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THE MEANING OF TERRORISM FOR THE IDF MILITARY COMMANDER

Louis René Beres

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The Problem of Defining Terrorism

For the tactical IDF commander on the ground, the meaning of terrorism has become increasingly vague and contradictory. This problem is both generic and Israeli-specific. Generically, the purposeful definition of terrorism now plagues all societies that confront destabilizing insurgencies. Covering forms of both guerrilla or irregular warfare against military targets and criminal attacks on noncombatant urban populations, the term is increasingly losing all operational precision. As a result, planning and executing counterterrorism operations could become excessively confused and difficult.

Before Israel's military forces can be expected to cope effectively with terrorism, they must, at a minimum, be able to identify what it is, exactly, that constitutes terrorism. It is up to the government, informed by sound scholarship, to present authoritative guidelines for such an identification.

With the onset of the "peace process," Israel's military commanders are understandably perplexed.

What were once described unambiguously as terrorist enemies of the Jewish state are now our "Palestinian partners." Once described as the arch-terrorist, Yasser Arafat has now become the government's principal ally in "counter-terrorism," an irony compounded by his selection — together with Prime Minister Rabin and Foreign Minister Peres — for the Nobel Peace Prize.

Who is the Terrorist Enemy? The Generic Problem

Despite the growing volume of academic publications dealing with terrorism, little if any serious progress has actually been made in suitably clarifying that concept, in distinguishing it clearly from various other uses of force in world politics and from other related crimes under international law.

Indeed, judging from the standard definitions of terrorism now in "professional" use, definitions that offer little or no operational benefit for scholars or for tactical commanders, the term has become so comprehensive and vague that it em-

Daniel J. Elazar, Editor and Publisher; Zvi R. Marom, Associate Editor; Mark Ami-El, Managing Editor.
13 Tel-Hai St., Jerusalem, 92107, Israel; Tel. 02-619281, Fax 972-2-619112. © Copyright. All rights reserved.
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braces even the most discrepant and unintended activities. Ironically, for example, using certain of the prevailing definitions of terrorism adopted by some U.S. government agencies and some scholars, the American Revolution, the Gulf War (Desert Storm), the Contra insurgency in Nicaragua, and the anti-Castro insurgency supported by the United States were/are all conceivably examples of "terrorism." In a similar vein, many of the major events and military operations in Israel's history could, under such definitions, be construed as "terrorism."

Typical of these official and unofficial American definitions are the following:

"...the unlawful use or threatened use of force or violence by a revolutionary organization against individuals or property with the intention of coercing or intimidating governments or societies, often for political or ideological purposes" — Department of Defense.

"...the unlawful use of force or 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" — Federal Bureau of Investigation (FBI).

"...premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents" — Department of State.

"...violent criminal conduct apparently intended: (a) to intimidate or coerce a civilian population; (b) to influence the conduct of a government by intimidation or coercion; or (c) to affect the conduct of a government by assassination or kidnapping" — Department of Justice.

"...the unlawful use or threat of violence against persons or property to further political or social objectives. It is usually intended to intimidate or coerce a government, individuals or groups or to modify their behavior or policies" — Vice-President's Task Force on Combatting Terrorism (1986).

"Terrorism is the deliberate employment of violence or the threat of the use of violence by subnational groups and sovereign states to attain strategic and political objectives. Terrorists seek to create overwhelming fear in a target population larger than the civilian or military victims attacked or threatened. Acts of individual and collective terrorism committed in modern times have introduced a new breed of extralegal 'warfare' in terms of threats, technology, targets, and impact" — Yonah Alexander, *Middle East Terrorism* (1994).

What, exactly, is wrong with these definitions? Why are they troublesome for military commanders all over the world, and especially in Israel?

