Defending Terrorism: Justifications and Excuses for Terrorist Violence

‘The evil in the tale may be understood, if not excused, by our circumstances.’*

A. INTRODUCTION

The international community has repeatedly condemned terrorism as ‘criminal and unjustifiable’, irrespective of ‘considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify’ it.¹ Yet, in condemning terrorism as unjustifiable, some States have persistently objected that violence in pursuit of just causes (such as self-determination) does not constitute terrorism; or even that a just cause justifies all means. There is thus a disagreement over the scope of exceptions to any potential definition of terrorism.²

Asserting that terrorism is unjustifiable does not preclude the idea that some acts of terrorism are at least excusable. The wider and more comprehensive a definition of terrorism, the more likely it is that some acts of terrorism may be justifiable or excusable. While the ‘inner core’ of terrorism, such as indiscriminate attacks on civilians, is very difficult to justify under any circumstances, the ‘outer core’ of terrorism—such as acts that would not be contrary to international humanitarian law (IHL) if committed by State forces in armed conflict³—is more susceptible to justification.

The highly-charged political atmosphere surrounding international discussions of terrorism has tended to entrench opposing ideological and rhetorical positions, often leading to neither side taking the arguments of the other seriously. Yet, if international law is not to become complicit in oppression by criminalizing legitimate political resistance, justifications for terrorist violence must be taken seriously by the law. Moreover, a failure to

take terrorist justifications seriously may itself be a cause of terrorist violence; as Habermas says: ‘The spiral of violence begins as a spiral of distorted communication that leads through the spiral of uncontrolled reciprocal mistrust to the breakdown of communication’.

This chapter, accordingly, considers the range of legal techniques available for accommodating genuine claims of justification or excuse. It also unravels some specific terrorist claims and rigorously subjects them to the scrutiny of existing international legal principles (particularly those of IHL) and the moral frameworks underlying those principles. Doing so helps in determining whether terrorist justifications are claims of substance, or merely claims that dress up unprincipled impulses to violence. Derrida marks the danger that: ‘Every terrorist in the world claims to be responding in self-defense to a prior terrorism on the part of the state, one that simply went by other names and covered itself with all sorts of more or less credible justifications.’

The first part of this chapter outlines the purported causes of terrorism advanced in the General Assembly, and the contrary views of States on their legal significance—particularly whether causes such as self-determination and national liberation ought to justify or excuse terrorist violence. In attempting to reconcile this fundamental disagreement between States, it then distinguishes self-determination violence permitted under IHL from terrorism, and argues for the extension of IHL as an appropriate normative framework for all self-determination struggles. The equal application of IHL to self-determination movements would help to depoliticize attempts to define international terrorism. Similarly, excluding internal rebel violence, through the application of combatant immunity, would assist in differentiating terrorist violence from more justifiable forms of political violence.

The second part examines how a limited range of justifications for any new international crime of terrorism could be accommodated by individual defences in international criminal law (including self-defence, and duress/necessity). It then proposes that non-State group actors accused of terrorism should be entitled to plead ‘circumstances precluding wrongfulness’, drawn analogously from the law of State responsibility. While a narrow class of terrorist acts may be excused by individual or group defences, some acts considered justifiable may still fall outside the scope of defences. To maintain the law’s legitimacy, the final part argues that some acts of terrorism could, in exceptional cases, be regarded as ‘illegal but justifiable’ (or at least, excusable) in stringently limited, objectively verifiable circumstances, possibly under the rubric of a ‘collective defence of human rights’. This equitable mechanism

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could also be supplemented by the availability of political pardons or amnesties for less serious terrorist crimes, where this is necessary to secure overriding community interests such as a peace settlement or national reconciliation. Proper consideration of the potential exceptions to, and excuses and justifications for, terrorism is essential before agreement can be reached on defining ‘terrorism’ as an international crime.

B. COMMON JUSTIFICATIONS FOR TERRORISM

1. General Assembly’s study of causes

The first concerted effort to address terrorism in the United Nations came in response to the killing of Israeli athletes at the Munich Olympics in September 1972, and earlier attacks at an Israeli airport and on a Soviet diplomat in New York. With the Security Council polarized by the Cold War, the General Assembly initiated a study of ‘the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, to effect radical changes’. The title of this agenda item does not assert that all terrorist acts are caused by such factors, but implies that those factors underlie at least some terrorist acts. Resolution 3034 (XXVII) of 1972 emphasized ‘the underlying causes which give rise to’ terrorist violence rather than focusing on the definition or prohibition of terrorism. It urged States to find ‘just and peaceful solutions’ to those causes and reaffirmed:

...the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements in accordance with the principles and purposes of the Charter and the relevant resolutions of the organs of the United Nations...6

The resolution does not expressly provide that terrorism is justified in pursuit of national liberation or self-determination. However, by affirming the legitimacy of those struggles, it impliedly excludes such violence from being regarded as terrorism. In addition, the resolution condemned only State, rather than non-State, terrorism.7

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(a) Identification and significance of causes

In the Ad Hoc Committee established by the resolution, most States agreed that it was important to address the causes of terrorism, but disagreed on identifying them and evaluating their significance. A broad range of causes was suggested, including: capitalism, neo-colonialism, racism, aggression, foreign occupation, injustice, inequality, subjugation, oppression, exploitation, discrimination, interference or intervention, subversion, disruption of development, and political destabilization. Some believed that ‘State terrorism’ was the principal cause of individual terrorism, a form of ‘reciprocity’ by the people against oppressive politics, economic inequality, and social trouble. The most detailed classification of causes was submitted by non-aligned States in 1979, which divided causes into ‘political’ and ‘economic and social’ ones. Others suggested adding State connivance with fascist or Zionist groups.

In contrast, other States believed the list was a partial and subjective pre-judgment of the causes, and unresponsive to the complex, dynamic links between terrorism and its causes. Some maintained that the causes involved a myriad of factors outside the competence of the Ad Hoc Committee, lawyers, and diplomats, including scientific, social, economic, political, psychological, psychiatric, or genetic causes. Others suggested that the causes were already being addressed by UN organs and by existing normative frameworks, and argued that addressing terrorism should not depend on resolving all underlying injustices.

In evaluating the significance of causes, some States asserted that those waging just or legitimate struggles were entitled to use any means, as a matter of last resort. Other States opposed this permissive view, arguing that the end does not justify the means, and that some acts, particularly violence

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9 Ad Hoc Committee Report (1973), n 8, 15, para 49.
10 Ad Hoc Committee Report (1979), n 8, 20–21, para 69 (Algeria, Barbados, India, Iran, Nigeria, Panama, Syria, Tunisia, Venezuela, Yugoslavia, Zaire, Zambia).
11 ibid, 21, para 70.
12 ibid, 21, para 71.
13 Ad Hoc Committee Report (1973), n 8, 15, para 48; UNGAOR (32nd Sess), Ad Hoc Committee Report (1977), Supp 37, UN Doc A/32/37, 14–15, para 13 (Sweden); Ad Hoc Committee Report (1979), n 8, 11, para 36; 18, paras 63–65.
14 Ad Hoc Committee Report (1973), n 8, 14–15, para 46; Ad Hoc Committee Report (1977), n 8, 13, para 9 (Uruguay); 24, para 23 (US); Ad Hoc Committee Report (1979), n 8, 11, para 36.
15 Ad Hoc Committee Report (1977), n 8, 22, para 16 (Italy); 24, para 23 (US).
16 Ad Hoc Committee Report (1973), n 8, 7, para 22; 8, para 24; 14, para 45; 15, para 49; Ad Hoc Committee Report (1977), n 8, 35; para 35 (Tanzania); Ad Hoc Committee Report (1979), n 8, 10, para 30; 25, para 87.
17 Ad Hoc Committee Report (1979), n 8, 9, para 29; Ad Hoc Committee Report (1977), n 8, 16–17, para 3 (Austria).
against civilians, are so heinous that they are never justified.\textsuperscript{18} Some analogously reasoned that just as IHL limits the permissible means of State violence in armed conflict, so too must individuals and liberation movements accept humanitarian constraints.\textsuperscript{19}

The debate in the Ad Hoc Committee occurred at a transitional moment in the evolution of IHL. The adoption of the 1977 Protocols took place between the Committee’s first meeting in 1973 and its last meeting in 1979. As a result, the debate shifted after the recognition and internationalization of self-determination movements in Protocol I.\textsuperscript{20} States that accepted Protocol I regarded qualifying liberation movements as subject to the limits on permissible means and methods of warfare imposed by IHL, legally distinguishing such movements from terrorist groups,\textsuperscript{21} and decriminalizing liberation violence in compliance with IHL.

