity, and the Choice of Evils*, in PRINCIPLES OF CRIMINAL LAW 153-54 (3d ed. 1999).

235. See LAFAYE, *supra* note 212, at 651-87; PERKINS & BOYCE, *supra* note 167, at 46-119; FLETCHER, *supra* note 210, at 235-391.

236. See *supra* note 213.

237. KITTICHAISAREE, *supra* note 155, at 129-39; RED CROSS, *supra* note 213; Legality of the

between the two is sometimes blurred. The same conduct will be terrorism when committed when there is no armed conflict; it may also be a crime against humanity, and some have argued that it should be prosecuted before the International Criminal Court.²³⁸ The essential commonality in these offenses is that they all entail individual responsibility for killing innocent human beings.

War crimes and crimes against humanity are less poorly defined than terrorism, but suffer from some vagueness of definition, at least for purposes of basic criminal law. Some violence is obviously legal. For example, some argue that violent humanitarian intervention is justified in the manner and nature of substantive criminal law's defense of others (which is akin to self-defense).²³⁹

What would be murder in civil society is justified in war. Intentional killing coupled with the intent to kill or do great bodily harm is war's essence. Where does terrorism fit amidst the definitions of war crimes, crimes against humanity, and common crime? How may terrorism be distinguished from war?

When one is at war, the enemy combatant, at least theoretically, is akin to an attacker. He is trying to kill and, hence, may be killed. Killing such an attacker is considered self-defense in domestic law or peacetime. It is justifiable homicide during war.²⁴⁰ On the other hand, if one

Threat or Use of Nuclear Weapons, *supra* note 213, at para. 78; GREEN, *supra* note 212, Caranhan, *supra* note 212, at 215, 219.

238. See, e.g., UN Weekly Newsletter, *Robinson Says Establishment of International Criminal Court Key to Fighting Terror* (Mar. 9, 2002), available at <http://www.unic.org.in/News/2002/nl/n19mar2002.htm> 17.

239. See T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT'L & COMP. L. REV. 1, 1-2, 9-18 (2002) (discussing the debate over humanitarian intervention); see also Farook Hassan, *RealPolitik in International Law: After Tanzanian-Ugandan Conflict "Humanitarian Intervention" Reexamined*, 17 WILLAMETTE L. REV. 859 (1981); Jost Delbruck, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887 (1992); Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 189-91 (Richard B. Lillich ed., 1973); BLAKESLEY, CASES, *supra* note 6, at 1117-27 (presenting the debate and interventions in Somalia, the former Yugoslavia (including Kosovo), and Iraq, among others).

240. See, e.g., UNITED NATIONS WAR CRIMES COMMISSION, XIII LAW REPORTS OF TRIALS OF WAR CRIMINALS 149-51 (1949).

The finding of the Court [to acquit Erich Weiss and Wilhem Mundo, tried on 9-10 November 1945 by U.S. military commission for the alleged unlawful killing of an American prisoner] is evidence that self-defence which, according to general principles of penal law is an exonerating circumstance in the field of common penal law offenses when properly established, is also relevant, on similar grounds, in the sphere of war crimes.

Id. See also R.Y. Jennings, *The Caroline and MacLeod Cases*, 32 AM. J. INT'L L. 82, 91 (1938).

Id. For analysis of self-defense in wartime, see generally DINSTEIN, *supra* note 150; see also MICHAEL WALZER, *JUST & UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL*

attacks and kills another without having been attacked first, it constitutes criminal homicide—a war crime, depending on the context.²⁴¹ Attacking another nation without being under imminent attack from that nation is a violation of *jus ad bellum*.²⁴²

Some conduct that is criminal even during justified war violates *jus in bello*.²⁴³ International humanitarian law is derived from international conventions and customary international law. It governs how force can be used (*jus in bello*). Killing non-combatants or innocent civilians is criminal. *Jus in bello* in the law of war is one of the oldest subjects of international law and has a long history in customary international law.²⁴⁴ Customary legal restraints on warfare are premised on the general doctrine that destruction and violence, superfluous to actual military necessity, are immoral and wasteful. Air bombardment is subject to constraints both in relation to the selection of targets and to the accuracy of the bombardment itself. By the time of the U.S. bombings in Cambo-

ILLUSTRATIONS 86 (2d ed. 1992). The U.N. Charter authorizes the use of force in only two situations: self-defense, or when the Security Council authorizes it. The jurisprudence of the International Court of Justice is also very clear. See Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 24 (1999); see also Leslie C. Green, *The Law of Armed Conflict and the Enforcement of International Criminal Law*, in ESSAYS ON THE MODERN LAW OF WAR 239 (1985); Michael Mandel, *Nato's Bombing of Kosovo Under International Law: Politics & Human Rights in International Criminal Law: Our Case Against Nato and the Lessons to be Learned from it*, 25 FORDHAM INT'L L.J. 95, 107-08 (2001). Cf. Gordon Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1988); see also Nicole Barrett, Note, *Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos*, 32 COLUM. HUM. RTS. L. REV. 429, 443-44 (2001); Alfred P. Rubin, *The International Criminal Court: Possibilities for Prosecutorial Abuse*, 64 LAW & CONTEMP. PROBS. 153 (2001).

241. See U.N. CHARTER chs. I, V-VII (noting especially note arts. 51 and 2(4)).

242. See Alfred P. Rubin, *Jus ad Bellum and Jus Cogens: Is Immorality Illegal?*, in HUMANITARIAN LAW OF ARMED CONFLICT CHALLENGES AHEAD; ESSAYS IN HONOUR OF FRITS KALSHOVEN 595-611 (Astrid I.M. Delissen et al. eds., 1991). On reprisal, see GREEN, *supra* note 240, at 197-243, 252-54, 347-54; see also WALZER, *supra* note 240, at 86.

243. See SUN TZU, *THE ART OF WAR*, *supra* note 95, at 75-76; MALDERMAR A. KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 102 (1955); Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM. U. J. INT'L L. & POL'Y 117 (1986); U.S. v. Calley, 48 C.M.R. 19 (1973); see generally TAYLOR, *VIETNAM*, *supra* note 97; ANTONIO CASSESE, *VIOLENCE AND LAW IN THE MODERN AGE* 180 (S.J.K. Greenleaves trans., 1988) (discussing the 1,836 women and children executed by the German Army as a reprisal for partisan attacks in the village of Marzabotto, Italy). It should be noted that two heroic German soldiers were also executed for refusing to participate in the slaughter. *Id.* For a brief discussion of the distinction between *jus ad bellum* and *jus in bello*, and the historical importance of maintaining the distinction, see Alfred P. Rubin, *Jus ad Bellum and Jus Cogens: Is Immorality Illegal?*, in HUMANITARIAN LAW OF ARMED CONFLICT CHALLENGES AHEAD; ESSAYS IN HONOUR OF FRITS KALSHOVEN, *supra* at 595-611. On reprisal, see generally GREEN, *supra* note 240; see also WALZER, *supra* note 240 at 86.

244. See STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 78 (1999) (citing GREEN, *supra* note 240; SUN TZU, *supra* note 95).

dia and Laos in the late 1960s, a rule requiring that attempts be made to spare civilians was firmly entrenched as a norm of customary international law, and, thus, binding on all nations. This rule is based on three related concepts: (1) distinction must be made between military targets and civilians;²⁴⁵ (2) attacks must not be directed against civilians;²⁴⁶ and (3) attacks must advance legitimate military objectives.²⁴⁷ They must be necessary and proportional.²⁴⁸

Some have argued that the analogue, when there is no state of war, is terrorism or a crime against humanity.²⁴⁹

245. See U.S. DEP'T OF THE AIR FORCE, AIR FORCE PAMPHLET 110-31: INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS para. 1-3(c) (1976) [hereinafter AIR FORCE PAMPHLET].

246. See HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (1625); FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 4 (1987).

247. INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, Gen. Orders No. 100, art. 23 (Adjutant General's Office, War Dep't) (1863) [hereinafter Lieber Code]; League of Nations, *Protection of Civilian Populations Against Bombing from the Air in Case of War*, Resolution of the League of Nations Assembly, O.J. SPEC. SUPP. 182, at 15 (1938); Geneva Convention IV, *supra* note 225; G.A. Res. 2444, U.N. GAOR, 23d Sess., Supp. No. 18, at 1(c), U.N. Doc. A/7218 (1968); G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp. No. 28, at 2, U.N. Doc. A/8028 (1970); see Protocol I, *supra* note 45, at art. 48. These concepts are elaborated in numerous international conventions, U.N. General Assembly Resolutions, U.S. military law, and other significant international efforts to codify the customary norms of humanitarian law. Notably, Additional Protocol I of the Geneva Conventions, which entered into force in 1977, codifies in treaty form many of these customary international legal principles.

248. Proportionality is a fundamental component of international law on the use of force and the law of armed conflict. The concepts of *jus ad bellum* and *jus in bello* are relevant to the U.N.'s policy toward Iraq which set the balance between the achievement of a military goal and the cost in terms of lives. JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR 203-04 (1981) (defining proportionality in the *jus ad bellum* sense as "where the total evil of the war is compared to its total good"; or "in contemporary language, the costs of the war must not outweigh the benefits"). In the *jus ad bello* sense, proportionality has "to do with calculations of force necessary to subdue the enemy." *Id.* at 202; see also Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391 (1993); U.N. CHARTER, Chapter VII, arts. 39-51. See generally Barrett, *supra* note 240, at 443-44 (discussing further the points made in this paragraph).

249. See *Akayesu* decision and discussion and other aspects of the Rwandan Genocide. Prosecutor v. Akayesu, Case No. ICTR-96-4-T (ICTR Trial Chamber Sept. 2, 1998), available at <http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm> (on file with author) [hereinafter Akayesu (TC)], *aff'd* Prosecutor v. Akayesu, ICTR-96-4-A (ICTR App. Chamber June 1, 2001), available at <http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/Arret/index.htm>; Jose Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 365-66 (1999) (citations omitted); Daly, *supra* note 196, at 86 (discussing Mark Drumbl, *supra* note 195):

Speaking at "Genocide and the Rwandan Experience: A Rwanda-South Africa Dialogue," sponsored by the Institute for Justice and Reconciliation on February 5-7, 2001 at Cape Town. Mark Drumbl provides an alternative metaphor: "Individuals must peel off the layers of their own prejudice and involvement."

Drumbl, *Sclerosis: Retributive Justice and the Rwandan Genocide*, 2 Punishment & Soc'y 288, 295 (2000).

Id. at n.26. Michel Moussalli, *Report of the Special Representative of the United Nations*

Terrorism Distinguished from Crimes Against Humanity

Crimes against humanity blur into and overlap with war crimes. They both were declared intolerable, along with specific mention of the slaughter of civilian populations, by the London Charter.²⁵⁰ The Nuremberg Tribunal, however, actually treated crimes against humanity and war crimes as overlapping or interchangeable offenses.²⁵¹

The Nuremberg Charter provided that crimes against humanity are: murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.²⁵²

The Protocol done at Berlin on October 6, 1945,²⁵³ modified this article by replacing the colon before "or persecutions . . ." in the English and French versions with a comma, so that it would be harmonized with the Russian text.²⁵⁴ Thus, the two provisos: "in execution of or in connection with any crime within the jurisdiction of the Tribunal" and "whether or not in violation of the domestic law of the country where perpetrated," cover the entire article.²⁵⁵

Control Council Law Number Ten included a non-exhaustive list of conduct considered crimes against humanity:

murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecution on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.²⁵⁶

Commission on Human Rights on the Situation of Human Rights in Rwanda, Aug. 4, 2000, at 197, available at www.unhcr.ch. [hereinafter Moussalli 2000]. Moussalli concludes that "Reconciliation of this kind is a lesson for the whole world. It belies the image of Rwanda as a country riven by ethnic hatred." *Id.*

250. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279, art. 6(c); Gerry J. Simpson & Kriangsak Kittichaisaree, *War Crimes: A Critical Introduction*, in *THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES* 1, 4 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997).

251. The difference was that crimes against humanity consisted of the same conduct as war crimes, but that which occurred in Germany itself or Austria and Czechoslovakia, those lands annexed to Germany. KITTICHAISAREE, *supra* note 155, at 87.

252. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, *supra* note 155, at art. 6(c).

253. Noted in UNITED STATES DEPARTMENT OF STATE PUBLICATION 2461, EXECUTIVE AGREEMENT SERIES 472 (1946); KITTICHAISAREE, *supra* note 155, at 86.

254. KITTICHAISAREE, *supra* note 155, at 86.

255. *Id.* (citing Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 188, 192-95, 204-05 (1946)).

256. *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council*

Control Council Number Ten added rape and torture to the Nuremberg Charter list and also clarified that there was no requirement that the crime against humanity be tied to a war crime, or that there be a nexus between a crime against humanity and a war crime.²⁵⁷

The Ad Hoc Tribunals for the former Yugoslavia and Rwanda have elaborated and extended the scope of crimes against humanity, both in their statutes²⁵⁸ and in their decisions.²⁵⁹ The Rome Statute of the International Criminal Court has developed the law even further in this regard.²⁶⁰ It provides that crimes against humanity include conduct enumerated in the statute "when committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."²⁶¹ This statute added: forcible transfer of population;²⁶² severe deprivation of physical liberty in violation of fundamental rules of international law;²⁶³ sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence

Law No. 10, 36 I.L.R. 31 []; KITTICHAISAREE, *supra* note 155, at 87. Control Council No. 10 is a charter for the trial of war crimes, which was adopted by four major powers that were occupying Germany. It called for trials in Germany by the courts of these occupying powers in their relative sectors. See Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 426 (1993). Meron cites FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, ART. 44, reprinted in THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 1988); Suzanne Sidun, Comment, *An End to the Violence: Justifying Gender as a "Particular Social Group,"* 28 PEPP. L. REV. 103, 106, 109 (2000).

257. KITTICHAISAREE, *supra* note 155, at 88 (citing Schwelb, *supra*, note 255, at 217-19).

258. *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991* (ICTFY), U.N. Doc. S/RES/827 (1993), amended by U.N. Doc. S/RES/1166 (1998); U.N. Doc. S/RES/1329 (2000) [hereinafter ICTFY Statute] (establishing the tribunal and endorsing a 34 article statute, annexed to the Secretary General's Report); *Statute of International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States Between January 1, 1994, and December 31, 1994*, U.N. Doc. S/RES/955 (1994), amended by U.N. Doc. S/RES/1165 (1998); U.N. Doc. S/RES/1329 (2000) [hereinafter ICTR Statute].

259. See, e.g., *Prosecutor v. Zejnil Delalic*, Case No. IT-96-21-A.

260. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9, reprinted in 37 I.L.M. 999, 1002 (entered into force July 1, 2002) [hereinafter Rome Statute]. The process ending in the successful promulgation of the Rome Statute for the ICC on July 17, 1998, and the ultimate ratification and realization of the Court in April, 2002, was initiated by a 1989 initiative by Trinidad and Tobago.