Legal Demarcation

First, although a few of these definitions do attempt to demarcate between lawful and unlawful uses of force, it is left entirely to the individual decision-maker to determine which particular criteria of legality should be applied. Do they refer to criteria of national or international law? Do they refer to both criteria of jurisprudential assessment? And what, for that matter, authoritatively constitutes pertinent criteria under national and international law?

Under national law, pertinent penal provisions (murder, assault, theft, illegal detention of persons, hostage-taking, arson, etc.) may contain no actual reference to terrorism, and may be applicable irrespective of any such reference. Under international law, criteria of lawfulness are more or less present in pertinent treaty provisions, but these criteria are one step removed from judgments regarding terrorism, i.e., the military commander must first understand that terrorism is a "conglomerate" crime under international law, and must then understand which particular penal components comprise this crime. Even with such an understanding, analysis may still be confounded by authoritative contradictory expectations, especially in regard to standards of "just cause."

IDF officers will be quick to understand the overriding rationale of such standards in general. After all, the international community's human rights regime supports the inherent right of individuals to express insurgent force when their "inalienable" natural rights are trampled upon. Nevertheless, in particular circumstances, the standards of "just cause" will be more or less problematic, depending, inter alia, upon the prevailing geopolitical objectives of the government. Moreover, decisions about "just cause" are certainly not normally made at the tactical level.

"Just Cause" and "Just Means"

Second, those definitions of terrorism making no explicit reference to legality also omit the essential elements of "just cause" (*jus ad bellum*) and "just means" (*jus in bello*). These indispensable elements distinguish permissible from impermissible insurgencies under international law.

Moreover, in view of the supremacy of certain international law over national or domestic law and of its pertinent incorporation, these elements are relevant whichever realm of law or combination of realms is

implicitly under consideration. Lacking these elements, a definition of terrorism necessarily includes both permissible and impermissible forms of insurgency. Hence, it is an altogether useless definition.

Under international law, of course, not all resorts to insurgent force are terroristic. "Just cause" for the "inalienable right to self-determination" and for the enjoyment of peremptory human rights is an integral part of customary and conventional norms. The right of insurgency is affirmed, *inter alia*, in the first part of the second paragraph of the Declaration of Independence of the United States (a document that qualifies as lawmaking generally under the authoritative provisions of Article 38 of the Statute of the International Court of Justice). But insurgency is unlawful, irrespective of "just cause," whenever the means used fail to satisfy *jus in bello* criteria, i.e., whenever the use of force is indiscriminate, disproportionate and/or beyond the codified boundaries of "military necessity." Significantly, such use of force is now increasingly characteristic of Palestinian violence against Israel in the midst of the "peace process," a fact that cannot be discounted for merely geopolitical reasons by the Rabin government.

For the military commander on the ground who needs to distinguish permissible from impermissible insurgencies, this means a primary emphasis on the question of "just means." Although considerations of "just cause" can be especially murky if not altogether impossible to sort out, the standards of "just means" are substantially straightforward. Codified in the easily recognizable norms of the laws of war, which are binding upon insurgent forces as well as on regular armies and in noninternational as well as international armed conflicts, these standards should become the operational determinant of authentic terrorism.

There is an important "flip side" to the matter of "just means." Not only is this standard essential to the identification of terrorism (every insurgency that violates this standard is terroristic), it applies as well to the permissible limitations of effective counterterrorism. Like the insurgents themselves, military forces opposed to terrorists are constrained by certain restrictions of the laws of war. Failure to comply with such restrictions does not make these military forces into terrorists (this is a silly propagandistic judgment by those who do not understand international law), but it does make them guilty of war crimes and possibly even crimes against humanity. This authoritative conclusion must be understood by military commanders everywhere.

On occasion, the war against terrorism may even involve forcible abduction of terrorists to one's own judicial jurisdiction for trial and possible punishment. For the military commander, there will likely be little effective need to ascertain the legality of such abductions. These judgments will have been made already at the very highest operational levels and by political leaders in the national command authority. Yet, in our post-Nuremberg world legal order, ultimate responsibility is diffuse and all levels of military participation, in Israel and elsewhere, should know what is right and what is wrong.

