

TITTLE

A CRITICAL EVALUATION OF SOME OF THE LEGAL IMPLICATIONS OF THE “WAR ON TERROR” IN INTERNATIONAL HUMANITARIAN LAW.

TANTOH MICHAEL TANGANG

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SUPERVISOR

PROFFESSOR L van der Pol

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ACKNOWLEDGEMENTS

THIS IS DEDICATED TO MY LATE MOM AND DAD TANTOH ELIZABETH AND TANTOH CHRISTOPHER. TO MY FAMILRLY TANTOH AUNT, TANTOH GLEN , TANTOH RHONDA AND BARON. FINALY TO MY FRIENDS CHU FIDELIS, LOUIS MUSAKE AND THE REST OF THE CAMEROONIAN COMMUNITY IN CAPE TOWN. JUST TO THANK THAN FOR ALL THEIR SUPPORT

A CRITICAL EVALUATION OF SOME OF THE LEGAL IMPLICATIONS OF THE 'WAR ON TERROR' IN INTERNATIONAL HUMANITARIAN LAW

PREFACE

Since 11 September 2001, the issue of terrorism has influenced events on the international stage. However, the necessity to eliminate this phenomenon had been perceived long before the above date. World leaders at the League of Nations already realized the importance of putting in place laws geared at combating terrorism. Proposed laws however did not see the light of day owing to the overly ambitious nature of the legislation coupled with the involvement of States in events leading up to the Second World War. The proposed laws of the League of Nations, though signed by all the representatives (except Britain), was only ratified by India. Despite the failure of the League of Nations to get all representatives to agree on laws to safeguard against international terrorism, the international community has continued to look for ways and means of addressing this problem in a peaceful and diplomatic manner. This does not mean to say that the events after the declaration of the “War on Terror” marked the first time an aggrieved State has used force against another sovereign State suspected of harboring terrorists or financing terrorist activities. In fact, the 1996 and 1998 bombings of Tripoli and Sudan respectively, are instances where the US used force against another sovereign state suspected of sponsoring terrorist activities against America. There was, however, a difference in agenda for the previous two situations and the attacks on Afghanistan and Iraq after the World Trade Center attacks in 2001.

Before 11 September 2001 the aim of the US was to prevent countries from financing terrorist activities, pursuant to the 1999 International Convention for the Suppression of the Financing of Terrorism. The so-called “War on Terror” on the other hand has a more elaborate agenda. It is not only geared at preventing sovereign States from sponsoring terrorist activities, but is also considered by the US as a crusade for human rights and the establishment of democracy in “uncivilized” nations.¹ These so-called “uncivilized” nations are considered an ‘axis of evil’ and, as a result, a threat to civilization. This

¹ The term has often been used by the Bush administration to refer to nations, which it perceives as undemocratic and hence a threat to international order. The agenda of the US administration is to eliminate such governments and help instal democracy and respect for Human Rights in such countries. Thus the elimination of the Taliban regime in Afghanistan and the Iraqi regime led by Saddam Hussein.

crusade for democracy has seen the US go to war with Afghanistan. This war led to the overthrow of the Taliban regime in that country. The next phase of the crusade was against Iraq, which also led to the overthrow of the Iraqi regime led by Saddam Hussein. These events are widely regarded as the beginning of the so-called “War on Terror”.² The above two armed conflicts have been a subject of numerous debates in the fields of International Law in general, and International Humanitarian Law in particular.³ So far, conceptualization of these wars has been a matter of controversy. First, an acceptable definition of the term terrorism has eluded International Law makers up till this point. It has proven more and more difficult to deal with the problem of terrorism without a general consensus on what will constitute these acts. Secondly, the definition of war itself is problematic. Thus it could be said that the notion of “War on Terror” is a controversy in itself. Thirdly, there are questions arising as to the nature of the so-called “War on Terror”. Is this actually a war of the type contemplated by the drafters of the Geneva Conventions or just another phrase coined to indicate a global struggle against a societal plague, such as ‘war against malaria’ or ‘war against polio’? The fourth and most controversial is the issue of the status of the captives of the war with Afghanistan and Iraq in particular, and the “War on Terror” in general. The legal status of those held in Guantanamo Bay and other detention camps around the world contrasts sharply with the notion of “enemy” combatant put forward by the US administration.

