TAB 4

The Struggle of Democracy against Terrorism: The International Arena – A Need for Modification of the Traditional Laws of War

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The struggle of a democratic state against terrorism is different from the other forms of armed conflicts we have known in the past. This struggle differs fundamentally from traditional armed conflicts due to the nature and characteristics of the terrorist act. Terrorists, by their definition, disregard completely from the laws of war. For the terrorists, the battleground is the civilian hinterland and not the military front. Civilians and not the army are the target of their hostile activities. For the terrorists, the individual rights and freedoms of the citizens against whom they fight, and to a certain extent even the rights and freedoms of their own people "for" whom they fight, are not sacrosanct values worthy of protection but rather the principal weapon in the war.[1]

The international laws of war, formulated over many years, were designed primarily to provide solutions to problems arising out of conflicts between sovereign states. Armed struggle between states and non-state parties is a relatively new phenomenon for which international law is not yet prepared.

Therefore, finding an effective course of action in dealing with terrorism, which is also compatible with the values of a liberal-democracy, entails finding solutions to new and unprecedented dilemmas: what are the rules of law that apply to such conflicts – rules that we know in advance only one side (the state) will regard

[1] EMANUEL GROSS, THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM – LESSONS FROM THE UNITED STATES, THE UNITED KINGDOM, AND ISRAEL 1 (2006).

itself as bound to follow? What is a state permitted to do or prohibited from doing within the context of its fight against terrorism?

Let's first examine the appropriateness of the legal framework that currently regulates the battle waged by democratic states against terrorist organizations.

i. The applicable laws of war

Both treaty and customary international law recognize the state's right to use the appropriate measures, including force, in order to thwart the dangers posed to its existence and to the security of its citizens.[2] Self-defense in customary international law is based on the "*Caroline Doctrine*", which established the state's right to use force in order to defend itself against real and imminent threats that require immediate response in circumstances where all peaceful means of resolving the dispute have been exhausted and the response is essential and proportional to the threat. Self-defense in international treaty law is entrenched in Article 51 of the U.N. Charter, which does not create a new right to self-defense, but refers to the preexisting customary right.[3]

Nonetheless, the right entrenched in the Charter is not identical to the customary law right.[4] This can be seen from the fact that customary law permits self-defense in every case of *aggression*, whereas treaty law permits self-defense only in cases of *armed attack*.[5] Thus, while terrorist attacks by non-state groups can qualify as acts of aggression, there is a difficulty in classifying them as an armed attack. Terrorist attacks are not an armed attack in the classic sense because the attacks are not directed

[2] ANTONIO CASSESE, INTERNATIONAL LAW 305 (2001).
[3] U.N. Charter, art. 51.
[4] Case Concerning Military and Paramilitary Activities in and Against Nicaragua, *Nicaragua v. United States of America*, 1986 I.C.J. 14, 94.
[5] GROSS, supra note 1, at 31.

against government and military targets but at civilian targets; the attacks are not prolonged but are intermittent; and there are no defined battle zones.

In June 2002, after two years during which the Israeli-Palestinian conflict reached new heights of violence, and after Israel has carried out several military operations that did not provide a sufficient answer to the immediate need to stop the murderous terrorist acts, the Israeli government adopted a military recommendation to erect a security fence that was supposed to prevent terrorist infiltration from the Palestinian territories into Israel. The chosen route of the fence, however, involved various limitations on the rights of the local Palestinian inhabitants.

The International Court of Justice (ICJ) was asked by the General Assembly to examine the legality of the fence. In its advisory opinion, the ICJ found that because the Palestinian terrorist organizations are operating out of the West Bank, which is not an independent state but an occupied territory held by Israel in 'belligerent occupation', Article 51 of the Charter had no relevance in this case.[6] Thus, it was impossible to recognize the fence as a legitimate measure of self-defense against terrorist attacks. The Court's opinion seems to suggest that Article 51 of the Charter only recognizes the existence of the right to self-defense in the case of an armed attack by one sovereign state against another state. When an attack is committed by a non-state organization, and all the more so when this organization is operating out of a territory held by the attacked state in belligerent occupation, the right to self-defense does not apply.[7]

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[6] Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ 131 (July 9, 2004), 43 ILM 1009, paras. 138-139.
[7] For a comprehensive analysis of the ICJ advisory opinion in this matter see: Emanuel Gross, *Combating Terrorism: Does Self-Defense Includethe Security Barrier? – The Answer Depends on Who You Ask*, 38 CORNELL INT'L L. J. 569 (2005).

