

THE EXTRATERRITORIAL USE OF FORCE AGAINST TERRORIST BASES

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DEFINING TERRORISM AND STATE OBLIGATION

Our Chairperson has clearly stated the issue which we are to discuss—namely, whether armed force may be used to attack terrorist bases in another country. I shall address this as a question of international law, with particular reference to the UN Charter provisions concerning use of force and relevant general or customary international law. It is not my aim to advocate or defend the legal position of a particular country. My standpoint will be that of a hypothetical international court.

Before considering the principal question—the international use of force against terrorist bases—it may be useful to clarify what is meant by international terrorism and to indicate the obligations of states in that regard. These are not simple questions, but I will limit myself to a fairly summary comment.

It is true that various definitions of terrorism have been proposed or adopted and that no single inclusive definition of international terrorism has been accepted by the United Nations or in a generally accepted multilateral treaty. In my opinion, this does not mean that international terrorism is not identifiable. It has a core meaning that all definitions recognize. It refers to the threat or use of violence in order to create extreme fear and anxiety in a target group so as to coerce them to meet the political objectives of the perpetrators. Such terrorist acts have an international character whether they are carried out across national lines or directed against nationals of a foreign state or instrumentalities of that state. It also includes the terrorists acts defined in the international conventions against hijacking, aerial sabotage, sabotage at sea, hostage-taking, and attacks on diplomats and other internationally protected persons. Terrorist acts are generally carried out against civilians, but they extend to acts against governmental buildings, vessels, planes, and other instrumentalities. The objectives of the terrorist are usually political, but terrorism for religious motives or ethnic domination would also be included. However, purely private motives, such as ransom or robbery, would not be included.

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We usually think of terrorists as organized groups that are not under state control. But, states may utilize terrorist agents or their own officials may perform terrorist acts on their behalf. There is no adequate reason to exclude such acts from the definition. Finally, I note that terrorism may be committed by the military in peacetime or during armed conflicts, including war. The indiscriminate or deliberate killings of civilians or prisoners of war constitute grave breaches of the laws of war; they are war crimes, but that fact does not make them any less terroristic. Guerilla forces fighting in organized, distinguishable units against governmental troops are not terrorists unless they perform terrorist acts such as deliberately slaughtering civilians. The same holds for regular military troops. To be sure, in armed conflicts the line between the indiscriminate attacks on civilians and attacks on military objectives can be difficult to determine in particular cases, but this does not change the general prohibition of terrorist acts by combatants.

Terrorist acts are criminal irrespective of terrorist motives or the cause served. It is often said that one man's terrorist is another's freedom fighter. This may well be true, but it does not mean that a person "fighting for freedom" cannot be a terrorist. Terrorism is defined by actions, not by the cause it is intended to serve. Killing children, bombing airplanes, and abducting journalists are all terrorist acts even though those responsible see them as a means toward liberation or some other ideal. This is the clear purport of the unanimous UN General Assembly Resolution that condemns as criminal "all acts, methods and practices of terrorism wherever and by whomever committed."¹ It is true that the same resolution recognizes the inalienable right to struggle for self-determination and national independence in accordance with the UN Charter. Some Americans have suggested that this eviscerates the resolution. That is a regrettable and, in my view, an unfounded interpretation. The great majority of governments voted for that provision on the understanding that the "struggle" for self-determination must conform to the Charter principles relating to the use of force and that international terrorism "by whomever committed" is an international crime. The United States and other western states acclaimed the resolution on that understanding. It is rather absurd for those opposed to terrorism to read into it an exception that is contrary to the main object of the resolution.

The condemnation of international terrorism as criminal must be understood as imposing on all states obligations to take appropriate measures to prevent acts of international terrorism. This includes the

1. UN General Assembly Resolution 40/61, reprinted in 25 *ILM* 239 (1986).

duty to refrain from aiding, supporting, or acquiescing in terrorist activities. For a state to allow a terrorist base within its territory would be incompatible with that obligation. A failure to apprehend persons who have carried out terrorist acts in other countries or aided and abetted such acts is likewise a violation of international obligation. When suspected terrorists are apprehended, the state must either extradite or try and punish them. This obligation, I believe, is now accepted customary international law. Questions may be raised as to its application in particular cases, but such questions should not blur the duty to take action so as to punish those found guilty of terrorism. I now turn to the main issue of the right of a state to resort to extraterritorial force against terrorist bases.