This mini-thesis intends to examine these questions. It does not pretend to discuss all the issues and debates raised by the so-called “War on Terror”, neither does it intend to provide full answers to all the questions raised in this study. It is presented as a contribution to a highly complex debate.

To have a better understanding of the issues raised, it will be imperative to understand the history and development of terrorism before 11 September 2001 and how the international community approached the problem of terrorism prior to that date.⁴ Also

² According to the US administration, these are States that harbor terrorists, and in the “War on Terror”, no distinction is made between these States and the terrorists.

³ The most controversial of the debates is centered on the legal status of those captured and held at Guantanamo Bay and other prisons around the world. Whether they satisfy the criteria to be considered prisoners of war as laid down in the Geneva Conventions will be considered in another chapter.

⁴ See Chapter one.

important will be the difficulties surrounding the definition of ‘war’ and ‘terrorism’.⁵ However, this mini thesis does not intend to propose any definition of the terms ‘war’ or ‘terrorism’. It only intends to show how the lack thereof impacts on the current fight against terrorism. Since the fight against terrorism developed a new dimension after the attacks on the World Trade Center (WTC), the events of 11 September 2001 that led to the declaration of the “War on Terror” will be discussed briefly.⁶ The context of the “War on Terror” in International Humanitarian Law will require a critical assessment of the wars in Afghanistan and Iraq. To this end, it will be necessary to examine the internal conflicts taking place in both countries prior to the US attacks. This is important, as it will help to determine the legal status of captives held at the island of Guantanamo Bay and other detention camps around the world. The legal bases of the attacks on Afghanistan and Iraq in the light of the decision in the *Nicaragua* case and the appeal court decision in the *Tadic* case will also be examined.

The issue of prisoners of war is the most controversial as far as the “War on Terror” is concerned. This being so, the debate surrounding this problem will constitute the main core of this mini-thesis.⁷ In this regard, the provisions of the law pertaining to the protection of prisoners of war will be analyzed in juxtaposition with the notion of ‘illegal’ or ‘enemy’ combatant as put forward by the US administration. Chapter Six will be dedicated to two issues. The first of which will be the importance of the Geneva Conventions in the so-called “War on Terror”: The second issue will be the relevance of these to the fight against terrorism in particular, and their adequacy in governing modern day conflicts in general.⁸ Finally, there will be the conclusion and appropriate recommendations on the key issues raised in this mini-thesis.⁹

⁵ Chapter Two will examine these difficulties and the impact they have on the current fight against terrorism.

⁶ See Chapter Three.

⁷ The issue of prisoner of war in the framework of the “War on Terror” will extensively be elaborated on in Chapters Four and Five.

⁸ For the importance of the Geneva Conventions and their various protocols in the fight against terrorism, see Chapter Six.

⁹ This will be the purpose of Chapter Seven.

CHAPTER ONE

1.1

Introduction

It would have been ideal to begin a mini-thesis of this nature with a definition of the term terrorism. This approach will however not be taken for three reasons. Firstly, there are disagreements inherent in the definition of the term due to the complexity of the issues involved.¹⁰ Secondly, any attempt to define terrorism at this point will limit the ensuing arguments to such definition. The third reason why this mini thesis does not commence directly with a definition of terrorism is that it does not intend to dwell on the problem related to the definition of the term at this stage. The intention here is to show how the lack thereof impacts on the research question, namely, the conceptual difficulties surrounding the so-called “War on Terror”. To this end, the problems of defining terrorism and the relevance thereof to the research question will be discussed in a subsequent chapter.¹¹ To facilitate an understanding of the subject matter and the challenges it poses today, it will be important to discuss the development of terrorism from a historical perspective and the early attempts by the international community to combat this phenomenon. Here again an attempt will not be made to scrutinize the various terrorist groups that have existed over the centuries. The reason being that they have been as numerous, as their motives have been diversified.¹² Thus it will be an endless task trying to identify each and every one of them. In this regard, it will be preferable to focus on the changing face of terrorism over the last century, making mention only of those terrorist acts that had a significant impact on International Law in general and International Humanitarian Law in particular. This chapter will thus focus on the developments in 20th century terrorism.