Any terror-type activity by those movements could henceforth be treated as breaches of IHL.\textsuperscript{22} Far from legitimizing or encouraging terrorism, this recognition imposed duties on liberation movements to observe IHL in armed conflicts. If national liberation groups could not lawfully target civilians in armed conflict, it became very difficult to see how civilians could be regarded as lawful targets in peacetime. The implications for States which did not accept Protocol I are explored further below.

(b) General Assembly’s response to causes

Following the Ad Hoc Committee’s final report in 1979, resolutions in the 1970s and 1980s urged States and UN organs to eliminate progressively ‘the causes underlying international terrorism’,\textsuperscript{23} particularly colonialism, racism, ‘mass and flagrant violations of human rights and fundamental freedoms’, alien occupation or domination, and foreign occupation.\textsuperscript{24} Some resolutions until 1991 also stated that nothing in those resolutions:

\textsuperscript{18} Ad Hoc Committee Report (1973), n 8, 8, para 23; 14, para 44; Ad Hoc Committee Report (1977), n 8, 13, para 8 (Uruguay); 21, para 11 (Canada); 24, para 21 (US); 36, para 41 (UK); Ad Hoc Committee Report (1979), n 8, 8, para 24; 9, para 29:10, para 31.

\textsuperscript{19} Ad Hoc Committee Report (1973), n 8, 7–8, para 23; 14, para 45; Ad Hoc Committee Report (1977), n 8, 16–17, para 3 (Austria); 24, para 21 (US); 33, para 28 (UK); Ad Hoc Committee Report (1979), n 8, 7, para 24; 10, para 31; 25, para 89.

\textsuperscript{20} Protocol I, Art 1(4) provides that international armed conflicts include: ‘armed conflicts in which peoples are fighting against racist regimes in the exercise of their right of self-determination, as enshrined in the’ UN Charter and the 1970 Declaration; see further ‘B(3) Jus in Bello: Self-Determination Movements’ below.

\textsuperscript{21} Ad Hoc Committee Report (1979), n 8, 10, para 30.

\textsuperscript{22} See Ch 5 below.


...could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter of the United Nations, of peoples forcibly deprived of that right... particularly peoples under colonial and racist regimes and foreign occupation or other forms of colonial domination, nor, in accordance with the principles of the Charter and in conformity with the above-mentioned [1970] Declaration, the right of these peoples to struggle [legitimately] to this end and to seek and receive support...

At first glance, this provision implicitly excludes acts in pursuit of 'just' causes from being regarded as terrorism, although the nature of the right to 'struggle' is ambiguous. This provision has often been interpreted as creating a national liberation exception to the international prohibition on terrorism.

However, the no-prejudice clause is not devoid of limitations. The resolutions state that the 'right' to struggle for self-determination is derived from—and must be exercised in accordance with—the Charter and the 1970 Declaration. Resolution 3034 (XXVII) itself provided that measures against terrorism must be 'in accordance with the principles and purposes of the Charter' and relevant UN resolutions.

These limitations are significant and are often glossed over. Respect for human rights is a basic purpose, or 'paramount object', of the United Nations in Article 1 of the Charter, which self-determination movements, as para-Statal entities, must act 'in accordance' with. Some resolutions also require movements to struggle 'legitimately' for self-determination, indicating limits on the permissible means of struggle.

In determining these limits, it is necessary to look at the right of self-determination, the law on the use of force, human rights law, and IHL. While there is a right of self-determination in the Charter, human rights treaties, and the 1970 Declaration (reflecting custom), none of those instruments explicitly specifies whether (a) force may be used to achieve self-determination, or (b) what kinds of force may be used by those fighting for it. If there is no ad bellum right to use force to secure self-determination, then any use of force by such movements may be criminalized as terrorism—as politically motivated violence designed to compel or intimidate—even if targets are strictly limited to military objectives.

26 See Ch 4 below.
Despite the near-completion of decolonization, the issue is not obsolete, given controversial denials of the right (in the narrow external sense) in Palestine, Western Sahara, and Tibet. There are also numerous claims of internal self-determination on the basis of ethnic or other group identity. During decolonization, developing and socialist States, and some writers, believed that ‘peoples’ were entitled to use force to achieve self-determination, whereas western States denied any right to use force. The Charter does not authorize the use of force for decolonization, and UN resolutions recognize the legitimacy of liberation struggles, but do not specify the permissible means of achieving liberation.

A legal compromise is reflected in the 1970 Declaration, which refers merely to the ‘actions’ and ‘resistance’ of movements against forcible denials of self-determination by States. States must refrain from forcibly denying the right, and in resisting forcible denial, peoples ‘are entitled to seek and to receive support’ from third States, not including sending military forces. Consequently, liberation movements have no legal right to use force to secure self-determination, but they do not breach international law by using force (defensively) against its forcible denial. It is significant that the UN position was adopted in the context of concerns about intervention by third States in self-determination conflicts. The UN response was less concerned about settling the question of whether self-determination movements themselves enjoyed an independent right to resort to force in the first instance.

Recourse to force by self-determination movements is clearly treated differently from recourse to force in ‘ordinary’ civil wars, in which international law is silent on any right of rebels to use force against a government. Where recourse to force against denial of self-determination is permitted, the repressive State necessarily loses its entitlement to criminalize such uses of force. Otherwise, national criminalization would frustrate the entitlements of self-determination movements under international law. An international crime of terrorism must, therefore, carefully exclude lawful uses of force.

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36 1970 Declaration, n 35, para 8: ‘Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country’; Cassese, n 35, 152, 199–200.
37 Cassese, n 35, 151, 153, 198.
38 See Detter, n 32, 102.
3. Jus in bello: self-determination movements

Regardless of whether self-determination movements are entitled to use to force, IHL applies equally to all participants in an armed conflict on humanitarian grounds. Parties to Protocol I recognize self-determination struggles as international armed conflicts. As such, the forces of parties to such conflicts may qualify as combatants (under more relaxed conditions of combatant recognizing the needs of guerilla warfare), and enjoy immunity for lawful acts of war. Combatants cannot be characterized as terrorists for acts compliant with IHL; Protocol I thus decriminalizes conduct that could formerly be regarded as terrorist. In such circumstances, liberation forces must comply with the detailed provisions of IHL, including prohibitions on terrorist-type acts against non-combatants and those out of combat, and the restrictions on permissible means and methods of war.

States not party to Protocol I may continue to treat national liberation struggles as non-international armed conflicts. Thus Israel commonly regards the killing of its soldiers in the Palestinian Occupied Territories as terrorism. There is also a view that even State Parties to Protocol I may so treat liberation struggles where the State does not recognize the liberation movement, since interpretation of Article 1(4) is thought to be within the subjective discretion of the relevant State. That view is doubtful, since Article 1(4) refers to the objective right of self-determination ‘as enshrined’ in the UN Charter, which does not make recognition dependent on the subjective agreement of the affected State. Further, Article 96(3) of Protocol I enables authorities representing peoples to lodge undertakings to apply the Geneva Conventions and Protocol with the depository (Switzerland), which triggers the application of the treaties.

While many of the protective provisions of Protocol I have entered customary law, Article 1(4)—which ‘internationalizes’ self-determination struggles—has not, being seldom applied in practice and possessing a largely agitational or rhetorical value. It has, however, influenced State practice.
and may be emerging as custom.\footnote{L Green, ‘Terrorism and Armed Conflict: The Plea and the Verdict’ (1989) 19 IYBHR 131, 136; M Scharf, ‘Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects’ (2004) 36 Case Western Reserve JIL 359, 370.} The more relaxed conditions of combatancy in Article 44 of Protocol I were traditionally regarded as only applying in occupied territories, or against colonial powers,\footnote{Green, n 41, 111; K Ipsen, ‘Combatants and Non-combatants’ in Fleck (ed), n 47, 65, 77.} but recent practice suggests an extension to secessionist movements,\footnote{Greenwood, n 47, 42–43.} encompassing internal, rather than purely external, self-determination causes.