261. *Id.* at art. 7(1).

262. *Id.* at art. 7(1)(d); see also LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 158-59 (2002).

263. Rome Statute, *supra* note 260, at art. 7(1)(e); see also SADAT, *supra* note 262, at 138.

of comparable gravity;²⁶⁴ the crime of apartheid;²⁶⁵ and the crime of forced disappearances, such as that of the *desaparecidos*.²⁶⁶ The traditional catchall crime against humanity, "other inhumane acts," is included, but refined and limited to acts "of a similar character intentionally causing great suffering, or serious injury to body, mental, or physical health."²⁶⁷

The constituent elements of crimes against humanity include an *inhumane act* in nature and character, that causes great suffering or serious injury to body, or to mental or physical health. The conduct must be committed as part of a widespread or systematic attack and must be committed against a civilian population.²⁶⁸

The Actus Reus. Thus, the *actus reus* for a crime against humanity includes participating in a widespread or systematic inhumane attack against a civilian population that causes great suffering or serious bodily injury to body, physical, or mental health.²⁶⁹

The Mens Rea. The *mens rea* for crimes against humanity must include proof beyond a reasonable doubt that the perpetrator actually held the specific *mens rea* for the specific offense involved (say, murder, rape, or torture), and that he committed the *actus reus* knowing or understanding the broader context in which it occurred.²⁷⁰ That is, that his conduct was part of a planned or policy based, widespread, or systematic

264. Rome Statute, *supra* note 260, at art. 7(1)(g); *see also* SADAT, *supra* note 262, at 138.

265. Rome Statute, *supra* note 260, at art. 7(1)(j); *see also* SADAT, *supra* note 262, at 138.

266. Rome Statute, *supra* note 260, at art. 7(1)(i); *see also* SADAT, *supra* note 262, at 138 (citing Alejandro Kirk, *Desaparecidos, A Festering Wound*, TERRA VIVA, June 24, 1998, at 4); Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution & Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT'L L. 1, 12-13 (2001). Note that the *Agrupación de Familiares de Detenidos y Desaparecidos de Chile* (Chilean Group of Relatives of Detained and Disappeared People) requested that Pinochet and other junta members be charged with genocide, terrorism, and torture. With Pinochet as the nexus, the Spanish judicial system consolidated the Argentine and Chilean cases before Judge Garzón. On October 30, 2002, the National Audience affirmed Spain's jurisdiction over the Argentine and Chilean cases and, on November 3, Spanish Judge Garzón issued a request of extradition against Pinochet on charges of genocide for designing and implementing a plan, coordinated down to the smallest detail, to eliminate a sector of the Chilean population. He also charged Pinochet with terrorism and torture. *See* BLAKESLEY, CASES, *supra* note 6; Richard J. Wilson, *Spanish Criminal Prosecutions Use International Human Rights Law to Battle Impunity in Chile and Argentina*, at <http://www.Derechos.org/koaga/iii/5/wilson.html?pinochet&tradition> (last visited Mar. 25, 2001).

267. Rome Statute, *supra* note 260, at art. 7(1)(k); *see also* SADAT, *supra* note 262, at 138.

268. KITTICHAISAREE, *supra* note 155, at 90.

269. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96 B4-T, para. 578, Judgment at the Int'l Crim. Trib. for Rwanda Trial Chamber (1998). Prosecutor v. George Rutaganda, Case No. ICTR-96-3, para. 65, Judgment at the Int'l Crim. Trib. for Rwanda Trial Chamber (1999); Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, para. 201, Judgment at the Int'l Crim. Trib. for Rwanda Trial Chamber (2000). These cases are cited and discussed in KITTICHAISAREE, *supra* note 155, at 90-91.

270. KITTICHAISAREE, *supra* note 155, at 91.

attack on the civilian population.²⁷¹

Crimes Against Humanity and Terrorism are Quintessential Crimes

Crimes against humanity and terrorism are crimes of the first order. They represent, along with genocide, the worst we mortals do to each other; that is to say, as I will explain more fully below, to ourselves. They are crimes of political violence without restraint of international law or morality. One question for this article is whether international criminal law and prosecution can even provide a remedy. The perpetrator's motive is important: violence against innocents to achieve a political, military, religious, or philosophical end or to be rid of individuals or groups seen as enemies (or as at least as folks deemed to interfere with "the good life"). Sometimes the offenses are bred of simple racial, religious, gender, or ethnic hatred, created and manipulated by evil leadership. The leadership usually does this to gain or maintain power. Finally, the people against whom the crimes are committed actually are part of the essence of the crime.

This violence against innocents is condemned as criminal by every nation of the world. When nations participate in it, they try to hide it or to claim some exception or exemption from coverage. The conduct is criminal and immoral no matter what its motivation. It is criminal whether it is ostensibly done in the name of sovereignty, democracy, national liberation, self-determination, God, or whatever other piety. It is criminal even when done in the name of "rectifying wrongs" or for "justice." The "values" one pretends to espouse in slaughtering innocent people in reality are evil vanity. The crimes occur and, sadly, those against whom these crimes are perpetrated often react in kind. The vendetta rages.

What is terrorism? How does terrorism compare to war crimes or crimes against humanity? What is the proper response when one is attacked with ferocious and indiscriminate²⁷² force, causing the slaughter of thousands? What is the proper response when one is part of a

271. See, e.g., Prosecutor v. Kayishema & Obed Ruzindana, Case No. ICTR-95-1-T, paras. 133-34, Judgment at the Int'l Crim. Trib. for Rwanda Trial Chamber (1999); Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, paras. 626, 638, 656-57, Judgment at the Int'l Crim. Trib. for former Yugoslavia Trial Chamber (1997); Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, para 271, Appeal at the Int'l Crim. Trib. former Yugoslavia Trial Chamber (1999); Prosecutor v. George Ruggiu, Case No. ICTR-97-32-I, para. 20, Judgment at the Int'l Crim. Trib. for Rwanda Trial Chamber (2000); Prosecutor v. Zoran Kupreskic & Others, Case No. IT-95-16-T, paras. 556-57, Judgment at the Int'l Crim. Trib. for former Yugoslavia Trial Chamber (2000). These decisions are discussed in KITTICHAISAREE, *supra* note 155, at 91.

272. Perhaps it is more accurate to say "discriminate," in that innocent civilians were targeted in the World Trade Center and in the airplanes used as weapons.

group that has been oppressed for ages? What does one do? These are questions that we must ask ourselves today.

Certainly, one defends self and family; one seeks to escape the oppression. This is not so simple, however. Lofty rhetoric, perverted religion and philosophy, appropriated principle, deep-seated fears and hatreds are used to prompt people to commit acts of atrocity. These things are also used to oppress. This article is an attempt to determine the proper responses to oppression and atrocity such as that which occurred on September 11, 2001. Is it possible to defend oneself and to defend and protect the innocents of the world without purposefully or indiscriminately destroying other innocents?

This article addresses terrorism, including the dangers that face those engaging in a "war" on terrorism. These dangers may be similar for those who use "terrorism" to fight what they see as oppression and for those who use terror based measures to fight "terrorism." This prompts us to focus on the need to define terrorism, to consider some of the causes of terrorism, and to evaluate what a proper response to terrorism should be.

The overarching issue that motivates the article is whether oppression can provide any justification for the September 11 attack on the United States and, similarly, whether that attack calls for self-defense under international law and, finally, what is a proper legal form of self-defense. Among other things, the article attempts to understand how leaders of nations or groups induce or inflame hatred and fear in people to the point of causing some to be willing to destroy themselves along with those they see as infidels or enemies. What can cause individuals to fly planes filled with innocent passengers as missiles into buildings also filled with innocents? Thus, this article considers terrorism, crimes against humanity, war crimes and the parameters of self-defense, elucidating the ideas behind and within these terms.

How is it possible to combat the menace of terrorism without allowing oneself to fall into a trap of hatred or blind fear that leads to the use of terrorism to fight terrorism? Officials claim that they are doing everything possible to avoid civilian casualties, pundits and followers argue that "they [al Qaeda, and the like] did not care that they were destroying innocents, so why should we?" In the midst of our difficult times, we run a significant risk of participating in or condoning violence that also could include mass slaughter of innocent civilians.

Civil liberties and human rights have been eroded as an expedient to fight terrorism. In the face of an attack as senseless and atrocious as that of September 11, we have allowed promulgation of rules for "protection," which ultimately create a society that conforms more to what

the perpetrators of terrorism would want one to live under than the one we intended to protect.²⁷³ We must, therefore, be vigilant to ensure that we are not manipulated into taking action or acquiescing to action that is terroristic and that can cause us to destroy ourselves or our values and liberty in the process.

We have seen that when an armed attack is committed against a person or group, it may require and justify a reaction in self-defense.²⁷⁴ The September 11 attack was so malefic that it generates similar conduct in reaction—conduct that one would wish that human beings could not commit upon others.

Voltaire's "everyman" in *Candide* cynically reckoned that international law and the laws of war were righteous brutality on a grand scale and simple suffering on a human scale.²⁷⁵ His sense of international law, terror, and our own tendency to become barbaric applies to our tendency to confuse justice with vengeance.²⁷⁶ Exploitation of human weakness by the few with power may be the prominent culprit.²⁷⁷ Primo Levi despaired over the awful realization that common, everyday, "civilized" people may fall into a miasma of evil.²⁷⁸ Humans tend to distrust, denigrate, and discriminate against those they see as different. This tendency is often manipulated by "leaders" who appropriate it for their own nefarious purposes. We are made to believe that those "who are different" are dangerous.

Urania Cabral, the protagonist in *The Feast of the Goat*,²⁷⁹ talking

273. See, e.g., USA Patriot Act of 2001, *supra* note 14. The so-called Patriot Act provides the following with regard to terrorism: it makes terrorism a predicate act for which a wiretap under Title III can be authorized. The USA Patriot Act also authorized law enforcement to conduct wiretapping for crimes related to computer fraud and abuse. Young, *supra* note 14, at 1064-65.

274. Principles of necessity and proportionality, rather than issues of jurisdiction, may inform considerations of self-defense based military responses to terrorism. See, e.g., Robert J. Beck & Anthony Clark Arend, "Don't Tread on Us": *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153 (1994) (discussing the United States response to the Iraqi government's attempt to assassinate former President Bush); Timothy F. Malloy, *Military Responses to Terrorism*, 81 AM. SOC'Y INT'L. L. PROC. 287 (1987) (discussing proposed responses to increases in terrorism against Americans); O'Brien, *supra* note 212, at 423.

275. Louis Rene Beres, *Straightening the "Timber": Toward a New Paradigm of International Law*, 27 VAND. J. TRANSNAT'L L. 161 n.7 (1994) (citing FRANCOIS-MARIE VOLTAIRE, *CANDIDE* 5 (4 Appelbaum ed., 1991) (1759)).

276. BLAKESLEY, *TERRORISM*, *supra* note 6, at 18-26, 177-79; Blakesley, *Obstacles*, *supra* note 102, at 77; Blakesley, *Atrocity*, *supra* note 62, at 211-24; P.D. JAMES, *CERTAIN JUSTICE* (1997).

277. See BLAKESLEY, *TERRORISM*, *supra* note 4, at 22-31.

278. See PRIMO LEVI, *I SOMMERSI E I SALVATI* (THE DROWNED AND THE SAVED) (Summit Books 1988) (1986); see also BLAKESLEY, *TERRORISM*, *supra* note 4, at 15-26; SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* (James Strachey trans., 1961). For an interesting fictional musing on the subconscious, see IRVIN D. YALOM, *WHEN NIETZSCHE WEPT: A STUDY OF OBSESSION* (1992).

279. LLOSA, *supra* note 90. The Goat was the secret nickname used by Dominicans for the dictator Raphael Trujillo.

to herself about the Trujillo era in the Dominican Republic, provides insight as to how this happens:

[A]fter reading, listening, investigating, thinking, you've come to understand how so many millions of people, crushed by propaganda and lack of information, brutalized by indoctrination and isolation, deprived of free will and even curiosity by fear and the habit of servility and obsequiousness, could worship Trujillo. Not merely fear him but love him, as children eventually love authoritarian parents, convincing themselves that the whippings and beatings are for their own good.

The Need for Justice

Caesare Beccaria understood how impunity impeded both peace and justice, noting that "the conviction of finding nowhere a span of earth where real crimes were pardoned might be the most efficacious way of preventing their occurrence."²⁸⁰ Individual criminal responsibility and protection of individual human rights must be the cornerstone of any domestic or international action taken to combat terrorism, including actual combat, extradition, and criminal prosecution.

Nuremberg Principle Number I reads: "[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment."²⁸¹ This principle provides one of the bases for the "war" against terrorism (certainly for the prosecution of terrorists), although its focus was on war crimes and crimes against humanity. The "war against terrorism," in turn, includes elements of law-enforcement and prosecution, as well as the use of force and violence. This principle was the motivation for the creation of the Ad Hoc Tribunals for the former Yugoslavia and Rwanda, as well as for the per-

280. J.A. FARRAR, *CRIMES & PUNISHMENTS* 103-94 (1880) (translating CAESARE BECCARIA, *DEI DELITTI E DELLE PENE* (1764)).

281. International Law Commission, Nuremberg Principle No. 1. In 1946, the U.N. General Assembly affirmed the principles of international law recognized by the Nuremberg Tribunal. See, G.A. Res. 95(I), G.A. Res. 95(I), U.N. GAOR, 1st Sess., 55th plen. mtg. at 1134-35, U.N. Doc. A/64/Add. 1 (1946). This Resolution affirmed the law that was made or clarified at Nuremberg. It declared this law part of general international law. See also, Robert F. Drinan, *The Nuremberg Principles in International Law*, in *THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION* at 174, 179 (George J. Annas & Michael A. Grodin eds., 1992). In 1949, the International Law Commission started working on the formulation of the Nuremberg principles and preparatory work of a Draft Code of Offenses against the Peace and Security of Mankind. U.N. GAOR, 5th Sess., Supp. No. 12, at 11, U.N. Doc. A/1316 (1950) (reporting on the Nuremberg Principles). See Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes* 35 VAND. J. TRANSNAT'L L. 1399, 1043 (2002). The Nuremberg Principles imposed individual criminal liability for grave international crimes and were later construed to require states to prosecute these crimes.

manent International Criminal Court (ICC). We have wondered why governments and scholars have been reticent to define terrorism.

What Justice is Due?