Forcible abduction is not an unknown remedy in international criminal law. Although great care must be taken not to violate fundamental human rights, where extradition is not a viable option the only alternative may be to leave terrorist crimes unpunished. Here, forcible abduction may represent the only way to prevent future terrorist crimes and to give needed effect to the expectation of *Nullum crimen sine poena*, "No crime without punishment."

There are several relevant examples of forcible abduction. In 1989, Israeli commandos abducted Sheik Abdul Karim Obeid, a leader of Hezbollah in Lebanon. Israel, in 1960, abducted Nazi war criminal Adolph Eichmann from Argentina on charges not of terrorist crimes but of Nuremberg-category crimes. In 1985, a United States military aircraft forced down an Egyptian aircraft over international waters on the grounds that the Egyptian plane held accused terrorists in the Achille Lauro affair. In 1987, again in international waters, the U.S. FBI lured Fawez Yunis, a Lebanese national, onto a yacht and transported him by force to the United States for trial (a case cited by Israel in defending its own forcible abduction of Sheik Obeid). And on April 2, 1990, Humberto Alvarez Machain, a medical doctor and a citizen of Mexico, was forcibly abducted from his office by persons answerable to the U.S. Drug Enforcement Agency (DEA) and flown by private plane to Texas to face charges of kidnapping and murdering a DEA agent and the agent's pilot, a charge related to "narco-terrorism."

The Problem of Sufficient Threat

Third, those definitions referencing "threatened use of force or violence" or "threat of violence" never establish needed and identifiable thresholds of threat.

When, exactly, is the threat sufficient to argue convincingly for the presence of terrorism? In the absence of settled, unambiguous thresholds, inclusion of "threat" within the definition can serve propagandis-

tic and/or geopolitical purposes.

How, then, might useful definitions of terrorism incorporate precise and essential thresholds, levels demarcating authentically terroristic threats from non-terroristic ones? One way might focus on the "hardness" of the prospective target. Here, drawing upon the previously identified rules of *jus in bello* or justice in war, threats directed toward noncombatant populations would, ipso facto, be expressions of terrorism. Of course, such threats would also have to be embedded in political demands, otherwise they would merely represent "ordinary" forms of criminality.

A complementary way to operationalize threats within the definition of terrorism would be to focus on the degree of anticipated harm. Thus, for example, threats above a particularly specified level of destructiveness could be construed as terroristic while those below this level would not necessarily be expressions of terrorism. But here, too, irrespective of the level of expected harm, a threat would be terroristic only where it was directed at "soft" targets and where the *jus ad bellum* argument was manifestly political. Although it is true that violence above certain thresholds would be patently violative of the laws of war (because such violence would be inherently indiscriminate, disproportionate and/or beyond the boundaries of military necessity), it is not true that such violence would necessarily be terrorism.

Still in keeping with the twin criteria of "just cause" and "just means," threats made by insurgents without "just cause" would be terroristic, regardless of the levels of intended harm. The problem with such determinations, however, is the operational difficulty in identifying "justness." It is always easier to judge the lawfulness of means than of ends.

Finally, it is worth noting that terrorist threats of special urgency, because of the softness of intended targets and/or the level of intended harm, could elicit anticipatory self-defense attacks by states. Under existing customary international law, states do not always have to wait until after an attack has been absorbed to undertake self-defense. Rather, where the threat is sufficiently imminent in point of time, they can choose to strike first, providing, of course, that the strike is within the parameters of discrimination, proportionality, and military necessity.

In extremely rare circumstances, even assassination can be construed as a permissible expression of anticipatory self-defense. Operationally, this means that where terrorist threats are sufficiently credible and ominous, it may be law-enforcing to assassinate certain terrorist targets preemptively. Although such assassina-

tion is itself normally a form of terrorism in times of peace, various "higher law" and international law arguments could conceivably support such extraordinary means. A case in point would be a plausible terrorist threat to use chemical or nuclear weapons against Israeli city dwellers. In such cases, would the "due process" rights of terrorists to be absolutely secure from extra-judicial remedies override the rights of Tel Avivians or Jerusalemites simply to survive? I think not!