The non-applicability of Protocol I to some self-determination conflicts has contradictory implications. On one hand, it frees liberation forces from the detailed IHL constraints governing international conflicts, and subjects them only to the more spartan rules of common Article 3 of the 1949 Geneva Conventions, the customary rules of non-international armed conflict\footnote{See, eg, Tadic (Interlocutory Appeal) ICTY–94–1 (2 Oct 1995).} and, where applicable, Protocol II. On the other hand, it permits States to deny combatant status to liberation forces and to treat them as criminals,\footnote{Green, n 41, 64. Protocol I, Art 96(3) allows the representatives of a ‘people’ in an international armed conflict under Art 1(4) to declare adherence to, and thereby bring into force, the 1949 Geneva Conventions and 1977 Protocol. A letter of 21 June 1989 from the PLO committed Palestine to the conventions, but Switzerland informed States on 13 September 1989 that it was unable to decide if the letter was an instrument of accession, due to international uncertainty about the existence of the State of Palestine. The existence of a Palestinian people is, however, ‘no longer in issue’: Israel Wall Advisory Opinion, ICJ Case 131, Judgment, 9 July 2004, para 118 (quoting an exchange of letters between PLO President Arafat and Israeli Prime Minister Rabin of 9 Sept 1993, and the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 Sept 1995, preamble and Arts II(1) and (2), XXII(2)).} including as ‘terrorists’. In the absence of combatant immunity, such persons could fall within an international crime of terrorism, defined as politically motivated, coercive, or intimidatory violence.

The differential treatment of similarly situated liberation movements undermines the consistency and coherence of IHL, and would frustrate the equal application of an international terrorism offence. There is thus some intellectual force in the claims of some States that the struggle for self-determination must be differentiated from terrorism. Dealing with liberation violence within the framework of IHL would assist in depoliticizing and defining terrorism.\footnote{Chadwick, n 42, 204.} Until there is universal ratification of Protocol I, or Article 1(4) enters into customary law, or key States such as Israel ratify it, there is little hope of dissipating the force of those objections.

States are naturally ‘reluctant to accept a form of international legislation which might eventually undermine their own power structure’.\footnote{A Cassese, International Law in a Divided World (Clarendon, Oxford, 1994) 92.} Yet denial of combatant status to movements resisting the forcible denial of self-determination implicates international law in oppression. The right of
self-determination is of fundamental international concern, given its *erga omnes* character. Yet under the guise of non-intervention in the affairs of States not party to Protocol I, international law protects oppressive regimes from popular destabilization, preferencing State sovereignty over more reasonable claims of popular sovereignty.

If international law takes self-determination seriously, it must impede human rights law to allow States to criminalize—as terrorists—those who forcibly resist its denial, and to deny them recognition as combatants. International agreement on defining terrorism must be conditioned on the exclusion of legitimate liberation movements from the scope of terrorism, by the universal application of Protocol I.

4. Human rights limits on permissible means

In armed conflict, IHL applies as *lex specialis* in determining if a violation of the right to life is arbitrary and therefore unlawful. Lawful killings in IHL are not arbitrary deprivations of life, and Protocol I establishes the conditions under which national liberation violence is justified. In contrast, self-determination violence is not justified by IHL in conflicts where Protocol I does not apply (precluding combatant immunity), or where an armed conflict does not exist and IHL is inapplicable. The question now is whether liberation violence not governed Protocol I may ever be justified.

In the absence of primary rules of self-determination authorizing violence in these situations, human rights law must be examined. Paradoxically, terrorism violates human rights but human rights is a major justification for it. Terrorists may assert that violence is the only means to secure self-determination and thus killings are not arbitrary, but legitimate restrictions on the right to life, designed to achieve a more valuable objective. There is thus a conflict of two norms of equal (*jus cogens*) status.

There is nothing theoretically novel about this conflict. The internal limitations of human rights law constrain the permissible means of pursuing rights-based causes. Common Article 5 of the International Covenant on

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Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Political Rights (ICESCR) states that nothing in those treaties ‘may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for [in those treaties]’. Those treaties do not expressly permit liberation movements to violate human rights in a generic or specific manner to secure self-determination—even if only combatants are targeted—and in a series of resolutions, the UN Commission on Human Rights has declared that terrorism can never be justified ‘as a means to promote and protect human rights’. Nonetheless, where Protocol I does not apply, attacks by liberation forces which are limited to military objectives may be considered more justifiable than those that instrumentally kill civilians.

Where rights conflict, balancing the relative importance of competing rights is an essential function of human rights law. Restricting certain rights is permissible to secure other rights; particular ends justify certain (but not any) means. What matters is whether the means protect a sufficiently important end to render those means proportionate. As Ignatieff observes, ‘human rights are not an ethic of queitism’, and some killing is justified: in self-defence; in combat; and for certain kinds of law enforcement. In such cases, the threat posed by the person justifies their killing, but randomly targeting civilians is ruled out. Human rights law forbids using the lives of one group of people instrumentally to secure the happiness (or ideology) of another; people should always be treated as ends in themselves and never merely as means.

On that basis, it is difficult to accept that the right of self-determination outweighs the right to life of (non-threatening) non-combatants. Nothing in human rights law suggests that all other rights may be sacrificed on the altar of self-determination. That argument would only make sense if all other rights depended on attaining self-determination, yet most rights can be enjoyed outside one’s ‘people’—a homogenizing concept which itself is open

58 See also 1948 UDHR, Art 30.  
63 See, eg, ECHR, Art 2(2); US Manual for Courts Martial 1951, para 197(b).  

Even States may not use unlimited means in self-defence and certain forms of violence are always impermissible under IHL. As Judge Higgins wrote in the Israel Wall Advisory Opinion, the absolute nature of IHL obligations is ‘the bedrock of humanitarian law, and those engaged in conflict have always known that it is the price of our hopes for the future that they must, whatever the provocation, fight “with one hand behind their back” and act in accordance with international law’. If the preservation of the State is one of the highest international values, it would be curious if other causes justified more extreme measures than those permitted in defence of the State. Self-determination is designed to achieve Statehood, so it is not so exceptional that it warrants the conferral of rights superior to those of States. Given the para-Statal personality of self-determination movements, their use of force is fundamentally defensive, exercised against foreign domination. As a defensive right, any action taken must be both necessary and proportionate, and the deliberate killing of civilians will rarely qualify; it may also infringe the self-determination of others.

Rodin takes the more radical view that the State right of self-defence (and by analogy, violent self-determination) sometimes may not even justify killing combatants. The tendency of escalation in war means that the suffering caused by recourse to defensive force often outweighs the value of the right sought. Most wars are not genocidal and merely replace the political order, and ‘populations can, and frequently do, survive the destruction of their state’s sovereignty’. Self-defence may cause more harm than accepting occupation (particularly after ‘bloodless invasion’).

Self-defence may also be inconsistent with international peace and security—collective defence of Czechoslovakia against the 1968 Soviet invasion would have risked global nuclear catastrophe. There is a danger in positing State sovereignty and self-determination as ultimate moral values in the international order. Although the common life is important, it is not a ‘source of value independent of its value for individual persons’. These provocative arguments are appealing, but demanding pacifism from invaded States (or suppressed ‘peoples’) encourages aggression, since it

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66 Rodin, n 61, 158–160.
69 Israel Wall Advisory Opinion, n 52, para 14 (Separate Opinion of Higgins J).
70 Ignatieff, n 57, 1149; Ad Hoc Committee Report (1977), n 13, 16, para 2 (Austria).
71 Rodin, n 61, 10–11, 138–139.
72 ibid, 124, 140, 147.
73 ibid, 131–132.
74 ibid, 117, 131.
75 ibid, 143.
eliminates the broader deterrence of violence that ensues from the recognition and exercise of defensive rights.

Whatever the merits of those views, the use of atrocious means often subverts or destroys the good end sought. Whereas Fanon and Sartre find personal liberation in liberation violence, a practitioner of liberation, Nehru, wrote: ‘Bad and immoral means often defeat the end in view.’ Even Marcuse argued that some forms of violence, including ‘arbitrary violence, cruelty, and indiscriminate terror’, can never be justified ‘because they negate the very end for which the revolution is a means’. As Berlin puts it: ‘Most revolutionaries believe, covertly or overtly, that in order to create the ideal world eggs must be broken, otherwise one cannot obtain the omelette. Eggs are certainly broken—never more violently or ubiquitously than in our times—but the omelette is far to seek, it recedes into an infinite distance.’ Revolutionary restraint is necessary for moral self-respect. Otherwise, all that is left is ‘the darker and more paradoxical thought that, if one can defeat evil only by becoming evil, then it is impossible to defeat evil’.

5. Other politically just causes: Rebellion

An early and persistent justification for terrorism is that violent resistance, rebellion, or revolution is justifiable against an unjust or oppressive regime. Such acts are manifestations of internal self-determination and purport to justify violating the rights of others. Theories of revolution and rebellion are ancient and varied, from Greece and Rome to natural law, the Enlightenment, liberalism, and human rights. Even deferential and hierarchical systems, such as Confucianism, feudalism, and some religions, have justified violent regime change in extreme circumstances.