Terrorist activities during this period can be divided into two phases, namely

¹⁰ Terrorism is a loaded term filled with political and economic issues. Thus as will be seen later, any legislation aimed at its eradication is often met with strong opposition by groups or countries who feel such legislation will hamper their economic or political agenda

¹¹ The problem of defining the terms ‘war’ and ‘terrorism’ is dealt with in Chapter Two

¹² According to Walter Laqueur, in the book *Terrorism*, terrorist groups have appeared in Italy, France and Russia mainly depending on the challenges posed at the period of their formation. They suddenly disappear as soon as their goal has been reached.

-Terrorism in the first half of the 20th century,¹³ a period noted for political assassinations and individual killings; and

-Terrorism in the second half of the 20th century.¹⁴ Where terrorist activities moved from political assassinations to massive killings with total disregards for civilian lives. This Chapter also intends to investigate the reasons for the rapid development in modern day terrorism¹⁵ and the earlier attempts by the international community geared at combating this phenomenon.¹⁶ 11 September 2001 is an important date in the fight against terrorism. This is because after this date, the struggle against terrorism intensified with tremendous consequences in International Law in general, and International Humanitarian Law in particular. This chapter will examine the international community's approach to terrorism before,¹⁷ and after this date¹⁸

1.2 Terrorism in the first half of the 20th century

There might be a lot of controversies and complexities in the formation of an internationally acceptable definition of terrorism. However, if there is one thing that is unanimously agreed upon, it is the fact that terrorism is not new. Terrorism is as old as history itself.¹⁹ This, however, does not mean that the nature of terrorism have remained static. It has evolved over the years, even if the evolution process, still retained some of its typical characteristics, for example, contemporary practitioners are still driven by religious and political convictions, something that drove most of their earlier contemporaries.²⁰ The earliest terrorist acts were perpetrated by organizations such as the Sicari and the Zealots, both Jewish groups active during the Roman occupation of Palestine the 1st century.

Though acts of terrorism are as old as history itself, the terms 'terrorism' and 'terrorist' are relatively recent. The meaning given to 'terrorism' in the 1798 supplement to the

¹³ See chapter 1

¹⁴ See 1.2

¹⁵ See 1.3

¹⁶ See 1.4

¹⁷ See 1.5

¹⁸ See 1.6

¹⁹ Yonah Alexander, *International Terrorism: Political and Legal Documents*. (1992). pix.

²⁰ *Ibid* p.2

Dictionnaire de l'Académie Française was: *system régime de la terreur*.²¹ According to a French dictionary published in 1798, the Jacobins had on occasion used the term when speaking and writing of themselves in a positive sense.²² Terrorism actually received the negative connotations we know of today during the time of Maximilien Robespierre and the Reign of Terror in France between 1793 and 1794.²³

The 20th century witnessed the evolution of terrorist behavior with the assassination of the heir to the Austrian throne, Archduke Franz Ferdinand and his wife in Sarajevo.²⁴ It was at its highest during this era in Russia owing to the advent of social revolutionary groups aimed at eliminating the Czars. An assassination by militant groups in the first half of the 20th century that shocked the world was that of King Alexander of Austria.²⁵ In Russia the social revolutionaries in the early years of that century in launching their attacks deliberately intended to destroy the awe in which the population of Russia held the regime. They felt that as long as people feared the government and believed it to be omnipotent there was no possibility of a revolution. Thus the murder of government officials or supporters of government was an important step in causing the numerous glows surrounding the government to evanesce.²⁶ These assassinations prompted the formulation and adoption by the League of Nations of the 1937 Convention on the Prevention and Punishment of Terrorism. This was the first international attempt at dealing with this issue.²⁷

²¹ This was a regime headed by Maximilien Robespierre. This regime ruled France for almost a year.

²² Walter Laquer, *Terrorism*, 1978 p.16.