In the United States today, we are faced with the prospect of prosecuting accused terrorists in secret military commissions.²⁸² Apparently, President Bush has taken the power to decide that some of the alleged terrorists in al Qaeda are not worthy of the protections afforded by the Third Geneva Convention, which should apply to all combatants captured during an international armed conflict.²⁸³ The administration's position seems to be that these fighters are terrorists, therefore, although they should be prosecuted and punished, they should not be afforded the

282. See President Bush's executive order of September 13, 2001, providing for the detention and possible trial of terrorists in military commissions. See Tobias & Bryant, *supra* note 21; Ruth Wedgwood, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18; Harold Hongju Koh, *Editorial*, at <http://www.time.com/time/nation/article/0,8599,186581,00.html>; Akhil Reed Amar, *War Powers: Is Bush Making History?*, TIME MAG., Dec. 03, 2001, at 62; see also *Yamashita v. Styer*, 327 U.S. 1, 8, 11-12 (1946):

If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.

A U.S. military tribunal, established pursuant to the law of war, tried Japanese General Yamashita in the fall of 1945 for his alleged war crimes committed in the Philippines. The crimes concerned Yamashita's failure to exercise command responsibility for the conduct of his troops. The Supreme Court again upheld the commission's jurisdiction. Several years later, the Supreme Court held that a court established as part of American military government in the part of Germany then occupied by the United States had jurisdiction to try an American dependent for a crime she had committed. *Madsen v. Kinsella*, 343 U.S. 341 (1952). Commander Yamashita was convicted by a U.S. military tribunal and applied for habeas corpus, but the courts adjudicating the application considered only the "lawful power of the commission to try the petitioner for the offense charged," not the evidence of his guilt. *Yamashita*, 327 U.S. at 8. None of the members of the Control Council of Germany who reviewed the Nuremberg clemency petitions had a legal education, and they agreed that review was to be "as a matter of policy" and that there would be "no review on legal grounds." TAYLOR, *supra* note 97, at 604. The petitions for clemency of the defendants convicted at Nuremberg were all denied. *Id.* at 606; see also Hon. Robinson O. Everett, *The Law of War: Military Tribunals and the War on Terrorism*, 48 Fed. Law. 20 (2001); *Ex Parte Quirin*, 317 U.S. 1 (1942).

283. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. See Human Rights Watch, U.S. Officials Misstate Geneva Convention Requirements (HRW Press Release, Jan. 28, 2002), available at <http://hrw.org/press/2002/01/us012802.htm>; see also *Geneva Convention to Cover Taleban*, BBC Online News Report, Feb. 7, 2002, at <http://news.bbc.co.uk/1/hi/world/americas/1775162.stm>; Hon. Richard Goldstone, *An International Legal Forum for Trying the Suspects of Al Qaeda*, GUARDIAN (LONDON), Jan. 30, 2002, at Features Section 14.

protections afforded combatants. It is claimed that these are “unlawful combatants,” presumably a term taken from the embarrassing U.S. Supreme Court decision in *Ex Parte Quirin*.²⁸⁴ The prisoner of war (POW) or non-POW status of the participants or conspirators is a separate question from whether they have protections under the Geneva Conventions of 1949, the Protocols to those Conventions, other conventions relating to the protection of those accused of crime, and customary international law.²⁸⁵ Today, the Geneva Conventions of 1949 provide minimum protections for all persons captured in any armed conflict.²⁸⁶ These protections include basic due process guarantees.²⁸⁷

Organization of American States (OAS) Urges the United States to Reverse Detainees Decision

In March 2002, the Organization of American States (OAS) Inter-American Commission on Human Rights called for a competent tribunal to be convened to resolve the legal status of Guantanamo detainees.²⁸⁸

284. *Ex Parte Quirin*, 317 U.S. 1 (1942).

285. See Jordan J. Paust, *Antiterrorism Military Commissions; Courting Illegality*, 23 MICH. J. INT'L L. 1 n.15 (2002); Int'l Comm., 3 GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, Commentary 51 n.1 (Jean S. Pictet ed., 1960) (noting that the Geneva “Convention [for Civilians] contains a safety clause for the benefit of persons not covered [as prisoners of war] . . . in [common] Article 3”). But see Ruth Wedgwood, *The Rules of War Can't Protect al Qaeda*, N.Y. TIMES, Dec. 31, 2001, at A17.

286. See *supra* note 283; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Convention IV]; see also Protocol I, *supra* note 45. Protocol II, *supra* note 46.

287. Some of these guarantees are listed in the International Covenant for Civil and Political Rights (ICCPR), International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 51, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR], the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948) [hereinafter UDHR], the Rome Statute for the International Criminal Court, U.N. Doc. A/CONF.183/9* (1998), available in BLAKESLEY ET AL., *supra* note 6; see also International Covenant on Economic, Social, and Cultural Rights, opened for signature Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]. Each of these reflects customary international law.

288. Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C.L.R. 1, 6 (2002). Camp Delta, a newer and more modern facility, has been constructed near Camp X-Ray and, as of May 2002, is receiving detainees. See Roy Gutman et al., *Guantánamo Justice*, NEWSWEEK, July 8, 2002, at 34, 36. Transport to Camp X-Ray began on January 11, 2002. *U.S. Readies New Prison at Guantánamo Bay*, GLOBE & MAIL (Toronto) (Apr. 28, 2002), at <http://www.globeandmail.com>. The issue is whether detained at Qaeda and Taliban fighters qualify for “prisoner of war” status under the Geneva Conventions. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; see, e.g., *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002) (denying habeas petition brought on behalf of Camp X-Ray detainees); John Cerone, *Status of Detainees in International Armed Conflict, and Their Protection in the Course of Criminal Proceedings*, ASIL INSIGHTS, at <http://www.asil.org/>

The Commission has been a primary and crucial entity promoting human rights in the Western Hemisphere, being most known for its efforts to end political disappearances in South America during the era of military dictatorships.²⁸⁹ Tom Malinowski, Washington Advocacy Director for Human Rights Watch, stated that the "Commission enjoys tremendous respect in Latin America, [and that i]gnoring this ruling could seriously hurt America's credibility as a defender of human rights in the region."²⁹⁰

The Bush Administration announced in February 2002 that it would consider much of the Geneva Conventions to apply to the Taliban prisoners in Guantanamo Bay, but that prisoner of war status would be denied, because these fighters failed to respect the laws of war or wear uniforms.²⁹¹ These criteria have traditionally been used to withhold POW status from irregular troops, not from regular forces fighting on behalf of a government, such as the Taliban.²⁹² The administration displayed its ignorance of or disdain for the Geneva Conventions because even as it denies combatant status to those caged in Guantanamo, it is ignoring that members of U.S. Special Forces in Afghanistan, Iraq and other places, for example, have fought while wearing traditional Afghan (or other local) clothing. Thus, interpreting the Conventions and the circumstances in this way endangers U.S. troops, considering them expendable. "They may not realize it, but the administration has effectively declared U.S. Special Forces fighting in Afghanistan to be unlawful combatants," said Malinowski. "The OAS Commission is giving them an opportunity to revisit that decision."²⁹³ Human Rights Watch also noted that abiding by the Commission's decision would not hinder United States efforts to interrogate or prosecute Taliban and al Qaeda prisoners who may be entitled to POW status.²⁹⁴

Another puzzling attitude taken by the United States relates to humanitarian missions. Indeed, Congress passed a law ensuring that

insights/insigh81.htm (Jan. 2002); Inter-American Commission on Human Rights, *Legal Status of the Detainees at Guantanamo Bay to Be Determined by Tribunal*, reprinted in 23 HUM. RTS. L.J. 15, 15-17 (2002); Alfred P. Rubin, *Applying the Geneva Conventions: Military Commissions, Armed Conflict, and al-Qaeda*, 26 FLETCHER F. WORLD AFF. 79 (2002).

289. *Id.*

290. Tom Malinowski, *OAS Urges U.S. to Reverse Detainees Decision*, HUMAN RTS. WATCH (Mar. 15, 2002), at <http://hrw.org/press/2002/03/oas031502.htm>.

291. See *supra* note 282-288.

292. *Id.*

293. *Id.*

294. *Id.*; see also Human Rights Watch Press Release, *U.S.: Bush Errs in Geneva Convention Rules*, Feb. 7, 2002, at <http://hrw.org/press/2002/02/geneva0207.htm>; Background Paper on Geneva Conventions and Persons Held by U.S. Forces, January 2002, at <http://hrw.org/backgrounder/usa/pow-bck.htm>; Human Rights Watch Press Release, *U.S. Officials Misstate Geneva Convention Requirements*, Jan. 28, 2002, at <http://hrw.org/press/2002/01/us012802.htm>.

when the United States does not want to take part in some proposed United Nations humanitarian intervention, such as the Rwandan genocide, the United States will not only not take part, but will actively campaign against anyone else taking part.²⁹⁵ Is that not strange and interesting? Just like the Belgians who, having lost ten soldiers in Rwanda the day the genocide started and wanting to get out quickly, mounted a huge diplomatic push to persuade other countries to abandon Rwanda so that Belgium would not look like a coward.²⁹⁶

295. See, e.g., FERNANDO R. TESON, *HUMANITARIAN INTERVENTION* 314 (1997); W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 *FORDHAM INT'L L.J.* 794 (1995); Louis Henkin, *Refugees and Their Human Rights*, 18 *FORDHAM INT'L L.J.* 1079 (1995); Alexis Heraclides, *Secession, Self-Determination and Intervention*, 45 *J. INT'L AFF.* 399, 402 (1992); see also Adam Roberts, *Humanitarian War: Military Intervention and Human Rights*, 69 *J. INT'L AFF.* 429 (1993); Stephen Salarz & Michael O'Hanlon, *Humanitarian Intervention: When Is Force Justified?*, 1997 *WASH. Q.* 3; Richard Falk, *The Haiti Intervention: A Dangerous World Order Precedent for the United Nations*, 36 *HARV. INT'L L.J.* 341 (1995); Mary Ellen O'Connell, *Commentary on International Law: Continuing Limits on UN Intervention in Civil War*, 67 *IND. L.J.* 903 (1992); Josh Delbruck, *Commentary on International Law: A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 *IND. L.J.* 887 (1992); Adam Roberts, *Humanitarian War: Military Intervention and Human Rights*, 69 *J. INT'L AFF.* 434 (1993). Some international lawyers argue that there is an obligation to humanitarian intervention, "when government is acting in a tyrannical manner its population, in the aim protect minorities from genocide or violent oppression, combat gross and persistent violation of human rights, and act to protect extreme cases of violence against a people." Judy Gallant, Comment, *Humanitarian Intervention and Security Council Resolution 688: A Reappraisal in Light of a Changing World Order*, 7 *AM. U. J. INT'L L. POL'Y* 881, 890 (1992). A similar opinion can be seen in the statement of former UN Secretary General Javier Perez de Cuellar: "We are clearly witnessing what is probably an irresistible shift in public attitudes toward the belief that the defence of the oppressed in the name of morality should prevail over frontiers and legal documents." DAVID J. SCHEFFER ET AL., *POST-GULF WAR CHALLENGES TO THE U.N. COLLECTIVE SECURITY SYSTEM: THREE VIEWS ON THE ISSUE OF HUMANITARIAN INTERVENTION* 4 (1992); Bogdan Denitch & Ian Williams, *The Case Against Inaction*, Apr. 26, 1999, at <http://www.globalpolicy.org/security/issues/kosovo41.htm> (lamenting the absence of a Security Council Resolution specifically endorsing military action); Bruno Simma, *NATO, the UN, and the Use of Force: Legal Aspects*, 10 *EUR. J. INT'L L.* 1, 2-6 (1999), available at <http://www.ejil.org/journal/Vol10/No1/abl.html> (last modified Apr. 26, 1999) (arguing that the right of a state to intervene militarily to permit humanitarian intervention "deserve[s] a friendlier reaction" under international law); see also Peter Uvin, *Difficult Choices in the New Post-Conflict Agenda: The International Community in Rwanda after the Genocide*, 22 *THIRD WORLD Q.* 177 (2001); Ian Martin, *Hard Choices after Genocide: Human Rights and Political Failures in Rwanda*, in *HARD CHOICES, MORAL DILEMMAS IN HUMANITARIAN INTERVENTION* 157 (Jonathan Moore ed., 1998); ALAN J. KUPERMAN, *THE LIMITS OF HUMANITARIAN INTERVENTION: GENOCIDE IN RWANDA* (2001). The Bush II regime did take a different tack at least rhetorically when it adopted the "humanitarian intervention" excuse for attacking Iraq after finding no evidence of Iraq's having weapons of mass destruction.

296. Romeo A. Dallaire, *The End of Innocence, Rwanda 1994*, in *HARD CHOICES*, *supra* note 295, at 71, 73; see also GUY VASSALL-ADAMS, *RWANDA: AN AGENDA FOR INTERNATIONAL ACTION* 31 (1994); ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 1, 15, 205 (1999) (estimating 500,000 to 800,000 Tutsi killed in Rwanda); J. Bryan Hehir, *Military Intervention and National Sovereignty, Recasting the Relationship*, in *DES FORGES, supra*, at 29, 30; J. Mathew Vaccaro, *The Politics of Genocide: Peacekeeping and Rwanda*, in *U.N. PEACEKEEPING, AMERICAN FOREIGN POLICY, AND THE UNCIVIL WARS OF THE 1990's* 374 (William J. Durch ed., 1996).

Before it became personal and acute to Americans on September 11, we had seen death dances of hatred around the world lead to mass rape, unthinkable brutality, other torture, and genocide. Most Americans, if they were aware at all, watched in abstract sadness as a widespread desire for vengeance arose with horrific consequences in Rwanda, East Timor, Bosnia, Kosovo, Sierra Leone, the Congo, Palestine, and earlier, Cambodia. We watched accounts of mass slaughter, rape, and torture, terrorist attacks and wars throughout much of the world. We shuddered to think of those who suffered and continue to suffer terrorism and oppression directly. Most people in all countries and groups surely have been made ill by it all, as they were once after the genocides in Nazi Germany and Turkey. We are reminded that none of this is new.²⁹⁷ One can list these horrors ad nauseam.²⁹⁸

We certainly must understand our own tendency to demonize if we are ever going to understand why others do the same, with us as the object. As U.S. citizens, we need only consider our past that included slavery, genocide of Native Americans, slaughter of Mormons in Missouri and Illinois, the internment of our brothers and sisters of Japanese ancestry, Jim Crow and lynching to keep African Americans in a position of servitude, and so many forms of racism or ethnocentrism, turned even uglier than usual. We may properly ask whether we, or any nation or group, escape the history of terrorism, either as perpetrators, as victims, or both.