Much of the vast literature on rebellion and revolution focuses on the existence of the right and the preconditions of its exercise, usually in a particular national order, political system, or philosophical tradition. Compara-

76 ibid, 65–66.
77 See F Fanon, The Wretched of the Earth (trans C Farrington, Grove Press, New York, 1963).
82 Rodin, n 61, 67.
84 Ignatieff, n 57, 1151.
tively less has been said about the status of the right in international law, and the permissible means of exercising it. The most sweeping consequentialist claims assert that just causes justify all means. Classic revolutions, such as the French and American, often involved ‘terrorist’ methods.

Both the *jus ad bellum* and *jus in bello* aspects are relevant to justifications for terrorism. If there is no right to rebel, then every internal use of violence against a State is unlawful and subject to national (and potentially international) criminalization as ‘terrorism’—even if violence is limited to military objectives. If there is a right to rebel (legalizing certain *ad bellum* acts of internal violence), then the contours of permissible means and methods of violence (*in bello*) must be carefully drawn, so that terrorist acts are distinguished from lawful acts of belligerency.

(a) The right to rebel in international law

(i) *Jus ad bellum: internal violence*

The existence of an international legal right to resist, or rebel against, tyranny or oppression is doubtful. Certainly a ‘right of revolution against oppressive regimes is central to the Western democratic tradition’, and is also common in other political systems. As Arendt notes, many modern political communities were founded on violence and thus originated in crime. Yet a shared principle in some domestic orders does not imply the existence of a similar international right. There is no binding treaty right to rebel against oppressive regimes. At best there is a preambular reference in the Universal Declaration of Human Rights (UDHR), which states: ‘Whereas it is essential, if man is not to be compelled to have recourse, as a last resource, to rebellion against tyranny and oppression, that human rights should be

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87 G Fox and G Nolte, ‘Intolerant Democracies’ in G Fox and B Roth (eds), *Democratic Governance and International Law* (CUP, Cambridge, 2000) 389, 432. eg Art 20(4) of Germany’s Basic Law (*Grundgesetz*) recognizes a right of resistance, as a last resort, against attempts to overturn the constitutional order.

protected by the rule of law’. A drafting proposal, endorsed by the UN Commission on Human Rights, to refer to a ‘right’ of resistance was not accepted: ‘When a Government, group, or individual seriously or systematically tramples the fundamental human rights and freedoms, individuals and peoples have the right to resist oppression and tyranny.’

Nonetheless, Honoré argues that the UDHR preamble implies that subjects have political rights against their governments. While it does not recognize a formal legal right to rebel, ‘neither is it a purely informal right grounded in the conventional morality of the international community’. Instead, it ‘possesses an intermediate, semi-formal status’, premised on human dignity and international political norms.

The factual recognition in the UDHR preamble that rebellion may flow from oppression does not, however, imply that a right of rebellion exists. The exclusion of reference to a ‘right’ during the drafting, the lack of reference to such a right in the 1966 covenants, and the preambular status of the provision in a non-binding declaration weigh against the existence of a right. Only peaceful rights of political participation are expressly mentioned in the ICCPR. While States occasionally exhort citizens of repressive States to ‘rise up’ against their leaders (consider US Presidential incitement of Kurds and ‘Marsh Arabs’ against Saddam Hussein’s Iraq), such statements are typically framed as political positions, not as a legal right to rebel.

In addition, there are no correlative duties on affected States not to suppress or criminalize legitimate rebellions, nor duties on third States to assist legitimate rebellions, nor even to shield rebels from extradition for political crimes. The duty on third States not to intervene in civil wars is not designed to recognize a right of rebellion, so much as to defer to a matter within...
domestic jurisdiction, the freedom of peoples to determine their own political status through internal self-determination.

(ii) Jus in bello: internal violence

It is unnecessary to determine the existence of a right to rebel to discuss the limits on violence when it occurs. The *jus in bello* of internal violence bears on justifications for terrorism in important ways. In non-international conflicts, the application of common Article 3 of the 1949 Geneva Conventions does not affect the legal status of parties. Similarly, Protocol II does not affect ‘the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity’.

Accordingly, rebels in civil wars do not automatically enjoy international legal personality or recognition as combatants, unless the State recognizes their belligerency, informally applies IHL, or where, in exceptional cases, there exist agreements between non-State parties in a conflict where the State has dissolved. The conditions of combatancy for irregular forces in international armed conflicts do not apply in non-international conflicts and there is no combatant immunity for non-State forces. Protocol II

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99 1966 ICCPR, Art 1(1); 1966 ICESCR, Art 1(1).
100 Prohibitions on terrorism in non-international armed conflicts are examined in Ch 5 below.
101 1949 Geneva Conventions, common Art 3.
105 In *Tadic (Interlocutory)*, n 51, para 106, the ICTY noted the trend of States since the Spanish Civil War and in the Nigerian civil war ‘to withhold recognition of belligerency but, at the same time, extend to the conflict the bulk of the body of legal rules concerning conflicts between States’.
106 eg in *Galic*, the ICTY held that an agreement between the Republic of Bosnia-Herzegovina, the Serbian Democratic Party, and the Croatian Democratic Community to apply certain IHL provisions was binding as if it were an international treaty: *Galic ICTY–98–29–T* (5 Dec 2003) paras 20–25. Capacity to enter into treaty relations does not, however, necessarily imply full international legal personality.
108 Cassese, n 104, 343.
contains no conditions of combatancy.109 Similarly, in internal violence below an armed conflict (such as internal disturbances and tensions, riots, isolated and sporadic acts of violence, and other acts of a similar nature),110 there is no combatant immunity. In practice, rebels may enjoy a partial immunity in relation to third States, although this is conditional since it may be withdrawn on political grounds.111

States may consequently treat violence by non-State forces as crimes under national law,112 including violence directed solely and proportionately against military objectives,113 and even if such forces carry arms openly, wear identifying symbols, and informally respect IHL. Thus Turkey does not recognize an armed conflict in Kurdistan,114 nor has Russia recognized internal conflicts in Chechnya. The only legitimate rebellion is a successful one.115 While the question of whether violence constitutes an internal armed conflict triggering IHL is an objective one, even where Protocol II applies it is still open to the affected State to treat rebels as criminals.

It is nonetheless noteworthy that fairly low level internal violence has been recognized by the Inter-American Commission in the Abella case as triggering IHL, which 'does not require the existence of large scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory'.116 In that case, the Commission applied IHL to an organized attack by 42 armed civilians on an Argentinian military installation in peacetime, against which Argentina deployed 1,500 soldiers using military tactics. Similarly, in Yunis (1991), a US court found that the defence of superior orders may be open to an Amal militia member who, in 1985, hijacked an aircraft in Beirut (in peacetime), where the militia qualified as a military organization under the laws of war.117

One concession is that Protocol II urges authorities at the end of hostilities to 'endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict'.118 Similarly, if belligerents do not

109 cf Detter, n 32, 146 (criteria in the 1949 Geneva Conventions or Protocol I apply by analogy).
110 Protocol II, Art 1(2).
112 H Lauterpacht (ed), Oppenheim’s International Law: vol II (8th edn, Longmans, Green and Co, London, 1955) 210–212; Green, n 41, 60, 318; Cassese, n 104, 343; Draper, n 98, 141.
113 Protocol II, Art 6 does, however, establish minimum procedural guarantees in criminal cases.
114 S Cayci, ‘Countering Terrorism and International Law: The Turkish Experience’ in Schmitt and Beruto (eds), n 56, 137, 141.
117 Fawaz Yunis, 924 F. 2d at 1097.
118 Protocol II, Art 6(5).
commit war crimes, ‘it is in the spirit of the [Geneva] Convention that trials and executions for treason should be reduced to an indispensable minimum required by the necessities of the situation’. 119 Although prosecution is permitted, it is often impractical or unwise.120 In practice, some States have conferred de facto recognition on non-State groups which generally comply with IHL, and third States commonly do not regard insurgents as criminals.121 However, for rebels, discretionary treatment is little legal comfort.

(iii) Implications of jus ad bellum and jus in bello

The striking feature of non-international armed conflicts, and situations of lesser internal violence, is the discretion enjoyed by States to criminalize both recourse to force, and the conduct of hostilities, by non-State forces. Unless non-State armed forces in internal conflicts—including those where Protocol II does not apply122—are excluded from an international crime of terrorism, there is an acute danger of internationally legitimizing State repression of internal dissidence. If terrorism is politically motivated, coercive, or intimidating violence, then those who rebel against oppressive regimes may be prosecuted as terrorists—even if they target only military objectives.