I should also mention that the Israeli Supreme Court has rendered several judgments regarding the legitimacy of the security fence. In these judgments, the court recognized the authority of the army to build the fence, but has chosen to do so not by anchoring the army's authority within the laws of self-defense but rather through alternative legal frameworks.[8] Nonetheless, the court criticized the conclusion of the ICJ claiming that it does not necessarily ensue from the language of Article 51 nor does it serve the needs of a democracy in its war against terrorism.[9]

In my view, the ICJ's opinion gave an inadequate interpretation to the laws of belligerent occupation. The terrorist act contains some of the principle characteristics of the traditional armed conflict: in most cases the attacks are not spontaneous but are meticulously planned; they can cause serious physical harm and property damage; and the group possesses an organized armed force, and a hierarchical structure with a political branch that directs the activities of the operational branch. Under these circumstances, in my view, it may legitimately be argued that terrorist attacks amount to armed attacks and vest the attacked state with the right to defend itself.[10]

A second relevant difference between the customary right to self-defense and the treaty right to self-defense concerns the possibility of engaging in preemptive activities directed at preventing anticipated attacks. Customary law, which recognizes the right of the state to defend itself in every case of aggression, provides that the right

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[8] See, for example, H.C. 2056/04 *Beit Surik Village Council v. Government of Israel*, 43 ILM 1099 (2004); H.C. 7957/04 *Merabe et al. v. The Prime Minister of Israel et al.* (as yet unpublished), para. 23. English translation of the judgment may be found at: http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.htm.

[9] H.C. 7957/04 *Merabe et al. v. The Prime Minister of Israel et al.*, ibid, at para. 23.

[10] Following the terrorist attacks of September 11, 2001 in the United States, the Security Council decided to reconfirm the right to self-defense recognized in the Charter. This impliedly confirms the thesis that terrorist attacks may be regarded as armed attacks that vest the right to self-defense. See S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

to self-defense embraces the right to adopt defensive tactics in the face of an anticipated act of aggression.[11]

The question whether the right to anticipatory self-defense also exists under treaty law has not yet been determined. On the one hand, there are those who argue that the language of Article 51 (*"the inherent right of individual or collective self-defense if an armed attack occurs"*) is unambiguous – that it is clear that a state is prohibited from employing armed force as an anticipatory measure and that it must wait for an actual armed attack.[12] Opposing them are those who contend that the language of the Charter is not so unequivocal, since it does not purport to create a new right to self-defense but refers to the customary inherent right which does recognize the right of states to anticipatory self-defense. A further argument is that in light of the fact that military capabilities have changed in recent years, Article 51 of the Charter should be interpreted to comply with the new world reality. Thus, for example, it would clearly be absurd to assert that a state is required to absorb a severe nuclear attack before it is permitted to defend itself.

In my opinion, in view of the modern means of warfare available to terrorist organizations, Article 51 must be interpreted in the light of its contents and purpose, so as also to enable self-defense in the face of future terrorist attacks.[13]

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[11] YORAM DINSTEIN, THE LAWS OF WAR 68-70 (1983). (Hebrew)
[12] YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 166 (3rd ed. 2001).
[13] It would seem that this is also the understanding of the U.N. General Assembly, as in a resolution concerning the definition of acts of aggression, it decided that the first use of force in breach of the Charter would comprise *prima facie* evidence of aggression, but that the Security Council is entitled to decide that in the light of the circumstances surrounding the commission of the act, it should not be perceived to be an act of aggression. In effect, this amounts to indirect recognition of the legality of the use of force as anticipatory self-defense. See G.A. Res. 3314 U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974).