²³ For more on the history and development of terrorism, see Mark Burgess. *History of Terrorism*: which can be accessed at <http://www.cdi.org>. (Accessed on the 25th of July 2006)

²⁴ This was an assassination that set in motion a series of events culminating in the outbreak of the First World War.

²⁵ He was assassinated in the streets of Marseille, France, together with the French Prime Minister Louis Bartou. Members of the Internal Macedonian Revolution (IMRO), claimed responsibility for this assassination.

²⁶ Richard Pipes. *The Roots of Involvement. International Terrorism: Challenges and Response*. in Benjamin Netanyahu (Ed). (1981)P.58.

²⁷ Marc A Celma. *Terrorism, US Strategies and Reagan's Policies*. (1987). p6. The relevant provisions of this Convention will be examined in greater detail in page 12

1.3 Terrorism in the second half of the 20th century

Terrorism in the first half of the 20th century was aimed at specific targets. The assassinations of Russian Tsars, for example, were carried out by people who felt that a specific man in power represented or embodied political or social evil, and as a result must be eliminated. By contrast, international terrorist incidents of the 1970's and the 1980s were aimed at a wider spectrum of targets with little regard, or concern for injuries to innocent civilians.²⁸ This is not intended to mean that such disregard only began in the 70's and 80's. In fact, The Peoples Will Organization in Russia was the first to consider the enemy to be the whole system. Their anger was not only directed against autocracy but also against capitalism, religion, law and anything else that kept the existing system intact. This organization was responsible for the assassination of Tzar Alexander II. Though they had no political hostility towards him personally (some even admired him for liberating the serfs), they regarded him as an essential part of an inherently evil system that had to be destroyed.²⁹ Thus, as rightly argued by Pipes, the assertion that the difference between previous and modern acts of terrorism is that modern terrorism takes no account of the lives of innocent civilians is not completely true. He asserts that Tsar revolutionary groups like The People's Will Organization happily killed anybody that came in their way. But many of the central figures of one of the most notorious terrorist organization of the time, the *Varodnaya Volya*,³⁰ had a different view of the reason for terrorist activities. They emphasized that terrorism was ethically a better choice than allowing the carnage that would result from a mass insurrection. If innocent people died as a result of terrorist activities, it was to be accepted as the inevitable consequences of war, and was therefore preferable to the slaughter that would accompany a mass struggle.³¹

The age of modern terrorism however, might be said to have begun in 1968 when the Popular Front for the Liberation of Palestine (PFLP) hijacked an El Al airline en route from Tel-a-Vive to Rome. While hijacking of aircrafts had occurred before, this was the

²⁸ Ibid

²⁹ Richard Pipes: p.58

³⁰ This was a small Russian organization initially consisting of thirty members with the intention of eliminating all the Russian Tsars.

³¹ Grant Wardland. *Political Terrorism; Theory, tactics, and counter measures.* (1989). P23.

first time the nationality of the carrier (Israeli), and its symbolic value, was a specific operational aim. In addition, it was the first time that passengers were deliberately used as hostages for demands made against the Israeli government.³²

19th and early 20th Century terrorist acts were directed against individuals and politicians in power. By contrast terrorist activities during the latter part of the 20th Century most will agree, had little regards for innocent civilians. If terrorism is taking center stage in world politics today, it is due to this total disregard for civilian lives. What then are the reasons for the developments in modern day terrorism?

1.4 Reasons for the recent growth in terrorism

Terrorism is an old phenomenon, but until recently, actions by individuals that today would be described as “terrorist” were subsumed under different labels. In the case of murders of heads of states, for example, those responsible for the assassinations were glorified by the subjects of the despots, and greeted in other countries at the time. Western European folk-lore glorified tyrannicide in the past where it had been the only means of bringing to an end a hated despotic rule, especially one imposed by foreigners by force of arms.³³ The heroic status given to these assassins and their acts encouraged others to follow suit. This definitely planted the roots of terrorism that has grown over the years to what we know today.

Another element that helped sustain terrorism in its early stages was the cultural-historical background of western political ideas legitimizing the exercise of direct action and force of arms as an instrument of societal change. This happened in cases where the ordinary constitutional-governmental process, to which one might normally look up to, either did not exist or had become hopelessly clogged.³⁴

In recent times, however, the growth of terrorism has been fostered by many factors.³⁵ Three of them will be considered at this stage.