The limited regulation of non-international conflicts is based on non-intervention in domestic jurisdiction,123 particularly where a State interest as vital as political authority is at stake. Yet human rights law interferes in the freedom of States to act arbitrarily towards those in their power, narrowing the reserved domain of domestic jurisdiction.124 Where oppressive States seriously violate human rights, the treaty-based, ‘soft’ machinery of human rights protection and supervision may fail to secure basic rights. In the absence of an effective, binding enforcement system, or Security Council intervention, violent rebellion—as collective self-help—may be the only means of terminating rights abuses.

Honoré elegantly proposes a right to rebel as a secondary right arising as a remedy against large-scale and sustained violations of primary rights.125 Rebellion is the right of oppressed or exploited individuals to use violence to

119 Lauterpacht, n 112, 211; see also T Franck and B Lockwood, ‘Preliminary Thoughts towards an International Convention on Terrorism’ (1974) 68 AJIL 69, 88.
122 Although ‘Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles’: Tadic (Interlocutory), n 51, para 117.
123 Green, n 48, 137.
125 Honoré, n 85, 38.
change the government, structures, or policies of society. In its absence, human rights remain rhetorical or aspirational. Serious and sustained State oppression dissolves the social bonds between the State and its subjects, and as a result, ‘it is no longer open to the state to define the conditions in which subjects may lawfully use force’. The State may be attacked as long as rebels respect ‘the same restraints as they would be bound to observe if the rebellion were a war between states’. This position has intuitive appeal and reflects the view of Lauterpacht, concerning the political offence exception to extradition, that the:

... international community was no longer a society for the mutual protection of governments. A revolution might be a crime against the established state, but it was no longer a crime against the international community. So long as international society did not effectively guarantee the rights of men against arbitrariness and oppression by governments, it could not oblige states to treat subversive activities... as a crime.

Were a right to rebel based on human rights standards accepted, it would jeopardize the realization of human rights to allow serious State violators to criminalize the recourse to force by internal rebels. The objection that a right to rebel revives a subjective doctrine of just war is no more persuasive than directing the same objection at the right of self-defence, itself a vestige of just war. Like self-defence, a right to rebel is a fundamentally defensive right, exercisable only when legal preconditions are satisfied—instead of an armed attack, the serious and sustained violation of human rights.

The difficulty lies in determining when a rebellion is ‘justifiable’. For Honoré, a State’s breach of duty must be ‘weighty, crucial and severe’, such as ‘sustained disinterest or contempt’ or continued discrimination, oppression, or exploitation which renders life intolerable. Since rebellion may entail widespread violence, it must only be considered in extreme circumstances, and not if other remedies are available in a reasonable period. The likely consequences of action must also be weighed. Despite the legal (rights-based) standards involved, such determinations still invite subjective appreciation of when the right to rebel arises—and when it may be denied. Such determinations are generally more subjective than verifying if an armed attack has occurred.

Regardless of its justifiability, where a rebellion generates an armed conflict, it would thwart the realization of human rights to criminalize the conduct of hostilities (such as violent resistance against military or official targets, which complies with IHL), and even to forcibly repress rebellions. There is a powerful argument that rebel violence against an oppressive State, while respecting

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126 ibid, 36. 127 ibid, 34, 38. 128 ibid, 53–54. 129 ibid, 54. 130 (1954–I) ILCYB 141. 131 Honoré, n 85, 48, 51. 132 ibid, 38, 54.
IHL constraints, should be lawfully *justified* in international law—by conferring combatant immunity—rather than merely excused at the level of mitigation in sentencing.

To avoid the problem of distinguishing just from unjust causes during combat, combatant immunity could be conferred on any rebel forces—progressive or reactionary—as long as they comply with IHL and its conditions of combatancy, transplanted from Protocol I. Internal conflicts would then mirror international ones, in which, for humanitarian reasons, the lawfulness or justice of recourse to force does not affect the lawfulness of a combatant’s participation in hostilities.\(^\text{133}\)

Objections are that such an extension would legitimize violent non-State groups (including terrorists), by conferring international recognition on them,\(^\text{134}\) and privatize war.\(^\text{135}\) It would also interfere in domestic jurisdiction, beyond the limited interventions of common Article 3 of the 1949 Geneva Conventions and Protocol II. Some of these objections are similar to those raised against the adoption of Protocol I.\(^\text{136}\) Recognition implies loss of control over territory and private violence, and a degree of governmental failure, and States are reluctant to relinquish their sovereign authority to identify and penalize ‘terrorists’.\(^\text{137}\)

Yet IHL is designed to serve neutral humanitarian purposes, not to confer political legitimacy or recognition on participants in conflict—just as recognizing the combatant immunity of an aggressor State’s forces does not legitimize their cause. Further, recognizing that non-State actors have rights and duties under IHL does not make them full subjects of international law, or give them legal personality equivalent to States. Conferring combatant immunity simply ensures that there is greater incentive for non-State groups to admit and respect IHL’s constraints on violence. This does not privatize war, but pragmatically concedes that private groups already fight wars, and will continue to do so, even if they are denied combatancy. It is better to regulate private violence internationally, to minimize harm in conflict, than to leave it to sovereign discretion.

To ensure civilian protection, rebels would have to comply with the conditions of combatancy, and would be liable for perfidy or other IHL breaches, although in practice it may be difficult to distinguish terrorist groups from

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\(^{133}\) Lauterpacht, n 112, 218.


\(^{135}\) G Abi-Saab, ‘The Proper Role of International Law in Combating Terrorism’ (2002) 1 Chinese JIL 305, 308.


\(^{137}\) Chadwick, n 42, 9, 11; Clapham, n 134, 113.
resistance and guerilla groups which sometimes use terrorist tactics.\textsuperscript{138} Rebels would require a minimum degree of organization to enjoy combatant status, since ‘structure is necessary for the activation and implementation of international norms’.\textsuperscript{139} Loosening the conditions of combatancy further (such as permitting perfidy) would jeopardize civilian protection, by reducing the distinction between combatants and non-combatants.\textsuperscript{140}

For instance, the French resistance woman in 1944 who, dressed in civilian clothes and concealing a revolver, cycled up to a German officer in a Paris street and shot him in the head,\textsuperscript{141} necessarily renders all French civilians suspect, and invites drastic retaliation. Yet it is such ‘freedom fighters’ that the EU Council sought to exclude from the scope of terrorism under the 2002 EU Framework Decision, in a draft statement excluding ‘the conduct of those who have acted in the interest of preserving or restoring . . . democratic values . . . as was notably the case in some Member States during the Second World War’.\textsuperscript{142} Were this reasoning adopted in IHL, it would analogously justify the commission of war crimes in pursuit of just causes—a position rejected by the international community in armed conflicts. Many guerillas in the Second World War would not have complied with the more relaxed conditions of combatancy in Protocol I. While the EU’s statement was not part of the legal text as adopted, it nonetheless signals political unease about criminalizing (as terrorism) the conduct of freedom fighters similar to those in Europe during the war. What is unclear is whether the EU believes that such conduct should not be regarded as criminal at all, in which case it would seem to lend support to a further liberalization of the relaxed conditions of combatancy in Protocol I.

Paradoxically, the EU’s position is not dissimilar to the exclusion of liberation violence from the anti-terrorism treaties of the Arab League, the Organization of the Islamic Conference, and the African Union—even though such an exemption is the main sticking point between these organizations and western States in the negotiation of a comprehensive anti-terrorism treaty.\textsuperscript{143} The EU’s lack of empathy for similarly situated ‘freedom fighters’ resuscitates the persistent adage that ‘one person’s freedom fighter is another person’s terrorist’.

\textsuperscript{138} Detter, n 32, 145.
\textsuperscript{140} Detter, n 32, 144.
\textsuperscript{141} J Henley, ‘You can’t know how wonderful it was to finally battle in the daylight’, The Guardian, 21 Aug 2004.
\textsuperscript{143} See Ch 3 below.
Even if IHL is fully extended to civil wars and all liberation movements, a different justification for terrorism rests on a challenge to IHL norms of distinction. On one view, some non-combatants are not ‘innocent’ and therefore become legitimate targets of violence: 144 not only police officers or government officials who enforce and implement the policies of an oppressive government, but Israeli settlers in the Palestinian Occupied Territories, pied-noirs in Algeria, or white South Africans during apartheid. These cases involve unlawful occupations or gravely unlawful acts under international law. Foreign settlers may be seen as instruments or beneficiaries of the State’s unlawfulness. As Fanon writes: ‘The appearance of the settler has meant . . . the death of the aboriginal society, cultural lethargy, and the petrification of individuals. For the native, life can only spring up again out of the rotting corpse of the settler.’ 145 The argument for ‘non-innocence’ (or ‘half-innocence’) 146 is most persuasive for voluntary settlers with knowledge of the international unlawfulness (regardless of domestic legality). Children of settlers ought also be excluded, since they may have no choice but to follow their parents, and their minority may preclude informed choice.