RIGHT TO USE FORCE

There are two obvious starting points to this discussion. One is that international law does not allow a state to exercise criminal enforcement jurisdiction in another country without the latter state's consent. The second is that a state is forbidden to use force against the territorial integrity of another state except as self-defense in response to an armed attack.² It has been suggested that terrorists should be an exception to the general rule. It is said that terrorists, like pirates, are "enemies of all mankind" and that states have a right to seize them wherever they are. I should observe, first, that this is not precisely the law on piracy. States may apprehend pirates on the high seas — that is, when they are not within the jurisdiction of any state. But, states have no right to enter another state's territory to seize suspected pirates. The analogy to piracy does not help to answer the problem of extraterritorial enforcement measures against suspected terrorists.

The answer can be found in the right of self-defense in accordance with article 51 of the UN Charter. Several questions have to be considered in this regard.

1) *Does article 51 or relevant customary law allow extraterritorial use of force in response to an armed attack by a non-state group?* Article 51 contains no qualification of armed attack. An armed attack by terrorists against a state would not be excluded any more than would an armed attack by insurgents.

2) *Is an attack by terrorists on nationals of a particular state outside*

2. My views on the international law relating to force are expressed more fully in two articles: *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984), and *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986).

of that state an armed attack on the state? I submit that when such attacks are aimed at the government or intended to change a policy of that state, the attacks are reasonably considered as attacks on the state in question. In some cases, attacks on non-nationals who have ethnic or religious affiliations with a state opposed by the terrorists should be regarded as attacks on the state. For example, the terrorist attack on the synagogue in Istanbul was presumably intended to strike fear or intimidate Israel, the real target.

3) *Is an attack on persons within a state that is not itself the political target of the terrorists an attack on the territorial state?* For example, would an attack on an American plane in Rome be an attack on Italy? It is certainly plausible to consider this as the use of force against territorial integrity. It may therefore be considered an attack on that state, permitting it to take self-defense measures.

4) *Would evidence of a terrorist base in a foreign country and of preparations to attack the target state legally justify an armed preemptive attack by the latter?* My short answer to this controversial issue is that an extraterritorial preemptive strike would not be a legitimate self-defense unless the threatened attack was imminent and armed self-defense required a preemptive strike as a matter of "necessity." "Necessity" is a matter I will discuss later.

5) *Where a terrorist attack on a citizen or instrumentality of the target state had occurred, would that state have a right to attack terrorists in another country as a reprisal or punitive action?* In principle, punitive reprisals are forbidden. However, self-defense would be legitimate where there was evidence of a continuing intent to carry out further attacks. Hence, President Reagan justified the U.S. bombing of Libya by referring to evidence of a planned series of attacks by Libyan-supported terrorists against U.S. targets around the world. The continuing activities of a group of terrorists, and their threats against target governments which have already been attacked by them, would support the legality of retaliatory acts of self-defense, even though such retaliation may also be seen as punitive.

6) *Does the state that suffered a terrorist attack have to prove that its counter-attack on the terrorist base is "necessary?"* The requirement of "necessity" remains a condition of self-defense under the Charter as under customary law. The International Court in the Nicaraguan case affirmed that rule. The state under attack has the right initially to decide for itself whether an armed retaliation is necessary, but its initial determination is not, as a matter of law, final or decisive.³ In the absence of

3. For a fuller discussion of the competence to judge the legitimacy of self-defense claims

compulsory jurisdiction, judicial review is highly unlikely: The Nicaraguan case is a rare exception. However, a state using force cannot escape review by the United Nations Security Council and General Assembly if other states challenge the legality of its use of force. For this reason, it cannot be said that the state using force is ultimately the judge of its own cause. Any state may raise the matter in the competent UN organ. Of course, the veto right of the big powers in the Security Council imposes a severe limitation on the Council's power to decide the issue. The veto protects not only the five permanent members, but also any country for whose benefit a permanent member is prepared to use the veto. Nonetheless, the Security Council has decided in several cases that states claiming self-defense as a justification for the extraterritorial use of force were not entitled to that right in the particular case. Such decisions have a large political component. The Council is not a judicial body, and it is not expected to behave as such. However, the legal issues are generally discussed and the views of states expressed on their merits.