The residual permissibility of assassination as a counter-nuclear/chemical terrorism preemption option derives from the persistently Westphalian logic of international law, from the multiple sources of international law identified at Article 38 of the Statute of the International Court of Justice, and from the frequently irreconcilable nature of competing norms. Were the world legal order more centralized, all forms of anticipatory self-defense, including assassination, could be strenuously and correctly condemned. But in the absence of a capable supranational authority, self-help is often the only available means of law enforcement against terrorism, including self-help via the use of force.

State Responsibility for Terrorism

Fourth, those definitions that do not specify insurgent organizations exclusively broaden the meaning of terrorism to unmanageable and operationally useless levels. As a crime under international law, terrorism cannot be committed by states. This is a most sensible exclusion because the alternative would lead to unwieldy conceptual expansion, "blending" with other related crimes (e.g., aggression) and a consequent watering-down of the crime. Moreover, in the simultaneous absence of precise "just cause/just means" permissibility criteria on the use of force, virtually all force exercised by governments could conceivably be construed as "terroristic."

Terrorism, of course, can be supported by states. Hence, counter-terrorism measures may be directed at various state sponsors of terrorism as well as at insurgent forces directly. For the IDF military commander, this involves various tactical considerations which, more often than not, are inextricably intertwined with legal questions. If, for example, a decision is made to strike at certain targets within the sponsoring state, concern for compliance with the laws of war becomes, by definition, far more comprehensive. Faced with state as well as non-state adversaries, states seeking to fight terrorism may need to assess correlations of forces on tactical, operational and/or strategic levels.

Circumscribing the Political

Fifth, those definitions referring to "political" violence and/or objectives fail to demarcate clearly the identifiable boundaries of politics. What, exactly, are these boundaries? When, exactly, is violence unambiguously political? What, indeed, are the differences between political violence and the violence of ordinary criminality? As a jurisprudential matter, these questions have, in fact, been around for a long time, especially in connection with the international law of extradition and pertinent criteria of the "political offense exception."

Today, some states calculate that politically motivated violence, by definition, cannot be terrorism. Here, acts of violence that are committed on behalf of "national liberation," "self-determination," and/or "anticolonialism" fall outside the definition of terrorism. Hence, as observed by John F. Murphy: "Under this approach, sending letter bombs through the mails, hijacking airplanes, kidnapping or attacking diplomats and international business people, and indiscriminate slaughter of civilians could never constitute terrorism if the revolutionary groups committed them on behalf of a just cause."

From the standpoint of international law, this approach ignores that the criterion of "just cause" is always augmented by the criterion of "just means." As we have already noted, the latter standard has been brought to bear upon insurgent resorts to force by both the common Article 3 of the four Geneva Conventions of 1949 and by 1977 Protocols I and II. Indeed, even if these authoritative extensions of humanitarian international law had not been enacted, the Martens Clause of the Hague Convention would in and of itself obtain in relevant circumstances, confirming that "...civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience."

The Problem for Israel in Particular

For the IDF commander, the meaning of terrorism presents some special difficulties. Constrained by the obligations of the "peace process," military commanders must now balance objective legal assessments against political realities. Moreover, such effectively pro-terrorist balancing is made even more problematic by the government's own acceptance of Palestinian claims that anti-Israel insurgency represents a legitimate expression of "national liberation" and by the government's codified cooperation in providing terrorists with security

in the "autonomous areas."