On one hand, law sometimes prohibits violence but accepts it as morally excusable: ‘when the victim is Hitler-like in character, we are likely to praise the assassin’s work.’ 147 Assassinations of oppressive politicians, which avoid innocent casualties, are distinguishable from random murders of innocents: 148 ‘who would say that he commits a crime who assassinates a tyrant?’ 149 Courts have even recognized assassinations as proportionate political acts exempt from extradition. 150 While settlers are not oppressive politicians, 151 they are voluntary, knowing agents of oppression, displacing and impoverishing local populations. The protection of civilians in general does

144 Ignatieff, n 57, 1147; Franck and Lockwood, n 119, 80.
145 Fanon, n 77, 93.
146 T Honderich, After the Terror (Edinburgh University Press, Edinburgh, 2003) 159.
147 Walzer, n 81, 199; Honoré, n 85, 37; Shearer, n 96, 185; C Van den Wyngaert, ‘The Political Offence Exception to Extradition: How to Plug the Terrorist’s Loophole’ (1989) IYBHR 297, 305; see, eg, AFP, ‘Hitler’s would-be assassin receives belated honours’, Sydney Morning Herald, 16 May 2003.
148 Walzer, ibid, 198–199.
150 See, eg, Watin v Ministère Public Federal, Swiss Federal Tribunal (1964), 72 ILR 614, 617: an attempt on the life of French President de Gaulle by a French national would be proportionate: ‘Where the person aimed at practically embodies the political system of the State so that it might be thought that his disappearance will entail a change in that system.’ In IHL, however, the assassination of an enemy head of State is forbidden, unless he or she is also the uniformed commander-in-chief: Green (2000), n 41, 145. But POW detention is permitted to recognize the danger such leaders pose to an adversary: Lauterpacht, n 112, 352.
151 Walzer, n 81, 199.
not disappear if the targeting of such a limited class is accepted, just as the
targeting of oppressive officials does not endanger ordinary citizens.152

Yet the argument for killing ‘non-innocent’ civilians is still unacceptable. The
killing of combatants in armed conflict is justified because soldiers are
militarily dangerous to an adversary.153 Violence against combatants aims to
disable them so they can no longer keep fighting.154 Civilian munitions work-
ers are lawful targets for the related reason that they are incidental casualties
of lawful attacks on military targets (munitions factories).155 In contrast,
neither police officers156 nor settlers are militarily harmful, although some
may be if they engage in hostilities and hence lose their civilian immunity.157

The argument for targeting settlers rests on a different argument about
their moral or legal culpability,158 not their military threat.159 But allowing
settlers to be killed for moral, political, or legal wrongdoing is little more than
vigilante justice. Punishment is a judicial function, requiring procedural
fairness, and not easily given over to summary justice.160 Extra-judicially
evaluating immunity, or guilt, by standards of morality, or suspected
illegality, renders civilian protection highly subjective.

Even in ideal cases of ‘just assassination’ such as that of Hitler,161 assassins
are entitled to moral respect, but can still be prosecuted. This is because
combatants are objectively harmful, but ‘the unjust or oppressive character
of the official’s activities is a matter of political judgment’.162 IHL provides
objective criteria of combatancy which identify harmful people in conflicts.

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152 ibid, 200.
153 ibid, 145. Although as Rodin, n 61, 127–128, observes: ‘soldiers fighting a defensive war are
permitted to use violence against persons who pose no imminent threat to anyone. For instance,
they may kill enemy soldiers who are marching, eating, sleeping, and so on, as well as uniformed
support staff such as lorry drivers, cooks, and administrators’. One might also wonder whether,
in an age of modern air warfare, a foot soldier is really a threat to a high-altitude bomber. The
point is that their harmfulness as a whole must be assessed, not their threat to particular
members of opposing forces.
154 Lauterpacht, n 112, 338.
155 See also 1923 Hague Draft Rules, Art 24(2); Walzer, n 81, 145–146.
156 eg French gendarmes in Algeria, who were attacked by an Algerian political group, were
considered ‘unarmed’, ‘peaceful’, ‘civilian’, and ‘non-belligerent’ persons; see Zaouche Tahar,
Abdi Arezki and Ouakli Rabah Court of Appeal of Brussels, 7 June 1960, (1960) 75 J Trib 467,
affirmed by the Cour de Cassation, 22 July 1960, Pasicrisie I, 1263 and in a subsequent advisory
opinion by the Court of Appeal of Brussels, 10 Nov 1960, Doss 26.463 E and 26.464 E.
157 In practice, distinguishing civilian settlers from militarized settlers may be difficult, as
in the Palestinian Occupied Territories, where settlers frequently carry military weapons for
158 Honderich, n 146, 159.
159 Rodin, n 61, 84.
160 Consider the many extrajudicial executions of suspected informers by Palestinian mili-
tants; eg S Goldenberg, ‘“Collaborator” shot dead as jet strikes’, Sydney Morning Herald, 16
July 2002.
161 Walzer, n 81, 203; see also Franck and Senecal, n 136, 196.
162 Walzer, n 81, 200. One might wonder, however, whether a foot soldier is objectively more
threatening than, for instance, the head of Stalin’s secret police.
While there are likewise human rights standards by which to measure the conduct of officials or settlers, such judgments entail a margin of appreciation far exceeding that involved in factually identifying a combatant.

Even more tenuous than the argument for killing settlers is Al-Qaeda’s view that Americans, by being Americans, are responsible for the acts of the US, or for sustaining its power. As Osama Bin Laden said of attacks on US civilians:

You may then dispute that all the above does not justify aggression against civilians, for crimes they did not commit . . . This argument contradicts your continuous repetition that America is the land of freedom . . . Therefore, the American people are the ones who choose their government by way of their own free will; a choice which stems from their agreement to its policies . . . The American people have the ability and choice to refuse the policies of their Government and even to change it if they want.163

Similarly, one of the organizers of the 7 July 2005 London bombings, Mohammed Sidique Khan, stated: ‘This is how our ethical stances are dictated. Your democratically elected governments perpetrate atrocities against my people and your support of them makes you responsible, just as I am directly responsible for protecting and avenging my Muslim brothers and sisters.’164 The idea of non-innocence stretches to different lengths, as one writer notes: ‘what of the private citizens who carry the flag in trade, athletics or non-governmental organizational activities? Or, for that matter, what of every private citizen who, merely by not resisting, may be presumed to condone his government’s acts?’165

The views of Al-Qaeda reflect a crude doctrine of collective responsibility and punishment, where (democratic) State action is mechanically imputed to all of its citizens. Such a view not only disavows the autonomy of individuals, but it is also politically punitive; it threatens a whole people, regardless of the individual harmfulness of its members.166 Likewise, the targeting of UN or humanitarian personnel, for supposed complicity in nourishing the US occupation of Iraq,167 embodies a world-view which ultimately exposes every individual to terrorist harm—whether on account of their occupation, political beliefs, religious affiliation, nationality, or otherwise.

165 R Mushkat, ‘“Technical” Impediments on the Way to a Universal Definition of International Terrorism’ (1980) 20 Indian JIL 448, 454.
Another extreme challenge to IHL comes from those like the Palestinian Sheik Ahmed Yassin, who stated: ‘The Jews attack and kill our civilians—we will kill theirs’. Similar claims have been made by Chechen groups, and by Al-Qaeda: ‘The time has come for vengeance against the Zionist crusader government of Britain in response to the massacres Britain committed in Iraq and Afghanistan.’ Arguments for retributive killings draw no moral distinction between intended and unintended killings of non-combatants, and embody a simplistic rejection of the doctrine of double effect. Incidental civilian casualties from proportionate military operations are a tolerated cost of war, but deliberately killing non-combatants—even in reprisal under treaty law—is unlawful.