The General Assembly, not inhibited by the veto, has passed on several important claims of defense. Here, too, the political character of the discussion and the decision diminishes its value as a judgment of legality. But when a state is condemned by very large majorities, including countries allied or friendly to the censured state, as occurred in regard to the bombings in Tunisia and Libya, the condemnation is significant.

7) *Are there appropriate legal criteria for determining the necessity for self-defense?* This is a hard question to answer. Essentially, the question of necessity can only be answered on the basis of the particular facts and their political context. Nevertheless, criteria are important for reaching judgments that reflect community expectations and will receive community support. All acts of terrorism are illegal, and all call for sanctions and preventive action. However, not every act or threat would justify the use of armed force outside of the injured state. Isolated and sporadic terroristic acts, even where apparently carried out under the orders or with the support of a government, have not resulted in retaliatory bombings or armed invasion and are not expected to do so. Other responses are considered appropriate. A critical determinant of the magnitude of the terrorist threat would often be the pattern of prior attacks. An attack that is part of a series of attacks adds to the "necessity" of forcible defense. It cannot be judged in isolation.

In regard to the U.S. bombings of Libya, both the United States and

by states using force, see Schachter, *Self-Defense and the Rule of Law* 83 AM. J. INT'L L. 259 (1989).

Britain emphasized that the United States had clear and definite knowledge of planned future attacks. The point is especially relevant to justify the necessity of defensive action and to distinguish it from punitive reprisals.

One might argue that if knowledge of an impending attack were truly precise and certain, defensive action could be taken in advance against the expected assault, and that further retaliation is unnecessary. However, it is rare that foreknowledge can be so certain and precise. If there had been a pattern of prior attacks and a substantial threat, the need to have definite knowledge of future attacks should be less demanding.

Sometimes states facing a terrorist threat have given warnings of retaliation by armed force. It cannot be said that there is a duty to warn, nor can it be said that a warning should strengthen an otherwise weak case. But like exhaustion of remedies, it may be a factor in finding a necessity to act when the warnings are not heeded.

Some of you will recall that the arbitral tribunal in the *Naulilaa* case held that attempts at peaceful redress should precede the use of force in self-defense. Clearly, in some cases of hostilities, this does not make sense. An ongoing attack requires armed defense at the time of the attack. However, in other cases, recourse to peaceful means of redress, if ineffective, may indicate that force is necessary. Even though nonviolent measures may not be adequate to cope with terrorism in some cases, it would be a mistake to eliminate the idea of seeking other means as a condition of necessity or to assume that other redress would always be ineffective. An economic boycott or severance of air and sea links has had the desired effect in some cases.

The case for use of force is obviously strengthened when the state responding to terrorism is able to show complicity or responsibility of the state in which the bases are located. This is true even if, as Secretary Shultz once said, it may not be possible to get the kind of evidence that can stand up in a court of law. The requirement of evidence varies with the charge. Detailed factual evidence may not be needed to support a claim that a state fails to control terrorist activities on its territory. On the other hand, charges that terrorists are under control of a state or supported by it would require more specific evidence. In fact, states making such charges generally tend to refer to specific evidence, as did the United States vis-à-vis Libya and the French with respect to Syria. The British insistence on proof by the United States of Libyan direction of the West Berlin attack that led to the U.S. retaliatory air strike shows how important it is to produce evidence that the retaliation is justified.

Difficulties arise, however, when the evidence has been obtained by means that must remain secret.