Since September 11, the United States²⁹⁹ and others³⁰⁰ have faced not only the dangers of expected terrorism, but also the dangers associated with possible implementation of reactive draconian criminal laws, procedures, and methods that risk eroding our values, our protections, and our liberties. We risk stereotyping those of other cultural backgrounds, religions, races, or views. We risk demonizing them. We have already demonized the al Qaeda, the Taliban, especially those in "deten-

297. U.S. citizens need only consider our past, including slavery, genocide of Native Americans, and racism.

298. ALBERT CAMUS, RESISTANCE, REBELLION, AND DEATH 174, 198 (Justin O'Brien trans., 1960).

299. See, e.g., USA Patriot Act of 2001, *supra* note 14, Oct. 26, 2001, to deter terrorism at home and abroad following the September 11 terrorist attacks.

300. The United Kingdom follows the United States' lead. See Hugo Young, *Once Lost, These Freedoms Will Be Impossible to Restore—The Terror Threat is Being Used to Attack Civil Rights Here and in the US*, GUARDIAN, Dec. 11, 2001, at 1.

John Ashcroft, the US attorney general, is a politician of the ultra-hard right. David Blunkett, the British home secretary, comes from the old Labour left. They meet tomorrow, when Mr. Ashcroft makes his first stop on a tour of coalition nations designed to ensure they all understand what must be done, in the field of law and justice, to defeat international terrorism.

Id.

tion,” or those who are presented as potential “sleepers,” ready to commit other terrorist acts, and Baathist Party members and other supporters of Saddam Hussein in Iraq.

Moreover, the United States originally designated all of the people detained and moved from Afghanistan to Guantanamo, Cuba, as “unlawful combatants.”³⁰¹ In February 2002, the U.S. government modified this position by noting that the Taliban captives fit under the Geneva Conventions as POWs, but not the al Qaeda fighters.³⁰² In late April 2002, the U.S. government considered another new angle. It contemplated making it a crime to be a member of al Qaeda, as long as the perpetrator is proved to have *furthered the aims* of the organization.³⁰³ This is interesting because it is reminiscent of the Italian crime *Gruppo di tipo Mafioso*, proscribing membership in the Mafia, and the French offense *Association de Malfaiteurs or Bande Organisée*.³⁰⁴ It appears that the U.S. government’s major concern is that it would not be allowed to question them if they were prisoners of war incident to these conventions. The Government also attempts to distinguish al Qaeda fighters or other “terrorists” from criminals to be prosecuted before United States domestic courts, or even before courts of military justice.³⁰⁵ Does this

301. See Human Rights Watch material, *supra* note 294. In a significant decision, the Inter-American Commission of the Organization of American States urged the United States to “take urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.” See Andres Cala, *Legal Status of Detainees Questioned*, A.P. ONLINE p. 1 (March 13, 2002). The Commission acted on a petition brought by the New York-based Center for Constitutional Rights. According to Michael Ratner, vice-president of the Center for Constitutional Rights, the decision is “a victory for advocates of the rule of law and due process.” Ratner added, “Failure to abide by the Commission’s recommendation would be a lawless act and a violation of the U.S.’ treaty obligations.” *OAS Tribunal Orders U.S. to Determine Legal Status of Cuba Prisoners*, 3/14/02, AGENCE FRANCE-PRESSE, March 14, 2002, at 1-2 2002 WL 2359292.

302. See, e.g., Neil A. Lewis, *U.S. Weighing New Doctrine for Tribunals*, N.Y. TIMES, Apr. 21, 2002, at 1; Donald R. Rothwell, *Opinion, When Our Citizens Are Left to Rot*, SYDNEY MORNING HERALD, May 15, 2002, at 1A; see also Human Rights Watch material, *supra* note 294.

303. See Lewis, *supra* note 302, at 1.

304. See Christopher L. Blakesley, *Rapport Général, Les Systèmes de Justice Criminelle Face au Défi du Crime Organisée*, 69 REV. INT’L DE DROIT PÉNAL 35 (1997).

305. See President Bush’s executive order of September 13, 2001, providing for the detention and possible trial of terrorists in military commissions; see also *Ex Parte Quirin*, 317 U.S. 1 (1946); *In re Yamashita*, 327 U.S. 1 (1946). See also William Glaberson, *U.S. Faces Tough Choices if bin Laden Is Captured*, N.Y. TIMES, Oct. 22, 2001, at B5 (discussing comments made by Ruth Wedgwood); see also Ruth Wedgwood, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18 (claiming that the criminal court system is poorly equipped for trials against international terrorists). Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT’L L. 337 (2002) (arguing that it is better to have trials of “terrorists in domestic criminal courts, rather than in military commissions, at least for terrorist acts committed on U.S. territory”); Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249 (2002); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT’L L. 328 (2002) (arguing the validity of jurisdiction in military commissions to “prosecute” al Qaeda terrorists). See also Neal K. Katyal & Laurence H. Tribe, *Waging War*,

approach reflect the image of Captain Ahab?

Terroristic outrage is sickeningly common. Few, if any, of us escape its taint. Chemical warfare has been applied against combatants and non-combatants alike. It is now well known that on or about March 23, 1988, the Iraqi Air Force bombed villages in Kurdistan, spreading mustard, cyanide, and possibly nerve gas over villagers, dropping them in their panicked tracks, many holding their babies to their breasts.³⁰⁶ Russia seems to have done the same in Georgia and Chechnya.³⁰⁷ Iraq accused Iran of using similar weapons.³⁰⁸ The anthrax attacks in the United States and the attacks on September 11, still under investigation at this writing, caused fear and the hurried promulgation of the "Patriot

Deciding Guilt: Trying the Military Tribunals, 111 YALE L.J. 1259 (2002) (arguing that no constitutional authority obtains to deny constitutional rights to those facing military tribunals when there is no immediate threat to the Constitution or to the Republic); George P. Fletcher, *Bush's Military Tribunals Haven't Got a Legal Leg to Stand On*, AM. PROSPECT (Jan. 1-14, 2002).

"If we argue it is legal, we are arguing that other sovereigns Libya, Syria, Iraq, Cuba could also have tribunals," said Alfred P. Rubin, a former Pentagon lawyer who is a professor at the Fletcher School of Law and Diplomacy at Tufts University. William Glaberson, *Critics' Attack on Tribunals Turns to Law Among Nations*, N.Y. TIMES, Dec. 26, 2001, at B1; see also World Organization Against Torture, Press Release, Jan. 25, 2002, available at www.omct.org; HRW *Demolishes U.S. Case on Status of Prisoners in Camp X-ray*, Letter from Kenneth Roth, Executive Director Human Rights Watch, to the Honorable Condoleezza Rice, National Security Advisor, (Jan. 28, 2002); *PoWs or Common Criminals, They're Entitled to Protection: Judge Richard Goldstone, International Human Rights Expert, Tells Clare Dyer Why al-Qaida Suspects Must Not Be Tried in Secret*, GUARDIAN (LONDON), Jan. 30, 2002, at 2-14. On Military Commissions, see *Ex parte Quirin*, 317 U.S. 1 (1942); *In Re Yamashita*, 327 U.S. 1 (1946); *Madsen v. Kinsella*, 343 U.S. 341 (1952) (holding that a court established as part of the U.S. military government in United States occupied Germany had jurisdiction to try an American dependent for a crime she had committed there). Cf. *Ex parte Milligan*, 71 U.S. 1 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). The armed services and Congress should seek to anticipate possible situations when military tribunals should be used to try terrorists for their acts of violence and espionage. The most likely situations would be those in which it seems necessary or desirable to conduct trials outside the United States. Under those circumstances, the Supreme Court might conclude that the cases fall outside its jurisdiction. Cf. *Johnson v. Eisentrager*, 339 U.S. 763 (1950). George P. Fletcher, *War and the Constitution*, 13 AM. PROSPECT 26 (2002); Bryant & Tobias, *supra* note 21, at 375, 434-38.

306. See, e.g., Peter Carlson, *Deportation Consternation – After Supporting Bush on War, Iraqi May Lose Asylum*, NEWSDAY, Apr. 14, 2003, at B-03 reprinted at 2003 WL 17814645; Peter Carlson, *Exile Fights Deportation; Woman, 53, Survived Early Poison-Gas Attack by Iraqi Army*, THE HAMILTON SPECTRE (Canada), April 11, 2003, at C-02, reprinted at 2003 WL 18356511.

307. Anne Barnard and David Filipov, *Ways to Subdue Attackers Probed: Putin Rebuffs Offer from Chechen Rebels for Diplomatic Talks*, BOSTON GLOBE, Oct. 29, 2002, at A-8, 2002 WL 101980884; cf., 2003 WL 2393173, LOS ANGELES TIMES, March 22, 2003. Anti-terrorist police have focused on an alleged Algerian-dominated network whose operatives are believed to have received specialized training with biological and chemical weapons at Al Qaeda camps in the Russian republic of Chechnya. One of the suspected leaders is Abu Musab Zarqawi, a veteran terrorist who has operated in Iraq with the protection of the Iraqi regime, according to U.S. officials.

308. Matthew Hickley & Paul Eastham, *U.S. closes Iraq's Oil Pipeline to Syria*, DAILY MAIL, April 16, 2003, 2003 WL 17440583.

Act,"³⁰⁹ which will further erode civil liberty in the United States. Even before the 2001 biological attacks, it was proposed that the United States government increase its research into biological agents to be used as weapons or defenses.

The *Achille Lauro* affair is well known and was once one of the worst examples of terrorism against United States citizens.³¹⁰ The outrage of the *desaparacidos* and the plight of those tortured for "good order" are now well known too.³¹¹ The United States government supported, both directly and indirectly, the Nicaraguan "Contras" who themselves killed innocent Nicaraguans in conjunction with their guerilla warfare.³¹² Sandinistas in Nicaragua and their enemies apparently killed many innocents in maintaining their power, including depredations against the native Miskitos.³¹³ The depredations in Cambodia are renowned for their infamy. In 1975, the Khmer Rouge destroyed the Cambodian legal system and culture, slaughtering by starvation, torture, and mass murder at the very least 800,000 to one million Cambodians, in their "auto-genocide."³¹⁴ There are so many others. It is nearly impossible to keep track: Sierra Leone, the Congo, Liberia. Every day it seems, some institution, government, or group uses innocent children, women, and men as fodder in their "war" against enemies, in their

309. USA Patriot Act of 2001, *supra* pay. note 14.

310. *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854, 860 (S.D.N.Y. 1990) (holding that although the Palestine Liberation Organization is not a state actor, "piracy" (hostage-taking) involved "clear violations of international law" and tort law), *vacated*, 937 F.2d 44 (2d Cir. 1991). The PLO moved to dismiss on the ground that it was immune from suit. The district court denied the motion, and the PLO appealed. *See Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991). Passenger Leon Klinghoffer was shot in his wheelchair as he sat on the ship's deck, then thrown into the sea. *Id.* at 47. His daughters brought suit in federal court, under state law, maritime law, and the Death on the High Seas Act. The Court of Appeals for the Second Circuit found that the PLO was not immune from suit because it was not a sovereign state, and only sovereign states were immune from suit under the version of the Foreign Sovereign Immunities Act then in force. *Id.* at 48 (citing 28 U.S.C. §§ 1602-1988 (1994 & Supp. 1999)).

311. *See, e.g.,* LAWRENCE WESCHLER, *A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS* (1998).

312. *See Nicaragua v. U.S.A.*, I.C.J. Rep. 392 (1984).

313. *See Damaize-Job v. INS*, 787 F.2d 1332 (9th Cir. 1986) (concerning persecution of Miskito Indians by the Sandinista government of Nicaragua where a Miskito prevented his deportation back to Nicaragua by establishing that there was a clear probability that his life or freedom would be threatened if he were returned because of his race, religion, nationality political opinion, or membership in a particular social group); S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 50-53 (2001).

314. *See* Craig Etcheson, *Terror in the East: Phases of Repression in Region 23 of Democratic Kampuchea*, Paper presented at Annual Meeting of the Society for Historians of American Foreign Relations, June 19-22, 1997; DAVID CHANDLER, *BEYOND THE GRAVE: AN ACCOUNT OF POL POT'S GENOCIDE IN CAMBODIA, TOLD THROUGH THE RECORDS OF ITS VICTIMS: VOICES FROM S-21: TERROR AND HISTORY IN POL POT'S SECRET PRISON* (2000); BLAKESLEY ET AL., *CASES, supra* note 6, at 681-90.

attempt at promoting a perverted vision of *lex talionis*.³¹⁵

Still, we have hope that something can be done about the Khmer Rouge killers: a timid dialectic toward and then away from the creation of an ad hoc tribunal to try Khmer Rouge *genocidaires*. At least some of the *genocidaires* of Rwanda and the former Yugoslavia are facing justice in their Ad Hoc Tribunals. Capture and prosecution of individuals in some of these atrocities triggers a media "feeding frenzy." If one is not careful, even prosecution prompts rage, fear, and propaganda.

Currently, quite a debate is taking place over the pros and cons of assassination of the leaders of al Qaeda, Saddam Hussein or other "terrorist groups" versus capturing, then prosecuting, them. One issue is whether killing Osama bin Ladin during a firefight or a bombing would be an assassination or the killing of an enemy combatant. If he were captured, where could one find an appropriate place to prosecute him? If we are so outraged by such things, and we are, how and why are we so easily manipulated into acquiescing or sometimes even participating in concomitant conduct in retaliation? Perhaps it is because: "Cruelty has a human heart, And jealousy a human face; Terror the human form divine, and secrecy the human dress."³¹⁶ This human tendency prompted Joseph Conrad to say, "The terrorist and the policeman both came from the same basket."³¹⁷

Nothing a government can do in the name of its people can justify the atrocity at the WTC. And who can forget the pusillanimous downing of Pan-Am Flight 103? Nothing can justify that, but some still claim that this carnage was in retaliation for the pusillanimous slaughter of innocent children, women, and men aboard the Iranian Air Bus, blown out of the sky by American forces. One thing is clear: Innocent children, women, and men aboard Pan Am Flight 103 and aboard the Air Bus were used as fodder for some "war" or cause. Two Libyans were finally prosecuted before a Scottish Tribunal that sat in The Hague.³¹⁸

315. See *Deuteronomy* 19:21 ("Do not look on such a man with pity. Life for life, eye for eye, tooth for tooth, hand for hand, and foot for foot!"); *Leviticus* 24:17-20 ("When a man causes a disfigurement in his neighbor, as he has done it shall be done to him, fracture for fracture, eye for eye, tooth for tooth; as he has disfigured a man, he shall be disfigured."); see also *Exodus* 22:32; 22:1; 22:6; JOHN SMITH, *ORIGIN AND HISTORY OF HEBREW LAW* (1960). In addition, see THE ANCIENT CODE OF HAMMURABI; GODFREY DRIVER & JOHN MILES, *THE BABYLONIAN LAWS* (1952) (applying both the *lex talionis* and compensation). Rule 196, for example, decrees that "[I]f one destroys the eye of a free-born man, his eye shall one destroy," but Rule 198 requires, "[I]f the eye of a nobleman he has destroyed or the limb of a nobleman he has broken, one mine of silver he shall pay." *Id.*, at Rule 196.