Arguments for retributive killings are, however, nourished by the overwhelming preponderance of civilian casualties relative to military casualties in modern conflicts, including in recent conflicts in Kosovo, Afghanistan, Iraq, and Palestine. High altitude air warfare minimizes military losses among the armed forces of technologically superior States, but may inflict

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171 See 1949 Geneva Conventions, common Art 3 (minimum guarantees); 1949 First Geneva Convention, Art 45 (wounded and sick); 1949 Second Geneva Convention, Art 46 (wounded, sick and shipwrecked); 1949 Third Geneva Convention, Art 13 (prisoners of war); 1949 Fourth Geneva Convention, Arts 27 (humane treatment of protected persons), 33 (protected persons and private civilian property in occupied territory), 147 (grave breaches); Protocol I, Arts 20 (wounded, sick, shipwrecked, medical and religious personnel), 51(6) (civilian population), 52(1) (civilian objects), 53(c) (cultural objects and places of worship), 54(4) (objects indispensable to civilian survival), 55 (natural environment), 56(4) (works and installations containing dangerous forces), 75 (fundamental guarantees), 85 (repression of grave breaches); Protocol II, Arts 4 (fundamental guarantees), 13 (protection of civilian population); 1954 Hague Convention on the Protection of Cultural Property, Art 4(4). See text to nn 314–318 below on the customary law of reprisals.
172 In the Iraq war from March 2003 to March 2005, non-combatant deaths are credibly estimated at 25,000, with 42,500 wounded: Iraq Body Count, *A Dossier of Civilian Casualties 2003–2005* (Oxford Research Group, Oxford, 2005); <http://reports伊拉compԲԲ全民>dossier_of_civilian_casualties_2003–2005.pdf> (about 37% of civilians were killed by US-led forces, 9% by insurgent forces, and 36% by post-invasion criminal violence). Another study found that direct or indirect Iraqi civilian deaths could be as high as 100,000: L Roberts, R Lafta, R Garfield, J Khudhairi, and G Burnham, ‘Mortality before and after the 2003 invasion of Iraq: cluster sample survey’ (2004) 364 (No 9448) *The Lancet* 1857. These figures compare with 2,252 US military deaths; 204 deaths of US allied forces; 300 deaths of coalition contractors; 80 dead journalists; and at least 4,000 Iraqi (coalition) police and military deaths: Iraq Coalition Casualty Count: <http://icasualties.org/Default.aspx> (as at 7 Feb 2006). It is also estimated that 5,000–6,000 Iraqi soldiers and insurgents were killed in ‘major combat’ between March 2003 and September 2004, though estimates of insurgents killed range up to 50,000: see P Bennis and E Leaver, ‘The Iraq Quagmire: The Mounting Costs of War’, A Study by the Institute for Policy Studies and Foreign Policy in Focus, 31 Aug 2005, 26. In the second intifadah in Palestine, from 2000 to 2002, 1,450 Palestinians were killed compared with 525 Israelis: Fisk, n 166, 556.
high incidental civilian casualties. The high rate of civilian casualties may suggest that judgments about military necessity have become overly protective of military forces (which are prepared to assume too few risks) and underprotective of non-combatants (who are too readily accepted as ‘collateral damage’). If this lack of proportionality is a cause of high civilian casualties, then it may encourage terrorists to claim that their targeting of civilians is not so morally different from States that kill civilians too casually.

C. CRIMINAL LAW DEFENCES TO TERRORISM

In the absence of any positive right to rebel against oppressive States, including by self-determination movements falling outside Protocol I, international criminal defences assume importance in accommodating claims of justification for terrorism. For serious crimes, a fair trial requires the availability of defences, which recognize that ‘the presumption of free will is displaced’ in some circumstances. There is little evidence in State practice that absolute or strict liability attaches to terrorism, and as such, the full range of defences is available. Sectoral treaties do not abolish defences, and most domestic terrorism laws also do not exclude them.

Just as defences are available to comparably grave charges such as genocide, war crimes, or crimes against humanity, so too should defences be available to terrorism. While criminalization expresses international disapproval of terrorism, defences moderate the law’s harshness in morally exceptional cases, and allow a more refined and calibrated response to claims of justification. Not all terrorism is the same, and it follows that the criminal law cannot treat all terrorist acts in the same way. The motive behind terrorism is relevant to evaluating criminal responsibility.

The scope of defences in international criminal law was historically ill-defined. Defences were not recognized in the Nuremberg Charter, although

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177 ibid.
178 Franck and Senecal, n 136, 201, 210–215.
the Nuremberg Tribunal permitted superior orders in mitigation. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) Statutes do not mention defences, and exclude official position as a defence or mitigating factor, but allow superior orders in mitigation. The Rules of Procedure and Evidence of those tribunals, however, allow both alibi and ‘any special defence’ to be pleaded.

The 1998 Rome Statute explicitly affirms grounds excluding criminal responsibility, including: (a) mental disease or defect; (b) intoxication; (c) self-defence; (d) duress; and (e) other grounds deriving from international law and general principles of law. Official capacity is excluded as a defence or a mitigating factor. Self-defence and duress/necessity are the defences most relevant to terrorist acts.

Civil law systems commonly distinguish between defences as justifications or excuses, and there is revived interest in the distinction in the common law. It is unclear if international law so distinguishes, although in the 1998 Rome Statute, it has been suggested that the words ‘a person shall not be criminally responsible’ characterize defences as excuses. Both justifications and excuses are rational explanations for wrongdoing, and both may produce an acquittal. The difference lies in the greater moral stigma attaching to excused conduct, where wrongfulness is admitted, but responsibility is wholly or partially refused. In contrast, a justification is a positive liberty to perform an otherwise unlawful act; responsibility is accepted but wrongfulness denied.

182 Kittichaisaree, n 181, 258.
183 ICTY Statute, Art 7; ICTR Statute, Art 6.
184 ICTY and ICTR Rules of Evidence and Procedure, rule 67; see Kittichaisaree, n 181, 258.
189 Cassese, n 2, 221.
190 Knoops, n 174, 29–30. In practice, cases have not yet arisen where the legal consequences of the distinction are relevant: see Cassese, n 2, 220–222; Smith, n 188, 210.
192 Smith, n 188, 210.
193 G Fletcher, *Rethinking Criminal Law* (Little, Brown, Boston, 1978) 759; Knoops, n 174, 29; Cassese, n 2, 220–222: examples of excuses include mental disease; intoxication; mistake of fact; mistake of law; duress; and physical compulsion.
194 Rodin, n 61, 29; Cassese, n 2, 219–221: examples of justifications include the lawful punishment of enemy civilians or combatants; lawful belligerent reprisals; and self-defence.
195 Fletcher, n 193, 759; Knoops, n 174, 29.
1. Self-defence

Is terrorism ever justified in self-defence, or defence of another? Self-defence is a general principle of criminal law. The 1998 Rome Statute excludes criminal responsibility where: ‘The person acts reasonably to defend himself or herself or another person . . . against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person.’ In the case of war crimes, a person may also act reasonably to defend property which is essential for the survival of the person or another person, or property which is essential for accomplishing a military mission.

In addition to requirements of an imminent and unlawful attack, and proportionality, Cassese suggests that the law requires two further conditions: there is no other way of preventing the offence (otherwise known as a requirement of necessity, and encompassing a duty to retreat or avoid conflict); and the conduct of the aggressor is not caused by the person acting in self-defence. The individual right of self-defence is distinct from the right of national self-defence exercised by States or State-like entities. Indeed the Rome Statute stipulates that a person engaged in defensive military operations is not automatically absolved of criminal responsibility, and the ICTY has found that such operations do not justify violations of IHL.

Because self-defence aims to protect ‘the legitimate interest a person has in their own continued survival and bodily integrity’, acts in self-defence are motivated by self-preservation, rather than by political aims, or premeditated coercive or intimidatory purposes. While killing an attacker may incidentally satisfy a political goal (if, for instance, the attacker is an agent of State policy), an act remains defensive as long as it is a reasonable and proportionate response to imminent, unlawful force. For this reason, attacks on innocent civilians can never be defensive, since such persons are not responsible for threatening imminent unlawful force. Less still are indiscriminate attacks on civilians justified by self-defence, because the lack of discrimination must fail the proportionality test.

197 The ECHR, Art 2(2)(a), recognizes the defence of any person from unlawful violence, where ‘absolutely necessary’, as a justification for deprivation of life.
199 Rodin, n 61, 40–41: indeed, the earlier requirement of imminence derives from necessity.
200 Ashworth, n 175, 146; Rodin, n 61, 40. A duty to retreat is not well established in the case law and the requirement in the Rome Statute to act ‘reasonably’ does not seem to automatically require it.
201 Cassese, n 2, 222.
202 ibid, 223.
203 1998 Rome Statute, Art 31(1)(c); see also Carl D O’Neal, US Ct Military Apps, 18 Feb 1966, 16 USCMA 33; 36 CMR 189, 196 (self-defence is not available to a person engaging in mutual combat).
204 Kordić and Čerkez, n 196, para 452.
205 Rodin, n 61, 30.
Self-defence does not confer a licence to use violence in a strategic way in protest at a generalized policy of State oppression. Where an oppressive government threatens imminent and internationally unlawful force, affected individuals may exercise self-defence against the State agents or officials implementing the policy, such as the police, security services, or paramilitaries. Examples include self-defence by a detainee against an official threatening torture, enslavement, or prolonged unlawful detention; where a civilian threatened with rape wounds a soldier.