³² Terrorism in The 20th Century. Can be accessed at [http://www. Terrorism research. Comm.](http://www.Terrorismresearch.Comm) (accessed on the 25th of July 2006).

³³ See Edward McWhinney: *Aerial Piracy and International Terrorism, The Illegal Diversion of Aircraft in International Law.* (1987) P.128.

³⁴ Ibid.

³⁵ According to Antonio Cassese. *Violence and Law in the Modern Age*, (1986), the existence of harshly authoritarian structures amongst many states, profound social and economic inequalities amongst nations, progressive fragmentation of various centers of power in the International community and the continuous

First, in an age of communication and media objectivity, it is sometimes argued that the media are tools used by terrorists for publicity purposes. The Chinese saying “kill one frighten ten thousand”³⁶ holds true in modern day terrorism. The press has become the unwilling, and in some cases willing, participant in terrorists’ publicity campaigns. While some terrorists and terrorist organizations use the media to spread fear and their ideologies, others actually make publicity their sole objective.³⁷ The media has been accused not only of giving extensive coverage to such incidents but adopting their terminologies and arguments and transmitting them to the public uncritically and even sympathetically.³⁸ Furthermore, the press interviews terrorist and murderers thereby, according them the status of respectable politicians. In hostage takings, for example, it is argued that the presence of the media endangers the lives of the hostages, as a hostage taker is more likely to kill a hostage in front of the press to prove his point to the world. In a free society, however, this is unavoidable, though it will be a good idea to give terrorism coverage the same constraint that applies to pornography and other deviant behavior.³⁹

The second element that has enhanced the growth of terrorism in recent years is the problem of state sponsorship. Terrorism in the early days used to operate on meagre funds and with no precise objectives. After the First World War it became the fashion among some governments to finance terrorist groups. The Italians and the Hungarians, for example, financially supported the Croats and the IMRO. The IRA received contributions from the USA, while the Palestinian Arab terrorist groups have been

proliferation of poles of interest owing to the fact that the international community is no longer crystallized into a few great blocks dominated by one power able to control any centrifugal tendency, the inability of the international community in its organized form, e.g. the UN, to offer an ‘adequate’ response to the request for greater justice and to the need for preventive mechanisms to defuse economic and social conflicts, the inability of oppressed groups to fight for their rights conventionally thus resolving to battle by way of terrorism, are some of the elements that have given impetus to the growth of terrorism in recent times. Yonah Alexander (1992) *International Terrorism, Political and Legal Documents*. adds further that, intensification of religious fundamentalism, rapid development in modern technology, communication facilities and inexpensive and convenient travel have greatly enhanced the growth of terrorism.

³⁶ Edward McWhinney *Aerial Piracy and International Terrorism* (1987) P.16

³⁷ As for example the Croats who seized Yugoslav hostages and demanded only that the press publish their manifesto. See Charles Krauthammer: *Partners in Crime, Terrorism, How The West Can Win*. In Benjamin Netanyahu (ed). 1986.P.111.

³⁸ Ibid: *Terrorism And The Media* P.103.

³⁹ For an in-depth look at how the media has enhanced modern days’ terrorism, see Alex P Shmid and Janny de Gaff: *Violence as Communication*; (1982). See also Gerard Chaliand: *Terrorism, From Popular Struggle To Media Spectacle*. (1985).

receiving hundreds of millions of dollars from oil producing countries.⁴⁰ Through out the Cold War the Soviet Union provided direct and indirect support to revolutionary movements around the world. Many anti-colonial movements found the revolutionary extremist against colonialism attractive. Also attractive was the advantage of free weapons and training coupled with the realization that assistance and patronage from the Eastern Bloc would amount to some international legitimacy.⁴¹

State support for international terrorism has not been the monopoly of the Soviet Union. Direct and indirect support has also been offered by Arab states to both Arab and non-Arab organizations.⁴² The Popular Front for the Liberation of Palestine (PLO) has been a great beneficiary of such support. They have relied heavily on the support of other Arab states for the provision of weapons and munitions.⁴³ For Palestinian Arab terrorists outside the Middle East, these Arab states have provided passports and other official papers, and the use of diplomatic pouch not only for mail but also for weapons and explosives. They have also provided intelligence and miscellaneous on-the-spot assistance.⁴⁴ This has enabled terrorism to grow over the years from little groups of individuals who wanted to use terror to foster their ideas to the multi-million dollar operations we know today.