As I said in the beginning, adjusting the *jus ad bellum* (i.e., the laws that regulate the declaration and termination of war) to the new and unprecedented challenges posed by terrorism is only the starting point. We then encounter the second – not less problematic – question regarding the nature of the limitations on the use of force in a war between a democracy and terrorist organizations.

ii. Limitations on the use of force in a war between a sovereign state and terrorist organizations

Which measures of force may be used by a democracy to protect its security in times of emergency? Clearly, not every means is permitted, since both in times of calm and in times of crisis, it is the legal norms that delineate what is permitted and what is prohibited. However, even though in times of war the law is not silenced, those same laws will occasionally permit a deviation from the legal norms prevailing in times of peace, since in its time of trouble a state is not required to self-destruct on the altar of the basic rights and freedoms of its citizens and is entitled to restrict them to the extent needed to deal effectively with its enemies.

Finding the right balance between state and public security on the one hand, and individual civil liberties on the other hand, is perhaps the most difficult test of a democracy.

When we come to delineate the appropriate way for a democracy to conduct its war against terrorism, we first need to determine the applicable law that governs the dispute: whether implementing the right to self-defense is subject to the restrictions of international law regarding the manner of conducting hostilities or whether the provisions of *jus in bello* do not apply when the right to self-defense is

implemented against terrorist organization and thus the manner of the use of force is governed solely by the domestic law of the defending state.

The primary difficulty in determining the applicable law is the lack of positive regulation of the status of terrorists in international law. The international laws of war positively regulate the status of *civilians* and *lawful combatants* during times of hostilities.[14] However, they do not regulate the status of a third category – *unlawful combatants* – which comprises of people who are not members of the armed forces of the state, but nonetheless take active part in the fighting without distinguishing themselves from the innocent civilian population and without maintaining the international laws of war. Hence, we currently do not have an explicit international regulation for the manner in which violent disputes between sovereign states and private terrorist organizations ought to be conducted.

The Israeli Supreme Court – when confronted with that problem – was unwilling to acknowledge this third category of 'unlawful combatants'.[15] In the court's opinion, this category has not been recognized, at the present time, both in international treaty law and customary international law.[16] Thus, the court concluded that under the current international law, 'unlawful combatants' are to be recognized as *civilians taking a direct part in hostilities*. In essence, this classification means that as long as they are taking a direct part in hostilities, they do not enjoy the protection granted to a civilian.

I do not agree with the court's opinion. In view of the special nature of the war waged by terrorists, as opposed to the other "classic" participants within the

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[14] Art. 4 of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III) (Aug. 12, 1949), 75 U.N.T.S. 135; the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV) (Aug. 12, 1949), 75 U.N.T.S. 287.

[15] H.C. 769/02 *Public Committee against Torture in Israel et al. v. Government of Israel et al.* (as yet unpublished, judgment dated 14.12.2006), paras. 27-40. English translation of the judgment may be found at: http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.HTM.

[16] Ibid, at para. 28.

international arena, I believe that they cannot be regarded either as civilians, lawful combatants, or even as freedom fighters.[17] Terrorists, by the nature of their definition, are principally people who do not regard themselves as subject to legal constraints. They do not balk at any measures that they believe will further their cause. Is it conceivable to classify them as "civilians" or grant them the protections awarded to "combatants", while their declared objective is to take active part in hostilities while breaching the laws of war?[18]

Nonetheless, the fact remains that as an outcome of the lack of positive regulation of the status of terrorists as 'unlawful combatants', international law also lacks the power to appropriately regulate the manner of conducting a violent dispute waged between a sovereign state and private terrorist organizations.

Article 2 common to the four Geneva Conventions of 1949 provides that the norms anchored in the conventions are intended to apply to *international armed conflicts*, i.e., to conflicts between two or more entities possessing an international legal personality.[19] Article 1(4) of the First Additional Protocol to the Geneva Conventions expands the definition of an armed conflict to situations where peoples fight against a colonial regime, foreign occupation or racial regimes within the framework of their struggle for self-determination.[20] International law also enables the attribution of the activities of non-state actors to a state sponsoring their acts if that state has effective control over them, i.e., if the person or group of persons is in fact

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[17] For a similar view see: YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 29 (2004).
[18] GROSS, supra note 1, at 50.
[19] Art. 2 common to the four Geneva Conventions of 1949 for the Protection of War Victims, Aug. 12, 1949, 75 U.N.T.S. 3.
[20] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 1(4), 1125 U.N.T.S. 3.

acting on the instructions of, or under the direction or control of, that state in carrying out the conduct.[21]