316. WILLIAM BLAKE, *Appendix to SONGS OF INNOCENCE AND OF EXPERIENCE*.

317. JOSEPH CONRAD, *THE SECRET AGENT* 61-79 (1924).

318. *Lockerbie Deal Closer After Talks*, SCOTSMAN, March 22, 2003, at 5, 2003 WL 15777613; Saif Aleslam al-Qadhafi, *Libyan-American Relations*, MIDDLE E. POL'Y 3544, 2003 WL 18602827 (2003).

One Libyan (Abdelbasset Megrahi) was convicted and another (Lameen Fhima) acquitted.³¹⁹ Many still think that Iran was actually behind at least part of the atrocity.³²⁰

When a group commits acts of such atrocity that they constitute crimes against humanity of a *jus cogens* scale, action must be taken to counter them and to protect against their continuation or recurrence. Over the years, however, only timorous steps have been taken on the prosecution front, while sometimes too vigorous steps have been taken on the war front.

History has not borne much hope in progress toward the goal stated by the Nüremberg Tribunal: that limits must be put on the amount and type of savagery that occurs in war. Despite the recognition that international law imposes duties on individuals that transcend national obligations³²¹ and the prohibition of needless cruelty, unmitigated butchery continues with impunity. Indeed, today, those who commit atrocities hide among innocents, so as to avoid being attacked in more ways than one.

PALESTINE, SABRA, AND SHATILA

Still, in Palestine innocent people are killed by Israeli forces, Palestinian forces, or suicide bombers, each seeking to use innocent bodies as the pathetically ironic weapon for freedom from fear or oppression. At this writing, we await information on whether war crimes took place in Jenin.³²²

In September 1982, innocent men, women, and children were slaughtered in the refugee camps at Sabra and Chatila, Lebanon by Lebanese-Christian forces dependent on Israel.³²³ Until repealed in July 2003, a landmark Belgian law incorporated the Geneva Conventions and the principle of universal jurisdiction into Belgian criminal law providing for prosecution of perpetrators of certain crimes committed against innocent civilians, conduct proscribed without any limitation in time or space.³²⁴ Incident to this expansive law, an attempt was made to charge

319. *Id.*, Scotsman.

320. *Id.*, Scotsman.

321. Judgment of the International Military Tribunal at Nüremberg, 22 I.M.T., TRIAL OF THE MAJOR WAR CRIMINALS 411, 427 (1948).

322. See, e.g., Erna Paris, *Sharon and Arafat Should Both be on Trial*, GLOBE & MAIL (TORONTO), April 17, 2002, available at <http://www.globeandmail.com> ("If the new International Criminal Court is to mean anything, we must be ready to judge the acts even of those whose causes seem just"); Baruch Kimmerling, *I Accuse*, KOL HA'IR (Israeli Hebrew Weekly), Feb. 1, 2002, at 1.

323. See, e.g., Laurie King-Irani, *Detonating Lebanon's War Files: The Belgian Court Case and the Beirut Car Bomb*, Jan. 31, 2002, available at <http://www.merip.org>.

324. See the Belgian Law on Universal Jurisdiction: the Law of 16 June 1993 "concerning the

and seek the arrest of Israeli Prime Minister Ariel Sharon for his responsibility in the events in Sabra and Chatila.³²⁵

Elie Hobeika, the leader of the Christian militia *Forces Libanaises*, which was responsible for the 1982 massacres in the Sabra and Shatila refugee camps, was blown up in front of his home by a car bomb.³²⁶ With him died two of his body guards and a passer-by.³²⁷ Hobeika also was a minister in the Lebanese government during the period Israel occupied Beirut.³²⁸ A Belgian camera team had interviewed Hobeika three days earlier.³²⁹ During the interview, he claimed innocence of the 1982 massacres and said he would testify in Brussels if and when the trial of Israel's Prime Minister Sharon occurs. Sharon was minister of Defense when the massacres in Sabra and Shatila happened.³³⁰ In spite of Israeli denials, the assassination of Elie Hobeika was attributed to the Mossad, Israel's secret service, by, amongst others, Lebanese President Lahoud.³³¹ A recent article by Laurie King-Irani, former editor of *Middle East Report*, provides details of both the massacre and the assassination of the Elie Hobeika:³³²

It is hard to say which news surprised Beirutis more on January 24: the previous evening's report from Brussels that a war crimes case against Israeli Prime Minister Ariel Sharon and others had moved one step closer to trial, or the sickeningly familiar roar of that morning's car bomb, which killed Elie Hobeika, one of the most ruth-

Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto," as amended by the Law of February 19, 1999, "concerning the Punishment of Serious Violations of International Humanitarian Law." *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2000 I.C.I., Feb. 14, 2002, available at <http://www.icj-cij.org/icjwww/iwhats.htm>. *La decision de la Cour internationale de justice (CIJ), rendue le 14 fevrier 2002, d'annuler un mandat d'arret international lance par la Belgique contre un ancien ministre congolais, au principal motif que le ministre etait encore en exercice au moment de l'emission dudit mandat d'arret, conduit a d'importantes consequences sur la mise en oeuvre de la responsabilite penale individuelle pour les crimes les plus graves.* The crimes with which Yerodia (the Congo's Foreign Minister) was charged were punishable in Belgium incident to the above noted law. See *id.* A summary of the decision can be found in 8 ANN. SURVEY OF INT'L & COMP. L. 151 (2002). Under pressure from the U.S. and Israel, and after the numbers changed in Belgian Parliamentary elections, this law was repealed, Summer 2003. See 19 No. 9 INTL E.L. REP. 352 (Sept. 2003).

325. See King-Irani, *supra* note 323.

326. See Alexander Cockburn, *The Nightmare in Israel*, THE NATION March 25, 2002, at 8.

327. See <http://www.guardian.co.uk/world/latest/story/0,1280,-2536399,00.html> *Belgian Senate Guts 'Genocide Law'*, THE GUARDIAN April 6, 2003; *Belgium Limits Genocide Law*, http://www.dw-world.de/english/0,3367,-430_A_827171_1_A,00.html 07.04.2003.

328. See material in notes 322-327, *supra*.

329. See material in note 322-327, *supra*.

330. See material in notes 322-327, *supra*.

331. Frank Tiggelaar & Elie Hobeika, *Leader of the Christian Militia Forces Libanaises—Responsible for the 1982 Massacres in the Sabra and Shatila Refugee Camps—Blown up*, based on a VRT Journal Report, Jan. 24, 2002, available at www.justwatch.com.

332. King-Irani, *supra* note 323.

less political survivors of Lebanon's bloody civil war of 1975-1990. Just 48 hours before his violent death, Hobeika, commander of the right-wing Lebanese Forces during the war, had met with two visiting Belgian senators to stress his willingness to testify in a landmark Belgian legal case that is reopening the troubling files of the 1982 Sabra and Shatila massacres. Claiming that his testimony would clear his own name while establishing Sharon's guilt, Hobeika voiced growing fears for his physical safety. This chronology of events immediately filled Lebanese newspapers and café discussions with speculations about possible links between the court case in Belgium and the car bombing in Beirut.

Top Lebanese officials and Syrian state-run radio quickly accused Israel of eliminating a key witness to and participant in the slaughter of 1000-2000 unarmed Palestinian and Lebanese civilians in the Sabra and Shatila refugee camps. Hobeika, after all, knew more than virtually anyone else about what really happened in Sabra and Shatila. Then intelligence head of the Lebanese Forces, Hobeika was the primary liaison between the Israel Defense Forces (IDF) officers and personnel surrounding the camps and the Christian militia members inside who undertook an orgy of murder, rape and torture from the evening of September 16 until the early afternoon of September 18, 1982.

Walkie-talkie and binoculars in hand, Hobeika, just 26 years old, had helped to orchestrate the unfolding massacre. In one infamous instance (recounted by an IDF soldier who gave testimony before Israel's 1983 Kahan Commission inquiry), Hobeika coldly commanded a militia member who had radioed to ask what he should do with 40 women and children his unit had rounded up: "You know exactly what to do with them. Don't ask me a question like that again!"³³³

*Legal Accountability, Command Responsibility.*³³⁴ The central issues of the Belgian case filed in June 2001 by massacre survivors centered on who had command responsibility. Such issues include: Who issued Hobeika's orders? Who ordered the Israeli army to block all entry and exit points to the two camps before, during, and after the massacres? Who gave the orders to launch flares during the night to assist the killers of these innocent non-combatants? Who allowed the Christian militia units to cross security lines between East and West Beirut and along the airport road? Who decided, even after being informed that a massacre was in progress, that the Lebanese militiamen should be allowed to

333. *Id.*

334. Cf. Mirjuan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455 (2001).

remain in the camps to continue "mopping up"?³³⁵ Who benefits from Hobeika's assassination? King-Irani continues:

The rumors now circulating inside and outside Lebanon that Hobeika was ready to testify that Israeli units had participated in the actual killing in the camps have strengthened this interpretation. Recent revelations that the car used in the January 24 bombing was purchased by two men using false identities from a car dealer in the southern Christian stronghold of Jezzine—formerly a key military intelligence post during Israel's occupation of south Lebanon—also seem to support this theory. But Hobeika had many enemies: Palestinians, Syrians and Lebanese as well as Israelis. Other issues, other half-remembered wartime files besides Sabra and Shatila, may help to identify Hobeika's assassins.

[Seasoned] observers of Lebanon's complex political scene have quietly presented alternative theories about who might have ordered Hobeika's elimination. Samir Qassir, writing in the pages of *al-Nahar*, voiced doubts that Israel was behind the car bombing. Noting that an act of assassination undertaken on foreign soil would have required a discussion, if not a vote, during an Israeli cabinet meeting, Qassir hypothesized that, given Sharon's controversial history in Lebanon, it was unlikely that such a decision could have been taken unanimously, let alone never leaked to the press.

. . . .

What no one has yet written or stated publicly and unequivocally in Beirut is that many people—Syrians, Lebanese, Palestinians and Americans, not to mention Israelis—dread the opening of Lebanon's wartime files. Over the last decade, other countries emerging from tortuous civil wars established truth commissions and official commissions of inquiry to come to terms with the blood-soaked past, assign accountability, effect a transition to a new government or establish just compensation policies. But Lebanon's long war—which resulted in 120,000 deaths and the disappearance of over 17,000 civilians, still missing—has yet to undergo such unflinching public scrutiny. The tentative opening of Lebanon's wartime files is largely left to the realm of popular culture: the sardonic music of Ziad Rahbani or the compelling feature films of Jean Chamoun and Randa Sabbagh.

. . . .

Opening the Sabra and Shatila files risks opening all of Lebanon's wartime files, thereby depriving the postwar, Syrian-backed regime of what little legitimacy it has ever possessed. Since 1990, Lebanese politics has hinged primarily upon a delicate Syrian balancing act: pitting this group against that in one context, that group

335. King-Irani, *supra* note 323.

against this in another, by means of threats, incentives and the construction of complex, overlapping patron-client relations within Lebanon and between Lebanon and Syria. A full airing of who did what to whom during the war years would destabilize this delicate game.

. . . .

Hobeika's assassination is a grim reminder that many others—Syrians, Lebanese and Israelis—have enjoyed, and hope to continue enjoying, impunity for the massive and systematic war crimes committed in Lebanon from 1975-1990. For their part, the Sabra and Shatila massacre plaintiffs and their lawyers stated on January 24 that they are undeterred by Hobeika's assassination and will continue to seek justice in a Belgian court.³³⁶

Western governments apparently have aided and abetted atrocity-riven situations in several places, such as East Timor, by their complicity or at least "willful blindness."³³⁷ We all must ask, with Primo Levi, why sometimes we have such difficulty perceiving "the experience of others" or allow a "construction of convenient truth" to move us the wrong way. Yes, how much of the Holocaust and "concentration camp experience is dead and will not return . . .?"

On September 11, 2001, terror transcended abstraction and we in the U.S. suffered both directly and vicariously the pain of terrorism on United States soil. Since that horrific day, we seem to be living an omnipresent terroristic melodrama. As we watched the terrorism committed on our own soil that awful day we were sickened, outraged, and certainly felt the need for self-defense. This sense was appropriate, but prompted the question of what constitutes valid action in self-defense.

Perhaps we do suffer from a plague, as Camus suggests in his wonderful novel of that name:

It is the willful negation of life that is built into life itself: the human instinct to dominate and to destroy to seek one's own happiness by destroying the happiness of others, to build one's security on power and, by extension, to justify evil use of that power in terms of "history," or of "the common good," or of "the revolution," or even of the justice of God. . . . Man's drive to destroy, to kill, or simply to dominate and to oppress comes from the metaphysical void he experiences when he finds himself a stranger in his own universe.³³⁸

336. *Id.*

337. See, e.g., Rick Mercer, *West Complicit in East Timor Genocide*, NATION, Apr. 23, 1999, 1999 WL15653159; John Pilger, *A Worse Slaughter: Blair Makes Much of 'Humanitarian Values' but Sells Arms to Indonesia Which Are Used Against East Timor*, GUARDIAN, June 1, 1999, at 14.

338. See, Thomas Merton: *The Plague of Albert Camus: A Commentary and Introduction*, reprinted in THE LITERARY ESSAYS OF THOMAS MERTON 181 (Patrick Hart, ed. 1981) (discussing ALBERT CAMUS, *THE PLAGUE* (1947)). See also ALBERT CAMUS, *L'Homme Révolté* (1952); THE MYTH OF SISYPHUS (1955); L'ÉTAT DE SIÈGE (1948); LES JUSTES (1950); LES POSSÉDÉS (1959).

Or is it simply that minions of various leaders are easily stirred up into a blind rage by desire for vengeance? It does seem that a few masterminds of manipulation ginned up hatred and fear of the United States, or the "West," or "modernity," into a desire for vengeance for real or perceived past sins and oppression. This reaped and is still reaping its bitter fruit. Our *mal du siècle* continues to accelerate in the new millennium. Crimes against humanity form part of a nauseating modern equivalent of the ancient blood feud.

There are so many other examples that it is nearly impossible to keep track, but now we have suffered one of the most massive atrocities on United States territory. The problem is that we are facing a vicious threat from a group that has moved beyond the pale to use terrorism against us by a group that feels a moral-religious (an invented word, "religiose," might be better?) right to kill innocent people in order to obtain vengeance, throw off oppression, and, as they see it, make the world safe for their god.

Other times, it is simply the wronged person or group looking to right wrongs or obtain retribution. Sometimes, it is the nihilist simply looking to destroy with terror. Even the nihilist seems to have an almost metaphysical vision of the need to destroy. Perhaps many of these are pretend nihilists, using crimes against humanity simply as his or her way of gaining power and becoming a statist functionary, then using terror to maintain his or her power.

