

COMMENT

TERRORISM AND SELF-DETERMINATION: THE FATAL NEXUS

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Aside from stating what the law is, or what the law is supposed to be, an important aspect of contemporary legal education is found in its emphasis upon precision, specificity, and definiteness; concepts that are sometimes difficult to grasp. In fact, much of Anglo-American law cannot be readily understood, nor properly implemented, without a working knowledge of legal definitions, for they set out the fundamental elements of our operative Anglo-American legal system. A similar situation exists in international law.

One must, however, be cautious at the outset since there is no legally recognized, or popularly accepted, definition of terrorism. The same holds true for self-determination, despite the more than 100 United Nations resolutions dealing with that controversial subject. Therefore, a great deal of confusion and misunderstanding has arisen over the past two decades as to exactly what these terms of art truly represent.

Terrorism is not only a political, psychological, and moral problem; it is first and foremost a legal problem. It is a legal problem because terrorist acts *per se* are considered criminal by all civilized societies throughout the world. No organized legal system tolerates murder, serious bodily harm, severe mental distress, and kidnapping or false imprisonment. Yet, it is not necessary to seek to prohibit a still undefined act, if the elements comprising that act are themselves proscribed. If terrorism is essentially criminal, then it can be dealt with—by law—on that very level.

Definitions which have been developed by academic experts in several disciplines are either too vague and overbroad, or too narrow and restrictive for possible statutory use, let alone public comprehension. For example, consider the following as a definition of international terrorism:

Individual or collective . . . conduct employing strategies of terror violence which contain an international element or are directed against an internationally protected target and whose aim is to produce a power-oriented outcome. . . . A power-

oriented outcome is an outcome which is aimed at changing or preserving the political, social or economic structures or policies of a given state or territory by means of coercive strategies.¹

Although this statement is by a legalist, it would be difficult to identify the legal elements. It is more a definition of state power, particularly in a self-determinative conflict, although the lines are fuzzy and the language too open-ended.

Not infrequently the political aspects of terror-violence take priority in definitional descriptions. For example, "the threat or use of violence by private persons for political ends, where the conduct itself or its political objectives, or both, are international in scope."² This explanation by two other legalists also fails to meet the myriad distinctions offered by terrorism's innumerable patterns and varieties. It does not tell us very much, for in the words of a best-selling modern novelist, "[t]error is a flexible trade."³

Non-legalists do not seem to do any better in the definitional area. A contemporary political scientist offers this description: "[t]errorism can be defined as a strategy whereby violence is used to produce certain effects upon a group of people. . . ." ⁴ (Yet this definition can also encompass a night mugging in Central Park). Many experts and commentators shy away from comprehensive generalizations and focus only upon the political aspect. For example, one prominent security analyst stated that, "[p]olitical terrorism can be defined as a strategy, a method by which an organized group or party tries to get attention for its aims, or force concessions toward its goals, through the systematic use of deliberate violence."⁵ The problem with this approach is that it focuses on

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1. Bassiouni, *Final Document*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES xiv (M. Bassiouni ed. 1975).

2. A. EVANS & J. MURPHY, *Preface* to LEGAL ASPECTS OF INTERNATIONAL TERRORISM at xv (A. Evans & J. Murphy eds. 1978).

3. M. WEST, HARLEQUIN 14 (1974). See M. MCCARTHY, CANNIBALS AND MISSIONARIES 217 (1980), implying a similar view.

4. E. EVANS, CALLING A TRUCE TO TERROR: THE AMERICAN RESPONSE TO INTERNATIONAL TERRORISM 3 (1979). Cf. R. LISTON, TERRORISM 14 (1977), who sees terrorism as a means of promoting "extreme fear among helpless victims," and a method utilizing "deliberate action against people."

5. E. WATSON, POLITICAL TERRORISM: THE THREAT AND THE RESPONSE 1 (1976). Cf.

motive rather than on conduct, while motive in criminal law is largely irrelevant to the consequences of a criminal act. Such an approach also ignores non-systematic terror-violence.

Terrorism, whatever else it may represent, is fundamentally an attack upon the prevailing legal order. The definition proposed by this Comment seeks to place the act itself, or what legalists refer to as conduct, within three basic typologies. "Terrorism is the use of force, or the threat of force, directed against innocent third parties for primarily ideological, financial or psychological purposes."⁶ The key to understanding the impact of the terrorist phenomenon is innocence, since the victim is not the ultimate target. There are two kinds of terrorism committed by two categories of victimizers. One is domestic and the other is international. International terrorism is any act of terror-violence containing an international jurisdictional element. For example, the perpetrator may be from one state while the victim belongs to another state, or the terrorist act may occur in a jurisdiction foreign to both. International terrorism may or may not be on the rise at the beginning of the 1980's. So far, the numbers are unclear, but domestic terror-violence (particularly in Spain, Italy, Central America, and, until recently, Turkey) has been escalating at a dangerous pace.