In South Lebanon the problems are substantially different. Although terror groups in that region are assuredly encouraged by the "peace process," and by corollary IDF weaknesses in the territories and within the "green line" (there are synergistic interdependencies between Israel's several theaters of counterterrorist operation), the Israeli commander has fewer legal or political constraints to worry about in this particular theater. From the standpoint of international law, Lebanese failure to control their own territory and to prevent Hezbollah and other groups from mounting anti-Israel terror permits Israel considerable latitude in the exercise of national self-defense. Here we may recall the authoritative argument of Hersch Lauterpacht, a distinguished scholar in pertinent international law: "International law imposes upon the State the duty of restraining persons within its territory from engaging in such revolutionary activities against friendly States as amount to organized acts of force in the form of hostile expeditions against the territory of those States."

Lauterpacht's rule reaffirms the Resolution on the Rights and Duties of Foreign Powers as Regards the Established and Recognized Governments in Case of Insurrection adopted by the Institute of International Law in 1900. From the standpoint of politics, the IDF commander in South Lebanon need not worry that his government now regards portions of the terrorist enemy as its "partner in peace." So long as he remains well within the settled standards of humanitarian international law (discrimination, proportionality, and military necessity), his use of force against terrorism in this theater should be restrained only by operational criteria of strategy and tactics. Unencumbered by formal ties between Israel and a terrorist organization (e.g., the Oslo Agreement) or by informal Israel-terrorist alignments and interpenetrations, the Israeli commander fighting terrorists in South Lebanon can confine his attention to the essential exigencies of war.

When fighting terrorism within the "green line," the IDF commander and pertinent police authorities will, of course, be impacted by the tactical advantages afforded terrorists by the "peace process," but they will not have to be concerned about conformance with the international law of belligerent occupation (as possibly in the administered territories) or with questions of sovereignty and territorial integrity (as in South Lebanon). Here, within Israel proper, terrorism means largely what Israeli domestic law says it means, and counter-terrorism against primarily Hamas and Islamic Jihad can and should be waged according to the appro-

priate survival needs of the Jewish state.

There is, however, one last cautionary note about the meaning of terrorism. To the extent that the IDF commander within the "green line" is expected to respect the laws of war of international law, he must make immediate judgments concerning whether the terror groups operating in Israel are acting as ordinary criminals or as agents of a sustained "armed conflict." Ordinary criminals, i.e., those terrorists who are involved in "only" isolated internal disturbances, riots, and specific acts of violence, are not subject to protection by the laws of war. Other terrorists, i.e., those who are engaged in sustained political violence, remain, according to the Geneva Conventions of 12 August 1949, "...under the protection and authority of the principles of humanity and from the dictates of public conscience."

In cases where terrorists are identified as being engaged in armed conflict, Israeli commanders may face an additional legal obligation to extend the privileged status of prisoner of war (POW) to such persons when they are taken captive. Regrettable as it may seem, especially after such horrors as the Tel Aviv bus bombing, this additional obligation is unaffected by terrorist disregard for humanitarian international law. While all combatants are obliged to comply with the

rules of war, applicable in armed conflict, violations of these rules do not automatically deprive an insurgent of his/her right to protection equivalent in all respects to that accorded to prisoners of war. This right, codified by the Geneva Conventions, is now complemented and enlarged by the two 1977 Protocols to those Conventions. In this connection, and in particular reference to Geneva Protocol I, terrorists captured after launching direct attacks upon Israeli citizens could be treated as prisoners of war rather than as ordinary criminals, but should then be vigorously prosecuted for the commission of war crimes.

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Louis Rene Beres (Ph.D., Princeton) is Professor of Political Science at Purdue University. He is the author of fourteen books including *Force, Order and Justice: International Law in an Age of Atrocity*, as well as several hundred articles dealing with international law and terrorism. His previous contributions to the *Jerusalem Letter/Viewpoints* series include "Israel, Iran, and Nuclear War: A Tactical Legal Assessment" (SAA34; 1 November 1993), and "Non-Proliferation Agreements, Territories, and Regional Nuclear War" (VP296; 15 June 1994).