*Propagandistic Appropriation of the Term and
the Law on Terrorism*³³⁹

We delude ourselves if we think that terrorism is committed only by our enemies. Our enemies do the same. My purpose in this article has been to try to convince governments and leadership groups that they must define terrorism in a neutral manner, not by the end sought. Doing this will help us to combat terrorism efficiently and justly. Failure to do so only tightens the grip of this deadly phenomenon. Yet, most of us are ideologically predisposed to dismiss any suggestion that we or our leaders would ever commit terrorism. It serves no good purpose to take the position that because others commit terrorism against us, we should do the same against them.

Terrorism, Torture, and Our Constitutional Republic

Leave truth to the police and us; we know the good;

339. Richard Falk used this term in his book, *REVOLUTIONARIES AND FUNCTIONARIES: THE DUAL FACE OF TERRORISM* (1988).

*We build the Perfect City time shall never alter;
Our Law shall guard you always like a circue of mountains
Your ignorance keep off evil like a dangerous sea.*³⁴⁰

Since September 11, some pundits have taken to arguing that torture is appropriate under these circumstances and should be legal. Mario Vargas Llosa uses his novel *The Feast of the Goat* to illustrate the dangers of what Professor Dershowitz and others are suggesting ought to become official practice. Generalissimo Trujillo's Minister of the Armed Forces, General José René (Pupo) Román Fernández, reflects on torture in La Cuarenta, where he thought he was being taken:

He knew that gloomy house on Calle 40, near the Dominican Cement Factory, very well. It had belonged to General Juan Tomás Díaz, who sold it to the State so that John Abbes could convert it into the setting for his elaborate methods of extracting confessions from prisoners. He had even been present, following the Castroite invasion on June 14, when one of those being interrogated, Dr. Tejeda Florentino, sitting on the grotesque Throne—a seat from a jeep, pipes, electric prods, bullwhips, a garrote with wooden ends for strangling the prisoner as he received electric shocks—was mistakenly electrocuted by a SIM technician, who released the maximum voltage.³⁴¹

General Pupo Román was tortured in another house that also had been equipped with a Throne. They kept Román “mounted” (a moribund term formerly used in Voodoo ceremonies in which the subjects were drained of themselves and occupied by spirits.³⁴²)

[T]hey stripped him and sat him on the black seat in a . . . windowless, dimly lit room. The strong smell of excrement and urine nauseated him. The seat, misshapen and absurd with all its appendages, was bolted to the floor and had straps and rings for the ankles, wrists, chest, and head. Its arms were faced with copper sheets to facilitate the passage of the current. A bundle of wires came out of the Throne and led to a desk or counter, where the voltage was controlled. In the sickly light, as he was strapped into the chair, he recognized the bloodless face of Ramfis [Rafael Trujillo's son]. . . . Ramfis moved his head and Pupo felt himself thrown forward with the force of a cyclone. The jolt seemed to pound all his nerves, from his head to his feet. Straps and rings cut into his muscles, he saw balls of fire, sharp needles jabbed into his pores. He endured it without screaming, he only bellowed. . . . Between sessions they dragged him, naked, to a damp cell, where buckets of pestilential water made him respond. To keep him from sleeping they taped his lids to his eyebrows with adhesive tape. . . . At . . . times they stuffed inedible substances into his

340. W.H. AUDEN, *supra* note 2, at 1.

341. LLOSA, *supra* note 90, at 328.

342. *Id.* at 328-329.

mouth; at times he detected excrement, and vomited. In a rapid descent into sub-humanity, he could keep down what they gave him. . . . [Later] they removed the tape, ripping off his eyebrows . . . and a drunken, joyful voice announced: "Now you'll have some dark, so you'll sleep real good." He felt the needle piercing his eyelids. He did not move while they sewed them shut. . . . When they castrated him, the end was near. They did cut off his testicles with a knife but used a scissors, while he was on the Throne. . . . They stuffed the testicles into his mouth, and he swallowed them, hoping with all his might that this would hasten his death.³⁴³

Another former Trujillista stalwart who had joined the conspiracy to assassinate the goat was Miguel Angel Báez Díaz. After being tortured like Pupo Román, he then received the following treatment:

[When they were near starvation], a pot with pieces of meat was brought to them. . . . Báez . . . gulped it down, choking, eating with both hands until they were full. . . . [The jailer came in and] . . . confronted Báez Díaz: "General Ramfis Trujillo wanted to know if eating [your] own son didn't make [you] sick . . . ?"³⁴⁴

The problems that terrorism cause strain the very core of a constitutional republic and, it seems, cause many who have professed to be libertarians to decide that abuse, even torture, is appropriate or acceptable under extreme circumstances, such as that caused by the September 11 attack. Some, claiming to represent "liberal" thought, such as Lawrence Tribe, Ruth Wedgwood, and Cass Sunstein, have argued that the institution of military commissions by President Bush's Executive Order of November 13, 2001, is constitutional and wise.³⁴⁵ A segment of CBS

343. *Id.* at 329-31.

344. *Id.* at 339.

345. *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2001), available at http://www.senate.gov/~judiciary/print_testimony.cfm?id=121&wit_id=42 (statement of Cass Sunstein, University of Chicago School of Law) (noting "the legitimate interests behind the President's military order can be accommodated while also producing what the president wants which is full and fair trials. . . ."). Sunstein also suggested that military commissions would be appropriate if: (1) the language of the order were narrowed to clarify that the commissions would only be used to try violations of the laws of war; (2) the "essentials of procedural justice" were protected, including the right of the accused to know charges against them, to reasonable rules of evidence, to be defended by counsel, to respond to the evidence, to be tried in a public proceeding except where strictly necessary, and to be presumed innocent; and third, the neutrality of the judges were assured, perhaps by appeal to a civilian court or the use of federal judges on the commissions). For arguments opposing the commissions based on American constitutional law, see generally *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, *supra* note 4 (statement of Laurence Tribe, Harvard Law School); *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, *supra* note 4 (statement of Neal Katyal, Georgetown University Law Center); George P. Fletcher, *War and the Constitution*, AM. PROSPECT, Jan. 1-14, 2002, at 26-29; Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002); Laurence Tribe & Neal Katyal, *Waging War, Deciding*

News' 60 Minutes program broadcast Sunday, January 20, 2002, featured law professor and pundit Alan Dershowitz, who argued that the use of torture by law enforcement officials should be sanctioned in certain cases, such as acts of terrorism.³⁴⁶ He argued that torture is "inevitable" in such cases and that it would be better to have procedures in place to regulate it.³⁴⁷ Kenneth Roth, executive director of Human Rights Watch, was also interviewed for the program, and disagreed vigorously with Professor Dershowitz.³⁴⁸ Part of the transcript of the program is enlightening:

(CBS) Is there a place in the United States justice system for torture?

Alan Dershowitz, the occasional civil libertarian defender of O. J. Simpson, believes the law should sanction torture so it may be applied in certain cases, such as terrorist acts.

In a report to be broadcast Sunday on 60 Minutes, Dershowitz tells Correspondent Mike Wallace that torture is inevitable. "We can't just close our eyes and pretend we live in a pure world," he says.

After the events of Sept. 11, with many al Qaeda members in custody, Dershowitz says he wants to bring the debate to the forefront. He gave the "ticking bomb" scenario—a person refusing to tell when and where a bomb will go off as an example of the type of case warranting torture.

The FBI has anonymously leaked to the press the belief inside the bureau that torture may be an option [in these trying times]. But Lewis Schiliro, former New York bureau director, warns of problems with torture.

"If anybody had the ability to prevent the events of Sept. 11 . . .

Guilt: Trying the Military Tribunals, 111 Yale L.J. 1259 (2002); Letter from Law Professors and Lawyers, to Sen. Patrick J. Leahy (Dec. 5, 2001), at <http://www.yale.edu/lawweb/liman/litterleahy.pdf>. These are all discussed in Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Definitions, Military Commissions, International Tribunals, and the Rule of Law*, 75 So. CAL. L. REV. 1407 (2002). See also Jim Puzzanghera, *The Case of Taliban John: Treason Among Options for Charging American*, SEATTLE TIMES, Dec. 20, 2001, at A3, available at WL 3530877; Charles Lane, *Walker's Case Poses Novel Legal Issues; Taliban Suspect's Detainment Overlaps Geneva Convention, Fifth Amendment*, WASH. POST, Dec. 20, 2001, at A25, available at 2001 WL 31544095; Ruth Wedgwood, *Commentary: The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18; Akhil Reed Amar, *War Powers: Is Bush Making History?*, TIME MAG., Dec. 03, 2001, at 62. These arguments are challenged by George P. Fletcher in *War and the Constitution*, AM. PROSPECT, Jan. 1, 2002, at 26, referring to *Ex parte Milligan* as being the proper precedent, not the aberrational and embarrassing decisions of (generally cited as authority) *Ex parte Quirin*, 317 U.S. 1 (1942), and *Yamashita v. Styer*, 327 U.S. 1 (1946) (almost never cited, as it is far too embarrassing). See also Koh, *supra* note 305; Bryant & Tobias, *supra* note 21, at 375, 434-38..

346. Andras Riedlmayer sent a notice of this to the discussion group JUSTWATCH-L, on Jan. 18, 2002, available at <http://www.cbsnews.com/now/story/0,1597,324751-412,00.shtml>.

347. *Id.*

348. *Id.*

they would have gone to whatever length The problem becomes, where do we draw that line?" he tells Wallace.

Torture is prohibited by the United States Constitution, says Human Rights Watch Executive Director Kenneth Roth, who also says its not reliable. He points out that an Islamic terrorist, convicted in America for terrorist plots he admitted to after torture by authorities in the Philippines, had also admitted to being the Oklahoma City bomber.

"People will say anything under torture," says Roth, adding that resorting to torture degrades humanity and the idea of democracy. "We, in many important respects, become like the terrorists," he tells Wallace. "They will have won. Our democracy will have lost."

This is a naive viewpoint, says Dershowitz. "If anybody has any doubt that our CIA, over time, has taught people to torture, has encouraged torture, has probably itself tortured in extreme cases, I have a bridge to sell you in Brooklyn."³⁴⁹

Dashiell Hammett provides an apt warning for those who take this attitude: "Play with murder [torture] enough and it gets you one of two ways. It makes you sick, or you get to like it."³⁵⁰ Camus also provides a moral legal negation: "[Even i]f murder is in the nature of man, the law is not intended to reproduce that nature."³⁵¹

Terrorism, Crimes Against Humanity, and Total War

Terrorism, crimes against humanity, and "total war" are parallel concepts. They have parallel results. In total war, where innocent civilians are targets for military victory, war or much of its conduct becomes quintessentially criminal. When blanket or saturation bombing occurs especially in unmilitarized places or certain weapons are used that are designed to cause massive death or unnecessary suffering, it is terrorism. The purpose of this conduct is to panic the population and to force the leadership to succumb. Thus, it was considered "acceptable" to drop the atomic bomb on Hiroshima and Nagasaki, slaughtering so many in such a horrible way, with "rags of hanging skin, wandering about [and lamenting] among the dead bodies," in order to terrorize the population and leadership of Japan so they would quit the war more quickly. Innocent persons, not part of the war effort, in undefended cities or undefended sections were chosen so that the shock would have sufficient impact. How different is that from placing a bomb on a civilian flight or at a shopping mall other than that the latter causes less mass destruction?

349. *Id.*

350. DASHIELL HAMMETT, *RED HARVEST* 102 (1929).

351. Albert Camus, *Reflections on the Guillotine*, in *RESISTANCE, REBELLION AND DEATH* 174, 198 (Justin O'Brien trans., 1972).

There is one other difference. Japan was given a chance to surrender and was warned of the consequences of not doing so. The Japanese leadership was aware that the United States had the bomb and was told that the United States would use the weapon if Japan did not submit to all the Allied demands by a certain date. Thus, the Japanese leadership was at fault for allowing their people to be subjected to this horror. This does not fully excuse the United States. The United States is the nation that unleashed this terrible weapon and used it against a civilian population.

Sadly, today and perhaps for many more years in the past than we think, belief in the inevitability of total war has pervaded all political and military theory and practice. When total war became accepted as a possibility or, worse, the norm, it quickly also became ingrained in the consciousness of all powers. Today, it pervades all of our relational thought processes, whether we are for societal status quo or for change. I wonder how different this is from how humans have been since antiquity.

Consider the fearsome view of the world held by much of its population. Each side of virtually every world conflict is manipulated into believing that it has absolute right on its side and that absolute evil resides in its enemy. Each applies absolutist terminology and action. Each group believes that its very existence is threatened by its enemies; that it may be annihilated, unless it annihilates the opposition first. Each believes that absolute or total war is appropriate and necessary for it to survive. Thus, oppressed minorities see the state or, today, the United States as an absolute evil to which absolute destructive power may be applied. Government tries to make its people see the group that might rebel or that is rebelling as absolute evil. So, each justifies the use of absolute power. This is the same in both the domestic and international context. Is it any wonder that terrorism and crimes against humanity are the mode of warfare and politics?

It is tragic that such a terroristic mindset seems to have permeated orthodox military strategy, or perhaps it has grown naturally out of that strategy. Nearly every nation's basic political and military strategic planning is based on this dangerously flawed vision. With current availability of absolute power to destroy, we would be wise to figure a better way to see the world and each other.

Fear, Rage, and Becoming What We Hate

Government leaders and leaders of smaller groups often react to harm or threats of harm to the group in a self-destructive way. They sometimes abuse their people's fears to accomplish selfish international

or domestic ends. This tactic crystallized for American policy early in the era of the Cold War. A special Report of Covert Operations commissioned by President Eisenhower was adopted as hallowed American policy: "Another important requirement is an aggressive covert psychological, political and paramilitary organization more effective . . . and, if necessary, more ruthless than that employed by the enemy There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply."³⁵²

In the face of terrorism or crimes against humanity, we may allow our fright to become rage and seek vengeance. This often happens because fear is easily manipulated into rage. If we succumb, we participate in what Albert Camus called an ugly, infernal dialectic—a self-destructive death dance.³⁵³ Leaders with a melodramatic bent of mind blind their adherents to any humanity on the other side. The people are made to believe that they are fighting the devil himself and that all truth is being destroyed. The people usually swallow it. Law and morality are perverted by reaction to violence, and when manipulated by obfuscation and deceit, unrestrained violence may ensue. None of this is to say that truly horrible conduct is not the cause or the trigger, but only to suggest that a horrific cause often implicates a manipulated reaction that may be more dangerous and destructive than the original terrorist acts. When this occurs and escalates, the rule of law is replaced by brute power. This was not lost on Adolf Hitler, who blamed Germany's failure in World War I in part on not having sufficiently utilized this propaganda tactic of "making monsters of their enemies" in the eyes of the German *volk*.³⁵⁴

Symbiotic Relationship Between Enemies

A weird and paradoxical symbiotic relationship may develop between leaders of enemy groups. An enemy is required to take the heat for the leadership's incompetency, corruption, or other internal problems. So, the leaders appropriate or pervert law and morality. A people's sense of losing security is exacerbated by its leaders. Purported wrongs that have been or are claimed to have been done to them are called upon by leaders to rationalize the claimed "necessity" for the people to commit crimes against humanity. Leaders often use their version of "law" and the claiming of a right as exhortation to summon public

352. Report of the Special Study Group on the Covert Activities of the Central Intelligence Agency (the "Doolittle Report") (Sept. 30, 1954) (declassified April 1, 1976); *see also* discussion *infra* note 319-24 regarding arguments for torture since September 11, 2001.