The term terrorism originated during the French Revolution of the eighteenth century and the Jacobin Reign of Terror. At first terrorism was identified with state action. Later it became applied to individual or group violence. Contemporary legal scholars and prevailing international legal standards divide terrorism into two major components: individual or group terrorist activities, and state or governmental repression. The United States has been primarily concerned with the first category, as have the governments of Europe and Japan.⁷ The Third World nations have emphasized the second category, particularly in the debates of the United Nations General Assembly's Ad Hoc Committee on International Terrorism.⁸

Hardman, *Terrorism*, in 14 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 575-579 (E. Seligman & A. Johnson eds. 1935), from which this definition was adapted.

6. Friedlander, *Reflections on Terrorist Havens*, 32 *NAVAL WAR COL. REV.* 59, 60 (1979).

7. 1 R. FRIEDLANDER, *TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL* 487-492 (1979).

8. *Id.* at 527-572.

There is also a sub-classification, often applied erroneously by non-legalists. Transnational terrorism refers specifically (and solely) to non-state, non-political actors whom psychiatrist Frederick Hacker calls "criminals" and "crazies."⁹ With some variations, these people are the direct opposites of ideologically motivated offenders. Furthermore, one type can interrelate with another, for political terrorism is also a manifestation of philosophical fanaticism. All violence is not terrorism, but all terrorism is violence, psychological as well as physical.

Legally speaking, terrorism focuses upon the effect, while self-determination deals with causal relationships. While terrorism is a human wrong, self-determination is, arguably, a human right. Yet both phenomena during the past quarter-century have become, to use a legal phrase, inextricably intertwined.

There is more agreement among scholars and commentators on the definitional aspects of self-determination, though here too, there is no generally accepted definition and no consensus on the exact meaning of its various attributes. One prominent legal scholar has even divided self-determination into two major categories, socio-cultural and political. His definition of political self-determination stresses "the collective right of a people to pursue their own political demands, to share power equally, and as the correlative right of the individual to participate freely and fully in the political process."¹⁰

Another distinguished legalist, who similarly emphasizes the dual themes of human dignity and human rights, sees the essence of self-determination as "the freedom of participation in different value processes which is fundamentally at stake" in political, social or cultural disputes.¹¹ Contrast this with the brief, explicit statement of the most prominent political scientist in the field, who defines self-determination as "the natural right of nations to determine their own statehood."¹² The leading historian of the sub-

9. F. HACKER, CRUSADERS, CRIMINALS, CRAZIES: TERROR AND TERRORISM IN OUR TIME (1977).

10. Paust, *Self-Determination: A Definitional Focus*, in SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS 12 (Y. Alexander & R. Friedlander eds. 1980), [hereinafter cited as *Self-Determination*].

11. *Id.* at 12, quoting Lung-chu Chen.

12. R. EMERSON, FROM EMPIRE TO NATION: THE RISE TO SELF-ASSERTION OF ASIAN AND AFRICAN PEOPLES 297 (1962).

ject also puts the major emphasis upon nationalism and nationhood maintaining that "the principle of self-determination is, in general terms, the belief that each nation has a right to constitute an independent state and determine its own government."¹³

It should by now be evident that there are almost as many definitions and variations as there have been self-determination movements. Almost every expert and commentator warns of overgeneralization, admits to imprecision in terminology, and imposes qualifications on essential elements. There does appear to be basic agreement, however, on the role of self-determination in the post-Charter¹⁴ world as a political program which stands for popular sovereignty on a global scale. The definition proposed here, admittedly, does not cure all of these defects, but tries to take into account the historical fact that self-determination has more than mere political objectives. This author believes it can be called the "right" of a "people" to shape its own political, economic, and cultural destiny.¹⁵ Yet there are many questions still unresolved. What constitutes a people? What is meant by a nation? Is self-determination an established right or merely a legally recognized remedy, qualified by the rights of secondary parties and the need to balance the overall equities in the context of the totality of the circumstances?¹⁶ Therefore, taking into account historical experience and inevitable political factors, this writer prefers the following as a more useful contemporary definition: "[s]elf-determination is a theoretical concept which implies the freedom of a dissident people to establish on its own initiative a viable independent national entity and whatever political and social structures it chooses for the preservation of that entity."¹⁷

The record of the past twenty years dramatically demonstrates that asserted claims of right by dissident minority groups have sometimes ripened into national liberation movements which

13. A. COBBAN, *THE NATION STATE AND NATIONAL SELF-DETERMINATION* 39 (rev. ed. 1970).

14. The United Nations Charter entered into force on October 24, 1945.

15. Friedlander, *Proposed Criteria for Testing the Validity of Self-Determination as It Applies to Disaffected Minorities*, 25 CHITTY'S L.J. 335 (1977). Cf. International Covenant on Civil and Political Rights, art. 1, para. 1; G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966), entered into force Mar. 23, 1976; and International Covenant on Economic, Social, and Cultural Rights, art. 1, para. 1; G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966), entered into force Jan. 3, 1976.

16. See generally *Self-Determination*, supra note 10.

17. Friedlander, supra note 15, at 336.

employ frightening techniques of terror-violence to accomplish their proclaimed political goals. Thus, the unholy alliance of nationalism and terrorism has not only served to break down the delicate structure of world public order, but has also presented the international state system with a dangerous and potentially catastrophic choice—either the establishment of a global society based upon the rule of force, or the creation of a world community adhering to the rule of law. At issue is the survival of humankind.