There is also a third factor: the creation of a terrorist network around the world. Terrorism could not have attained its present proportions without states support and the collaboration of terrorist groups throughout the world. There are numerous examples of terrorist groups collaborating with each other. The PLO, for example, played a pivotal role in terrorist collaboration over the years.⁴⁵ This role was in turn backed by the Soviet Union and the Arab world. For many decades the PLO was the only terrorist organization in existence to possess in Lebanon a quasi-independent state to which terrorists from all

⁴⁰ Walter Laquer: *Terrorism*; (1978). P.111.

⁴¹ Terrorism in the 20th century. Can be accessed at <http://www.Terrorismresearch.com>. (Accessed on the 25th of July 2006).

⁴² According to Barry Rubin : *Israel, the Palestinian Authority and the Arab States* (1988), the Arab States were an indispensable base of support for terrorist organizations without which movements such as the PLO might have collapsed or be ignored.. Can be accessed at <http://www.biu.ac.il/books/36pub.html#A>

⁴³ According to the same source, Arab states treated the PLO more as a tool than partner neither consulting it nor respecting its interest when setting goals against Israel or the US.

⁴⁴ For an in-dept understanding of the role played by Arab states in international terrorism see Aharon Yariv. *International Terrorism: Challenges and Response; Arab State Support For Terrorism*. In Benjamin Netanyahu ed. (1981). Pgs.73-78.

⁴⁵ Haris O Shoenberg. *A Mandate for Terrorism. The United Nations and the PLO*. (1988) P605.

over the world were brought for training and, in many cases, indoctrination.⁴⁶ Another example of collaboration and a high standard of networking is provided by *Al-Qaeda*. With satellite branches all over the world,⁴⁷ each satellite carries out its own operation all in the name of the mother organization. It, however, remains unclear whether they receive orders from a central command.⁴⁸

This network of support by states and terrorist organizations alike not only exists, but also is instrumental to the growth of modern terrorism. An effective struggle against international terrorism, thus, must begin by eliminating this network that is growing from day to day. As for the support of states, there is already the 1999 International Convention for the Financing of Terrorism geared at deterring States from sponsoring terrorist acts.

The above factors have greatly enhanced the growth of terrorism in recent years. But this does not mean that the threat to civilization posed by terrorism had not been realized by earlier statesmen. The next section will examine the earlier attempts by the international community to combat terrorism.

1.5 Earlier attempts by the international community to combat terrorism

While the main wave of 18th century terrorism might have taken place in imperial Russia with the Czars and their police chiefs as target and victims, the European royal dynastic houses were not spared. In the space of three decades leading up to the 19th century and the outbreak of the First World War in 1914, there were assassinations of monarchs and heads of states all over Europe and America. Apart from the assassination of Franz Ferdinand, heir to the Austro-Hungarian throne, and his wife as well as the Russian Tzars, there were the assassinations of the President of France, the wife of the Emperor of

⁴⁶ Though the PLO lost its base in Lebanon, it continues to play through its various factions, its contacts, its funds, and its world wide operations, a pivotal role in international terrorism. For a comprehensive look at the relations and collaborations between the PLO and other Arab and non-Arab revolutionary and terrorist groups around the world, see Benjamin Netanyahu. *The International Network. Terrorism, How The West Can Win*. In Benjamin Netanyahu (ed) (1987). Pgs 83-110.

⁴⁷ The US Congress in 2003 reported that this organization has 60 branches all over the world some operating within the US itself.

⁴⁸ According to an article by Desmond Butter in the New York Times London, before the war with Iraq, *Al-Qaeda* networks all over Europe were recruiting young people for Iraq presenting them with money and travel documents. This article can be accessed at <http://www.smh.com.au/article/2003>.