353. *See* CAMUS, *supra* note 351, at 198; ALBERT CAMUS, NEITHER VICTIMS NOR EXECUTIONERS (Dwight MacDonald trans., 1960) (1947).

354. ADOLF HITLER, MEIN KAMPF (Behtle Verlag trans., 1981).

support for uses of force. To accomplish this, the person against whom the force is applied must be associated with evil. Media and many commentators fall into the trap laid by leaders, using the label “*genocidaire*,” “terrorist,” or other villainous epithet to justify their own crimes against humanity or terrorism.

An Infernal Dialectic

Both sides of most conflicts either try to hide or rationalize even their own worst conduct as “legal” even though, if it were done to them, they would consider it criminal. So, we see how easy it is to fall into Albert Camus’s

infernal dialectic that whatever kills one side kills the other too, each blaming the other and justifying his violences by the opponent’s violence. The eternal question as to who was first responsible loses all meaning then . . . [Can’t we] at least . . . refrain from what makes it unforgivable—the murder of the innocent.³⁵⁵

I trust that Albert Camus was right when he wrote that humanity generally does not want to be either victim or executioner,³⁵⁶ but leaders often manipulate their people to become both. When we participate in this conduct or accept the role, however, no matter how lofty the claimed end, we simply become executioners, oppressors, or slaughterers of innocents. As Camus said in his *Reflections on the Guillotine*, “[even i]f murder is in the nature of man, the law is not intended to reproduce that nature.”³⁵⁷ But in this, we must still try to overcome, by rectifying wrongs done in the past or currently being perpetrated, the tendency to allow inertia or momentum to make executioners or victims of us all.³⁵⁸

Unfortunately, we are all caught up in this “infernal dialectic,” this horrible “death-dance,” this “plague” which is a propensity to pestilence and destruction that we try to hide. Thomas Merton, analyzing Camus’s *The Plague*, states the tendency beautifully:

It is the willful negation of life that is built into life itself: the human instinct to dominate and to destroy . . . to seek one’s own happiness by destroying the happiness of others, to build one’s security on power and, by extension, to justify evil use of that power in terms of “history,” or “the common good,” or of “the revolution,” or even of “the justice of God.”³⁵⁹

355. Camus, *supra* note 351, at 135, 138.

356. CAMUS, NEITHER VICTIMS NOR EXECUTIONERS, *supra* note 353, at 27.

357. Camus, *supra* note 351, at 131, 135, 137, 174, 198; CAMUS, NEITHER VICTIMS NOR EXECUTIONERS *supra* note 353, at 27.

358. Camus, *supra* note 351, at 218.

359. THOMAS MERTON, *The Plague of Albert Camus: A Commentary and Introduction*, in THE LITERARY ESSAYS OF THOMAS MERTON 181-82 (Patrick Hart ed., 1981).

Merton continues, noting that our drive to destroy, to kill, or simply to dominate and to oppress derives, perhaps, from our alienation or the "metaphysical void he experiences when [we find ourselves] a stranger in [our] own universe."³⁶⁰ Merton explains that we seek to make that universe familiar by using it for selfish ends, but that these ends are often capricious and ambivalent.³⁶¹ When a group is alienated and manipulated, these ends usually become life denying, armored in legalism and false theology, or perhaps even the naked language of brute power.³⁶² Thus, those who are oppressed, or are manipulated into believing that they are, or those who believe insanely that they have a divine right to destroy, act out with brute violence. Those who are attacked will inevitably react with similar or worse violence.

All attempts (from either side) to make it appear acceptable through obfuscation, secrecy and rhetoric, in the end, will be for naught. We must stop participating in this

miasma of evil [being deluded by t]he self-assurance of those who know all the answers in advance and who are convinced of their own absolute and infallible correctness [which] sets the stage for war, pestilence, famine, and other personages we prefer to leave unnoticed in the pages of an apocalypse.³⁶³

This ignorance that Camus and Merton reject "prefers its own rightness to the values that are worth defending. Indeed it sacrifices those values by its willingness to kill men in honor of its dogmatic self-idolatry."³⁶⁴ "As long as one is content to justify one's existence by reference to these automatically accepted norms, one is in complicity with the absurd, with a murderous society, with death, with 'the Plague.'"³⁶⁵ It is worth considering whether prosecution of perpetrators, especially the leaders, is beneficial to escaping the cycle.

Do law and international law exacerbate or thwart influences? Jean-Paul Sartre believed that law made things worse. He wrote:

A fine sight they are too, the believers in non-violence, saying that they are neither executioners nor victims. Very well then; if you're not a victim when the government which you've voted for, when the army in which your younger brothers are serving without hesitation or remorse have undertaken race murder, you are, without a shadow of doubt, executioners³⁶⁶

360. *Id.* at 221.

361. *Id.*

362. *Id.*

363. *Id.* at 181, 191.

364. *Id.* at 195.

365. *Id.* at 198.

366. Jean-Paul Sartre, *Preface* to FRANTZ FANON, *THE WRETCHED OF THE EARTH* 21 (1963).

Try to understand this at any rate: if violence began this very evening and if exploitation and oppression had never existed on the earth, perhaps the slogans of non-violence might end the quarrel. But if the whole regime, even your non-violent ideas, are conditioned by a thousand year-old oppression, your passivity serves only to place you in the ranks of the oppressors.³⁶⁷

Could it be true that even international law may be seen as fostering oppression and violence? Indeed, when the law is appropriated and abused it may do just that. And it is true that some oppressing nations justify their conduct by claiming that it is consistent with international law. Others simply suggest by their actions and their cynical excuses that there is no international law. But the reality is that oppression violates international law, no matter what the excuse given and regardless of whether some nations "get away with it" for a time.

As a means to break the yoke of oppression and terror, victims or their leadership sometimes opt for violence. This, of course, is a perfectly legal form of self-defense. On the other hand, violent action against other innocents is not self-defense. Still, many times when the oppressed rise up, they do so in a way that causes them to become what they hated in their oppressors. *Lex talionis*, "an eye for an eye" (as in *Exodus 21:24*), calls for victims or the victims' proxies to carry out the sanction against the victimizers. There are proper and improper sanctions. The history of *lex talionis* is interesting and may provide important insight into the "modern" sensed "need" to retaliate.

Self-Centered, Self-Justified, and Self-Serving "Self-Defense"

It was argued by the Reagan and Bush I administrations and resurrected by President George W. Bush against Iraq, that it is "justifiable self-defense" to apply military force to preempt anticipated terrorist activity or to retaliate against terrorists or against states that harbor, finance, or train terrorists.³⁶⁸ In addition, abduction of "terrorists" or even common criminals from abroad is claimed to be "justifiable self-defense."³⁶⁹ Thus, the bombing of Tripoli, including the targeting of Qaddafi's family, was argued to be in "self-defense" and, although Qad-

367. *Id.*

368. See Seymour Hersh, *Qaddafi Targeted*, N.Y. TIMES MAG., Feb. 22, 1987, at 5; RICHARD FALK, REVOLUTIONARIES & FUNCTIONARIES: THE DUAL FACE OF TERRORISM 73, 78, 123, 198 n.1 (1988) (pointing to over 100 civilian casualties in the attack on Qaddafi's compound).

369. See generally Oscar Schachter, *Self-Judging Self-Defense*, 19 CASE W. RES. J. INT'L L. 121 (1987); Abraham Sofaer, N.Y. TIMES, Jan. 28, 1986, at A24; Abraham Sofaer, N.Y. TIMES, Jan. 19, 1986, at A14; John Walcott et al., *Reagan Ruling to Let C.I.A. Kidnap Terrorists Overseas Is Disclosed*, WALL ST. J., Feb. 20, 1987, at 1; Ver Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. INT'L L.J. 1 (1988); U.S. v. Alvarez-Machain, 504 U.S. 655 (1992).

dafi was missed by the bombs, his adopted baby girl and at least a hundred civilian casualties were not.³⁷⁰ Moreover, it was argued that the only judge of a self-defense claim is the claimant. Hence, a decision to take such measures of "self-justified self-defense" becomes per se legal. No other branch of government and certainly no other nation or institution may question it. Here, we find ourselves making the same tired argument once again.

One obvious practical danger of this attitude of self-justification is that other nations or groups may utilize it as well. President George W. Bush in his State of the Union Message in January 2002 "warned" us all about the "axis of evil": North Korea, Iran, and Iraq. Does this rhetoric help or hurt? Could it prompt North Korea, or could China or Russia "justify" a pre-emptive strike against the United States? Can groups that consider themselves violated by the United States "justify" similar conduct through nuclear, chemical, or biological weaponry? If self-justification replaces a neutral rule of law for self-defense, and the former is elevated to the level of legality, there is no rule of law in any crucial context.³⁷¹

Unfortunately, self-justification is popular today. A significant danger of this concept of self-justifying self-defense is that it allows all nations or groups to claim legality to any act that they wish to commit in the name of "self-defense." If one has the power to succeed, one is "justified." It is fearsome that this is the current view of international law and self-defense held by many leaders in the world including leaders of states or smaller groups. Another danger is what such a self-defining vision of self-defense might do to democratic constitutional order. That vision assumes a dangerous perception of the separation of powers tending toward accepting executive branch absolutism. We see this eroding the idea of the separation of powers in the U.S. Constitution. In the United States, acceptance of abduction of criminals as a tool of law enforcement is a good example. It is worth noting that much of the abuse of the criminal justice system in the United States and elsewhere today is based on a "war against terrorism," a "war on drugs," and a "war against crime." Rhetorically placing a problem on a "war footing" seems to fool the people into accepting draconian measures that erode constitutional protections.

Self-justified self-defense is strikingly similar to the ancient Russian, then the former Soviet, the current Russian, and ancient Germanic notions of "necessary defense." The ancient German concept of *das*

370. See Seymour Hersh, *Quaddafi Targeted*, N.Y. TIMES MAG., Feb. 22, 1987; FALK, *supra* note 368, at 198, n.1.

371. Schachter, *supra* note 369, at 122-23.

Recht combined with that of "necessary defense" (*Notwehr*),³⁷² and the Russian idea of the same notions (*neobxodimaja oborona*),³⁷³ provide that any right or defendable interest, from life to personal honor, receives the same degree of protection and privilege. The only question is whether a right or interest is threatened. If one is threatened, good social order is equally threatened. "Necessary defense," therefore, is triggered. Any force necessary to prevent the invasion of the right or interest, and the concomitant destruction of "good order" is justified.³⁷⁴

In both the German and Russian conceptualization of "necessary defense" the ideas of "legal order" (*die Rechtsordnung*) and social dangerousness (and *protivopravnost*) identify "necessary defense" with protection of the legal order itself in its entirety.³⁷⁵ Thus, justification for attacks on the Sudetenland, Poland, and the like at the beginning of World War II, as well as the attempted "elimination" of many perceived "threats" to the legal order, such as the Jewish population, the Roma, "deviates," the insane or otherwise "mentally deficient," or similar enemies of the Third Reich, were justified in the name of self-justified "necessary defense."³⁷⁶ The same thing has occurred in Stalinist Russia, Bosnia, Rwanda, Kosovo, Tibet, East Timor, Sierra Leone, the Congo, Iraq, and more.

The policy of self-justified self-defense and the cliché "one person's terrorist is another's freedom fighter"³⁷⁷ are really a propagandistic appropriation of the law that actually should be allowed to condemn terrorism in a principled and neutral way. What is occurring with regard to terrorism and counterterrorism today seems almost analogous to the increasingly popularized view of many private individuals, at least in the United States domestic scene: Because many criminals are not caught or punished, there is no effective criminal law; hence, resort to vigilante justice and terrorism are promoted. Usually, it is the innocent minority that suffers.

Nationalistic solutions to crimes against humanity assume that such offenses are committed only by "the enemy." The enemy is painted as fully evil; the solution is to eliminate the enemy. Obviously, when the

372. See former German Penal Code, StGB, 53 (1986).

373. See former Penal Code Uголовnyj Kodeks, R.S.F.S.R. 13.

374. See Fletcher, *Proportionality* *supra* note 210, at 123-27.

375. *Id.*

376. Dostoyevsky presents this with his usual genius through Raskolnikov's attempts to justify his slaughter of the old malevolent pawnbroker, Aliona Ivanova, as a revolutionary blow against capitalism and a call to destroy the Czarist rule in Russia. See generally FYODOR DOSTOYEVSKY, *CRIME AND PUNISHMENT* (1932); see also Thomas Franck & Scott Senecal, *Porfiry's Proposition: Legitimacy and Terrorism*, 20 VAND. J. TRANS'L L. 195, 197 (1987); Fletcher, *Proportionality*, *supra* note 210, at 123-27.

377. See generally FALK, *supra* note 339, at 140.

leaders of all sides to a conflict have that attitude and transfer that attitude to their people, power is accepted as the only medium of international relations. Sadly, most nations and groups in conflict take this tack, and the rule of law and constitutional or human rights protections are thrown aside.

Any Positive Strains of History?

For centuries, military commanders—from Henry V of England, under his famous ordinances of war in 1419, to the United States military prosecutions of soldiers involved in the My Lai massacre under the United States Code of Military Justice, through the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda—have enforced such laws against violators. In other cases, states have brought to trial captured prisoners of war for offenses committed against the customary laws of war. Thus, both the accused's own state and the captor state have standing to prosecute. None of these systems, however, functions with any degree of efficiency.³⁷⁸

CONCLUSION

*Behind you swiftly the figure comes softly,
The spot on your skin is a shocking disease.
Clutching a little case,
He walks briskly to infect a city
Whose terrible future may have just arrived . . .*³⁷⁹

True, those who allow, affirm, or acquiesce to oppressing others and, of course, to the slaughter of innocents are truly on the side of the executioners. Similarly, as Thomas Merton warns in his essay *The Plague of Albert Camus*,³⁸⁰ and as Camus himself suggests in his novel *The Plague* and in his essay *L'Homme Revolté*,³⁸¹ revolution and "freedom fighting" are often used as "facile justification of mass murder."³⁸² Sartre was wrong to suggest that violence against non-combatants is justified. He believed that all those not engaged in fighting oppression were enemies; hence, the equivalent of combatants or oppressors. Camus was correct, on the other hand, to reject this Sartrean ethic to the extent that it finds virtue in slaughtering innocents, even for a supposed

378. See TAYLOR, *supra* note 96, at 20; BLAKESLEY ET AL., *CASES*, *supra* note 6, at 1253-67.

379. W.H. AUDEN, *GARE DU MIDI* (1938).

380. MERTON, *The Plague of Albert Camus*, *supra* note 338, at 181.

381. *See id.*

382. *See id.* at 199 (asking "[c]an there be any historic action that does not eventually end in mass murder?").

just cause.³⁸³ One can defend and protect the innocents of the world without destroying other innocents.