However, in the existing reality, even though the vast majority of terrorist organizations are indeed supported by sovereign states, it is very difficult to adduce sufficient proof for such support. Thus, only in a few cases, is it possible to operate the doctrine of effective control and attribute to the sponsoring state responsibility for the terrorist acts carried out in the territory of another state. In the remaining cases, the war of states against terrorist organizations is governed by the state's domestic laws (subject to the international human rights law)[22], except in circumstances which relate to *internal armed disputes not of an international character*, i.e., internal disputes which take place in the territory of a certain state between that state and non-state armed groups. These latter situations are governed by Article 3 common to the four Geneva Conventions which provides minimum humanitarian norms which bind all the parties to the dispute.[23] It follows that the central question is whether this article is applicable to terrorist attacks against a sovereign state, where such attacks are perpetrated by a terrorist organization which is not sponsored by a state or where it is not possible to prove such support.

Article 3 sets out two cumulative conditions for its application; *first*, the existence of an armed conflict; and *second*, that the dispute is not of an international character.

Even if we assume that the second condition is directed to apply to every armed conflict which is not governed by Article 2 common to all the conventions, i.e.,

[21] *Nicaragua v. United States of America*, supra note 4, at 65; see also Draft Articles on Responsibility of States for internationally wrongful acts, International Law Commission, 53rd Sess., art. 8 (2001), at http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf.
[22] Derek Jinks, "September 11 and the Laws of War" 28 YALE J. INT'L L. 1, 21 (2003).
[23] Art. 3 common to the four Geneva Conventions of 1949 for the Protection of War Victims, (Aug. 12, 1949) 75 U.N.T.S. 3.

a conflict in which only one of the parties is a sovereign state and the other is a non-state actor, we still need to determine whether it is possible to regard terrorist attacks as armed conflicts, and not merely as internal uprisings or riots. Although terrorist acts are not armed conflicts in the traditional sense, due to their special nature and attributes, they nonetheless meet some of the basic characteristics of the classic armed conflict. As noted, a terrorist organization is an organization possessing a hierarchical structure, which consists of a political wing responsible for the activities of the operational wing. Terrorist acts are not spontaneous but are preceded by careful planning and often intelligence gathering in order to increase the chance of success. Additionally, they are capable of causing great damage to life and property.

It follows that even if it is not possible to clearly delineate the scope of application of the term "armed conflict", it is still possible to determine that it applies at the very least to hostilities which comprise or threaten to comprise a grave breach of international humanitarian law. Thus, while not all terrorist attacks may amount to an armed conflict, in those cases where the perpetrators of the attacks are organized groups which methodically execute planned and coordinated attacks against civilians and cause serious damage, it is proper to regard the attacks as amounting to an armed conflict.

I believe that the application of international humanitarian law is essential as it can provide a stable normative framework for managing the conflict in view of the fact that it attracts broad international support from the nations of the world.[24] However, even if we were to conduct the war against terrorism in accordance with domestic laws, it would not necessarily be a flawed process, as these laws may fetter the state even more stringently than international humanitarian law.

[24] Jinks, supra note 22, at 47.

In view of the special nature of the terrorist enemy, it is difficult to conclude that the laws of war, as they exist today, provide an adequate solution to the terrorist threat. Even if we accept the interpretation of self-defense which permits a democratic state to defend itself against the terrorist threat by way of military action, numerous questions arise in relation to the rules of engagement. How will a democratic state conduct a war against an undefined enemy that is dispersed among the civilian population? Should the democratic state remain subject to the rules of war and avoid causing harm to population centers and thereby also avoid causing harm to the terrorists themselves? Or does the goal of eradicating terrorism justify all means, including collateral injury to innocent civilians, merely because the terrorists have found shelter among them?

I have no doubt that the international laws of war must be modified or at least interpreted in a manner that accords with modern reality. The international community must formulate new norms which will provide balanced and effective answers to the difficult challenges posed by the war on terrorism.

We know that terrorism is an international problem that feeds on the unusual cooperation between extreme groups throughout the world. Therefore, the solution too must be international, and it too must be nourished by a unique cooperation between the states now facing a terrorist threat. So long as the international community chooses not to provide guidance in this pressing matter, we in fact willingly give up our most effective tool in the war against terrorism.