8) *Is the requirement of proportionality meaningful?* Proportionality, as often noted, is difficult to define. However, its significance in judging the propriety of forcible responses should not be minimized. A grossly disproportionate response, the destruction of a city because of a single terrorist incident, would create revulsion and horror, even when the target state is seen as an enemy. In addition to the moral reaction, a prudential role is also served by respect for proportionality since it inhibits the escalation of conflict. The bombings in Tunisia in 1985 and in Libya in 1986 have been condemned more for lack of proportionality than for any other reason.

The U.N. Security Council in several cases, most involving Israel, has judged proportionality by comparing the response on a quantitative basis to the single attack which preceded it. Two other tests would have been appropriate. One would be to consider the response in relation to a continuing pattern of attack rather than the last one. Tit for tat is not the only test of proportionality.

Another test would be to judge proportionality in terms of the end sought, namely, the cessation of attacks, and the means used. If proportionality consists of a reasonable relation of means to ends, it would not be disproportionate if in some cases the retaliatory force exceeded the original attack in order to serve its deterrent aim. One might say that the force would have to be sufficient to cause the terrorist to change his expectations about costs and benefits so that he would cease terrorist activity.

Proportionality is especially relevant to actions that injure non-combatants or destroy civilian property in excessive degree. Self-defense actions against terrorism are not exempt from the humanitarian rules applicable to armed conflict. Thus, the general prohibition against non-combatants or excessive destruction of civilian property apply. The fact that terrorist bases are found in the midst of cities, and may therefore be "shielded" by non-combatants, can give rise to a difficult dilemma. It is nonetheless desirable to recognize legal as well as moral restraints relating to non-combatants. Non-combatants should not be intentionally injured, and their injury should not be a means to achieve an otherwise legitimate end. The U.S. bombing in Libya was defended in the United States on the ground that other means of retaliation would have involved greater risks to civilians and that the bombing was aimed at military bases (the U.S. asserted that collateral damage to civilian areas occurred by error). The actual facts are in controversy, and it must be noted that a large number of states voted to condemn the U.S. bombing.

Demands to treat state-supported terrorism as "war" raise the issue of proportionality. The rhetoric of war is resorted to in order to win public support for more strenuous measures. It carries with it the danger of raising anti-terrorist activities to the level of unrestrained violence and moving the responses beyond the legal limits of self-defense. Actually, no state has considered itself legally at war in response to terrorism, but public and political emphasis on "war" by terrorists fosters attitudes that are counterproductive to proportionate responses.

It is not difficult to think of cases in which nearly everyone would agree that a retaliatory use of force is so grossly excessive in relation to the attack provoking it that it must be regarded as inhumane and violative of basic laws of war. The tougher question is whether a terrorist base should acquire an immunity from retaliation by locating itself in the middle of a city, such as Beirut or Tunis. Much depends on the magnitude and gravity of the terrorist activity. Even if the base is still legitimately an object of defensive retaliation, the obligation to avoid indiscriminate and wanton killing of non-combatants must be observed.

CONCLUSION

In keeping with my assignment, I have sought to discuss the use of force against terrorism as a problem of international law. Some will find this approach of marginal relevance, if not misleading. This viewpoint is quite understandable. Terrorism is a complex phenomenon, with political and emotional roots and consequences. It strikes fear far beyond its actual damage. Terrorist bases in foreign countries should not enjoy immunity. Counter-force is the most obvious remedy; one uses fire to fight fire. Law, even when it permits such counter-force, requires restraint and discrimination. Potential victims may see terrorists protected by legal restraint: That this is so cannot be denied. Nevertheless, to allow force to be used without regard to the constraints of law is no more acceptable in the case of terrorism than it is in regard to killing prisoners of war or common murderers. Unrestrained and indiscriminate use of violence in the cause of anti-terrorism exacts a high price. Those who use it betray their own basic standards of decency and morality. They open themselves to condemnation and escalating violence. International law does not require the victim to turn the other cheek when terrorist outrages occur. It allows force to the extent necessary and proportionate. To ignore or scorn these basic requirements can be destructive of our deepest moral values and of our common interest in achieving a more decent world.