No doubt, Camus is correct that the established clichés or the “ethic” of established order, or at least of those with power, are based upon “values” that lead ultimately to a moral (and I would add, legal) abyss. Obviously, this makes the abased or perverted values immoral and illegal. Many with power who are trying to maintain or expand that power, or those seeking power, apply an ideology based on demonization and death. Thus, oppression and exploitation of human beings to accommodate one’s material interests, even if disguised in some high sounding abstraction, are terroristic. Similarly, destruction of innocent humanity to accomplish escape from oppression is terrorism.³⁸⁴ In the end, self-justification and self-delusion work only to allow one’s so-called enemies to feel justified in their counter-vengeance. Oppression, war crimes, crimes against humanity, and in kind counter-violence are of a kind; they only continue the frightening cycle. We participate in this tyranny of evil and death³⁸⁵ when we passively allow our government or the leaders of our group to commit evil or bolster regimes or groups that commit evil. Our obligation as human beings actually is to fight passionately to save the lives of all other human beings.³⁸⁶

Sartre was correct, but incomplete, in aphorizing that “once begun, it [a war of national liberation] is a war that gives no quarter.”³⁸⁷ Killing in war, sadly, is deemed by nations and other groups to be justifiable or acceptable. This perception is especially troublesome when groups consider themselves faced with an unending war. Thus, the seemingly eternal war of the oppressed to escape oppression (or what is called oppression) calls for destruction of the enemy so that one’s own will not be destroyed. We saw a “Crusade” against Islam during the Middle Ages. Now we see the idea of a “Crusade” against Islam raised as a “battle-flag” of vengeance to manipulate the manipulable to rise up in a counter “Jihad.” To counter that, President Bush called for his “War against Terrorism,” which he warns will be long-lasting and continual, requiring all our devotion.³⁸⁸ Thus, it seems that we have an ongoing, continual war against evil-doers (from both sides’ points of view). What

383. *Id.* at 185, 194.

384. *Id.* at 181.

385. *Id.* at 182.

386. *Id.* at 186.

387. SARTRE, *supra* note 366, at 21.

388. David E. Sanger, *Domestic Security Spending to Double Under Bush Plan*, N.Y. TIMES NEWS SERV., Jan. 25, 2002, available at 2002 WL-NYT 0202500118 (“President Bush said on Thursday that he would propose doubling the amount the government spends on domestic security next year to nearly \$38 billion, saying the United States was ‘still under attack’ and would remain on a war footing for a long time to come.”).

happens to our values, our human rights, and civil liberties? If we remain in an emergency setting, what are we willing to accommodate?

Happily, the reality is that the actual rule of law proscribes such a self-destructive and baleful approach to life, or governing, or death. Some conduct still, even within war, and thus, *a fortiori* during times of relative peace, is not justifiable, legal, or acceptable. A fight for survival or even one for gaining or retaining power may cause people to do unspeakable things, but we must not justify or even accommodate this. Thus, even if killing innocents is deemed effective to promote an end considered by the actors to be good, even if it actually is an efficient means to intimidate a government or dissident group, or to render a population insecure, it is not morally justified or legal. Unfortunately, governments and revolutionaries alike, as well as most international-law jurists and commentators, have not learned or have forgotten their essential and basic criminal law.³⁸⁹

Would that we have developed enough to transcend the extremes of this need to propitiate the gods, but justice is *required* for real peace. At least some culprits may now be preparing to meet a proper legal fate. For example, Generalissimo Augusto Pinochet, although not extradited to Spain by the United Kingdom, was held not to be immune from prosecution both in the United Kingdom and in Chile.³⁹⁰ He may never stand trial as there was a question about his competency a couple of years ago. Spain and the United Kingdom have attempted or are attempting to prosecute some Argentine and Chilean military officials for their conduct during the dirty wars in Argentina.³⁹¹ Also, a "mixed tribunal" (international and local) has been established for Sierra Leone.³⁹² Another may be established to prosecute some of the Khmer

389. See, e.g., LAFAYE, *supra* note 212; BOYCE & PERKINS *supra* note 210, at 46-119; GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 235-391 (1978). Cf. JOSEPH CONRAD, *LORD JIM* (1925); JOSEPH CONRAD, *THE HEART OF DARKNESS* (1915); WILLIAM FAULKNER, *THE SOUND AND THE FURY* (1929); WILLIAM FAULKNER, *LIGHT IN AUGUST* (1929); WILLIAM FAULKNER, *SANCTUARY* (1931). All of this is discussed brilliantly in THOMAS MERTON, *Faulkner and His Critics*, in *THE LITERARY ESSAYS OF THOMAS MERTON* 117-23 (Patrick Hart ed., 1981). See also, *Regina v. Dudley & Stephens* 14 Q.B. 273, 285-86 (1884); *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842); GLANVILLE WILLIAMS, *TEXTBOOK OF THE CRIMINAL LAW* 604 (2d ed. 1983); JOHN SMITH, *JUSTIFICATION AND EXCUSE ON THE CRIMINAL LAW, AND NECESSITY AND DURESS, THE HAMLYN LECTURES* (1989). On the moral problem of choosing one's victim, see Andrew Ashworth, *Justifications, Necessity, and the Choice of Evils*, in *PRINCIPLES OF CRIMINAL LAW* 153-54 (3d ed. 1999).

390. See Blakesley, *Autumn of the Patriarch*, *supra* note 104, at 16-18.

391. See Jonathan Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and its Collapse in Argentina*, 21 *HASTINGS INT'L & COMP. L. REV.* 151-52, 176 (1997) (explaining the collapse of judicial independence in Argentina, resulting in a highly politicized judicial review which de facto always supported the actions of the executive branch).

392. See Michael Dynes, *War Crimes Court Waits for Sierra Leone Poll*, *TIMES* (LONDON), May 14, 2002, available at 2002 WL 4207936; Anthony Goodman, *Mixed Court Proposed to Try*

Rouge *genocidaires*.³⁹³

Pinochet and these other leaders, of course, have wanted immunity. The United States' claim that to allow trials of its own for the violation of international humanitarian law endangers peace is similarly spurious. Whoever orders or participates in terrorism of any sort has committed an ongoing crime. Those who have suffered the pain of terror, torture, rape, and slaughter of loved ones will hold that pain within themselves. They, and humanity, need catharsis, which prosecution may help provide. Whether a "peace" is imposed or not, someday, unless there is justice, rage will fester and we will face the same problem again. Mercy is also necessary in certain cases, but, as Aryeh Neier noted, mercy is not possible if there is no possibility of punishment!³⁹⁴ It is not true and it is dangerous to suggest that somehow *not* punishing those who commit atrocities lends itself to peace. By the same token, prosecuting or punishing without being scrupulous in ensuring fairness and justice is just as dangerous.

Are terrorism and the usual response to it of one cloth? They are indeed, in at least one way. Simone Weil and Thomas Merton were not far off in expressing this as they described a great beast, which is the urge to collective power, "the grimmest of all the social realities . . ."³⁹⁵ They said aptly that this lust for power is masked by the symbols of "nationalism, fundamentalism, capitalism, fascism, [and] racism."³⁹⁶ I would add to that list that perversions of morality and perversion of values like sovereignty, self-determination, and even democracy, cause similar problems.³⁹⁷ Abusing people's sense of ethnicity and heritage, by prompting fear that they are being destroyed, and by fostering insecurity, leaders can cause their followers to do unspeakable acts. And, of course, one must add to the list the perversion of national security,

Sierra Leone War Criminals, at <http://www.my.aol.com/news/story/html#CYCLE> (July 27, 2000); Tom Masland, "We Beat and Killed People. . ."; *Leaders Gather at the U.N. This Week to Discuss the World's Kids, Including Child Soldiers*, NEWSWEEK INT'L, May 13, 2002, at 24, available at 2002 WL 7294190.

393. *Hun Sen Accuses U.N. of Blocking Khmer Rouge Trial*, ASIAN POL. NEWS, May 20, 2002, available at 2002 WL 17029790; *Cambodia's Hun Sen Lashes UN for Pulling Out of Khmer Rouge Trial*, AGENCE FR.-PRESSE, May 14, 2002, available at 2002 WL 2406826; *UN Not Needed for Khmer Rouge Tribunal, Says Cambodia's Prime Minister*, CANADIAN PRESS, May 14, 2002, available at 2002 WL 21293642; *U.N. Endorses Tribunal for Khmer Rouge War Crimes Trial*, at <http://www.cnn.com/WORLD/asiapcf/9903/06/cambodia.01> (Mar. 6, 1999).

394. Presentation by Aryeh Neier, *Meeting of Experts, Association Int'l de Droit Pénal, December 4-8, 1994, Siracusa, Italy* (on file with author). See also ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, and the STRUGGLE FOR JUSTICE* (1998).

395. See THOMAS MERTON, *The Answer of Minerva: Pacifism and Resistance in Simone Weil*, in MERTON, note 338, at 134, 138 (analyzing Simone Weil, *The Power of Words*, in *SELECTED ESSAYS 1934-1943* (1962)); see also SIMONE WEIL, *A FELLOWSHIP OF LOVE* 155-60 (1964).

396. MERTON, *The Answer of Minerva*, *supra* note 395, at 138.

397. See *Ecclesiastes* 1:2 (everything is—may be—vanity).

which often is "a chimerical state of things in which one would keep for oneself alone the power to make war while all other countries would be unable to do so."³⁹⁸ We must, individually and in our nations or groups, explode the myths created and used to prompt us to violence. Otherwise, terrorism and crimes against humanity will be the norm.

The conduct at the focus of this essay poses a vicious threat to peace and human dignity. I believe, however, that the common person may be capable of avoiding or overcoming the manipulation that prompts participation. I believe that we human beings have a common core of values on a few very basic points that are at the essence of our common humanity, that allow us to recognize these crimes and to condemn them.³⁹⁹ We condemn them easily when these crimes are committed against us. We need to instill the vision and fortitude to recognize and resist them when our leaders want to pursue that sort of conduct against others.

Terrorism is condemned—it is criminal—whether committed by states against their own inhabitants or extraterritorially. It is criminal whether it is perpetrated by insurgents, even those struggling for independence or freedom from oppression. I am not arguing for punishment of states, nations, or groups for the commission of these offenses, although this may sometimes be appropriate. My attention has been aimed at the fact that individuals commit these offenses and cause their people to commit them. Thus, individuals, even (or certainly) when functioning in their official governmental capacity, are subject to law and may be punished for committing or aiding and abetting the criminal conduct analyzed herein. Impunity must be eliminated.

If prosecution is to occur, the elements of the offenses must be clearly established. Thus, this criminal conduct we call terrorism should include: (1) violence committed by any means; (2) causing death, great

398. MERTON, *The Answer of Minerva*, *supra* note 395, at 139 (quoting Simone Weil).

399. Cf. Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737, 761 (1999).

The absence of a [complete] "common core" of values and legal norms, however, should not be interpreted as lack of a common humanity but rather as recognition of different normative values and possibly institutional processes. Moreover, a group's identification of difference may serve to "'create' the community and 'create[]' the difference with the outside world." Such a process may be psychologically necessary to counteract the perceived pressure to achieve cultural and legal uniformity, as expressed through universal human rights standards.

Id.; See Laura Nader, *Introduction to LAW IN CULTURE AND SOCIETY* 1, 7-8 (1997); Mark Van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT'L & COMP. L.Q. 495, 498, 536 (1998). Cf. CONRAD, *THE HEART OF DARKNESS*, *supra* 389; CONRAD, *LORD JIM*, *supra* note 389; FAULKNER, *THE SOUND AND THE FURY*, *supra* note 389; FAULKNER, *LIGHT IN AUGUST*, *supra* note 389; FAULKNER, *SANCTUARY*, *supra* note 389.

bodily harm, or serious property damage; (3) to innocent individuals; (4) with the intent to cause those consequences or with wanton disregard for those consequences; (and for the purpose of coercing or intimidating some specific group, or government, or otherwise to gain some perceived political, military, or other philosophical benefit); (5) without justification or excuse. During legitimate conflict, some innocents will be killed or injured, but this is not criminal if it was unavoidable and proportionate to legitimate self-defense.

Procedural and other human rights protections for victims and the accused must be clarified and vigorously maintained. To date, no treaties have done this. Perhaps customary international law and *jus cogens* principles, as manifest in the domestic laws of virtually all nations, provide the needed clarity and specificity. The penal codes of all nations and the customary rules of groups everywhere condemn intentional killing or maiming without justification or excuse. Even those nations or groups that claim some privilege, justification, or excuse to commit such conduct, find it criminal when committed by others against them!

An example from the human rights arena may illustrate. Groups that commit female genital mutilation justify it on cultural or even religious grounds. Suppose, however, that a group of women from another culture (or even from their own) captured men from the group that commits genital mutilation. Now suppose that the capturing group of women apply genital mutilation on the captured men, claiming some justification or excuse. Does anyone have any doubt that the captured men and the official hierarchy of their group or nation would claim that the mutilation was criminal? So it is with a common core of crimes that can be established by looking to the basic principles of nations; that conduct which is deemed criminal when committed against that nation may well be universally criminal. These crimes will essentially be those that impact on our personal autonomy and the integrity or autonomy of our group. This is true, regardless of whether nations commit this conduct against others. Thus, the evidence of the universal condemnation of these offenses is found in the complex of international custom, treaties, and *jus cogens* principles arising out of custom and domestic substantive criminal law. The excuses and reasons given by apologists for those who commit these atrocities ring hollow, but frighteningly familiar. They should remind us of Milton's poignant warning: "*So spake the Fiend, and with necessity, The tyrant's plea, excused his devilish deeds.*"⁴⁰⁰

Care must be taken to ensure that international and domestic action

400. JOHN MILTON, *PARADISE LOST*, bk. 4 (emphasis added), lines 393-94; see also CONRAD, LORD JIM, *supra* note 389, at 86, 95, 357, 367; CONRAD, *HEART OF DARKNESS*, *supra* note 389.

taken to obtain justice and to prosecute perpetrators does not fall into the same trap that ensnared those who committed the crimes. If we allow ourselves to descend to simple vengeance, we are lost.