However, it would be disproportionate to use lethal force against a person depriving another of the right to vote or freedom of expression, or even to protect property. In allowing defence of property essential to survival or to accomplishing a military mission, the drafters of the Rome Statute reached a ‘disturbing compromise’ which may violate *jus cogens* and contradict IHL. In practice, threats to property will seldom have imminent lethal consequences, since alternative means of survival will often be available, and thus killing to protect such property would seldom be proportionate. Exceptional cases may, however, arise, such as threats to destroy or steal food in situations of starvation or scorched earth policies. On the other hand, it is difficult to see any rational justification for classifying defence of property essential to a military mission as *self-defence*, since such conduct falls within the primary rules of IHL on the conduct of military operations and would, in appropriate cases, attract the ordinary application of combatant immunity.

The requirement of imminence also precludes self-defence against State officials who order, but who do not personally implement, oppressive policies. While such action might fall within a more general right to rebel, only an expanded (or preventive) right of self-defence would authorize violence against such persons.

May individuals act pre-emptively in self-defence? There is little international case law on the point, but some national courts permit pre-emption. In the English case of *Beckford*, it was held that ‘a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike’. The rationale is that a person’s vital interests cannot be protected if the person is required ‘to wait until the first blow was struck’.

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206 ibid, 48; see, eg, C Banham, ‘Guantanamo escape may be justified: Kirby’, *Sydney Morning Herald*, 13 Nov 2003.
207 Cassese, n 2, 222–223.
208 Rodin, n 61, 48.
209 ibid, 44: other means of redress are available in relation to property which are not available in the case of death or serious personal injury.
212 *Beckford v R* [1988] AC 130, 144; see Ashworth, n 175, 147–148.
213 Ashworth, ibid, 148.
Yet the attack must still be imminent, not merely anticipated or predicted at some point in the future. Pre-emptive ‘self-defence’ against State oppression would rarely be justified, unless a potential victim knew, with reasonable certainty, the identity and intention of a potential attacker. Thus if a police officer was ordered to exterminate an ethnic group, and accepted those orders, members of the group may be justified in pre-emptively killing that police officer. The killing would thus be defensive, not terrorist, even though it has a political aspect. Other cases might include pre-emptive actions in defence of others, such as harm to public property intended to prevent one State using internationally unlawful force against another State.214

2. Duress/Necessity

In the General Assembly’s Ad Hoc Committee, some States asserted that terrorism is the inevitable or logical outcome of underlying causes.215 The implication is that it is unfair to punish desperate acts of necessity. In contrast, many States objected that terrorism is not an automatic consequence of even legitimate grievances,216 emphasizing the choice involved in using terrorism over other means,217 or even in the absence of oppression.218

There is evidently no strict criminal law causation between terrorism and injustice219 and some empirical research even suggests that stable democracies are the most frequent victims of terrorism and that both the perpetrators and victims are from those States.220 Many resolutions acknowledge the lack of causation by indicating merely that causes ‘may’ give rise to terrorism. Even non-aligned States observed that examining the causes of terrorism was ‘not in any way intended to justify’ it.221 and no resolution after 1991 has asserted that the causes of terrorism justify it. The dissipation of the ‘exception’222 after the Cold War allowed the Assembly to make progress in later resolutions.

214 See, eg, AAP, ‘Opera House graffiti “an act of self defence”’, Sydney Morning Herald, 29 July 2004 (anti-Iraq war protesters painted a ‘No War’ slogan on the Sydney Opera House); R Norton-Taylor and S Hall, ‘Lawyers do battle over war advice’, The Guardian, 10 Mar 2004 (Greenpeace activists chained themselves to tanks at a UK military facility, to prevent the Iraq war, and were charged with aggravated trespass); but see R v Jones [2006] UKHL 16.

215 Ad Hoc Committee Report (1973), n 8, 6, para 17; 13, para 42; Ad Hoc Committee Report (1977), n 13, 35, para 36 (Tanzania); Ad Hoc Committee Report (1979), n 8, 9, para 28; 11, para 35; 13, para 42; 24, paras 81, 86.

216 ibid, 9, para 29; 23, para 78; 24, para 81.

217 ibid, 22, para 75; 23, para 78.


221 Ad Hoc Committee Report (1979), n 8, 22, para 72.

222 Cassese, n 2, 124.
International criminal law supports political contentions that terrorism will rarely be justified by necessity or duress. The defences of duress and necessity are often conflated as categories and there remains conceptual ambiguity about the distinction.\(^{223}\) Generally, duress refers to compulsion by human threats, whereas necessity involves emergencies arising from natural forces or objective circumstances.\(^{224}\) Necessity is broader than duress,\(^{225}\) which it encompasses; an act performed under duress is performed out of necessity.

The trend in international criminal law is to combine duress and necessity as a single defence. The 1998 Rome Statute excuses responsibility where conduct:

\[\ldots\] has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person’s control.\(^{226}\)

In addition to the requirements of an imminent serious threat and proportionality, Cassese adds that there must also be no other ‘adequate means of averting such evil’ (this includes a duty to retreat or to reasonably seek escape)\(^{227}\) and ‘the situation leading to duress or necessity must not have been voluntarily brought about by the person concerned’.\(^{228}\) Threats to property are insufficient.\(^{229}\)

(a) A limited defence to terrorism?

In civil law systems, duress is usually a complete defence.\(^{230}\) In contrast, the defence is often not available at common law for serious crimes such as treason, murder or attempted murder, and is only relevant in mitigation.\(^{231}\) In


\(^{224}\) Knoops, n 174, 13; Cassese, n 2, 242; Ashworth, n 175, 227.

\(^{225}\) Cassese, n 2, 243.\(^{226}\) 1998 Rome Statute, Art 31(1)(d).


\(^{228}\) Cassese, n 2, 242. The Canadian courts require that there be ‘no reasonable opportunity for an alternative course of action that does not involve a breach of the law’: Perka (1984) 13 DLR (4th) 1.

\(^{229}\) Ashworth, n 175, 228; Smith, n 188, 257; DPP v Lynch [1975] AC 653, 687.

\(^{230}\) Knoops, n 174, 13. The American Model Penal Code also proposes duress as a defence to all crimes, including homicide: MPC §2.09, Explanatory Note, 374–375.

Erdemovic (Appeal), the ICTY followed the common law approach in a narrow 3–2 decision, rejecting the defence for war crimes or crimes against humanity that involve the killing of innocents. The traditional rationale is a policy interest in preventing the killing of innocents, even in extreme circumstances of survival. Killing innocents to save oneself is regarded as a greater harm than that which it avoids, and there is no ‘absolute or unqualified necessity to preserve one’s life’. Self-sacrifice is expected of an ‘ordinary man of reasonable fortitude’.

While Erdemovic (Appeal) would exclude a plea of necessity to a terrorist killing, lesser terrorist acts might be excused. For example, English cases have found that the defence is available to persons who hijacked aircraft to escape from imminent threats of death or serious injury, by reason of persecution in Iraq or Afghanistan. The United Nations High Commissioner for Refugees (UNHCR) likewise believes that defences of duress and self-defence are relevant in applying the refugee exclusion clauses to hijackers. In the Iraq war, there have been a number of reports of people being coerced, beaten, drugged, or tricked by insurgents into attempting suicide bombings against US forces or the Iraqi authorities.

An important limitation on duress is that the person must not intend to cause greater harm than that sought to be avoided. Thus a trivial fear of persecution will not excuse endangering aircraft, while the killing of passengers will rarely be excused. Like hijacking, hostage-taking may be a necessary and proportionate response to an imminent threat and may be excused by duress. As soon as hostages are killed, however, the act is likely to become disproportionate.

Other terrorist-type offences are less likely to support a plea of duress. Whereas hijacking furnishes control over transport, facilitating escape from imminent peril, other terrorist acts are not so calibrated. Bombing government buildings, shooting randomly into a crowd, or exploding aircraft are far more likely to be disproportionate.

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233 Dudley, n 231, 287.


less likely to facilitate escape, though the possibility cannot be discounted in extreme circumstances.

While duress/necessity may be available for some sectoral crimes, its application to generic terrorism offences presents other problems. On one hand, if terrorism is defined by its intimidatory or coercive aims, irrespective of the underlying motive, then the defence would remain available, since coercing or intimidating others may supply a means of escape, or alleviate a peril. The defence would, however, be unavailable in the absence of an imminent peril, or where the coercion or intimidation aims not to alleviate peril, but to achieve some wider political, or other, objective.

On the other hand, if terrorism is defined by political motives, the preponderance of such motives will usually negate the basis of duress/necessity. In the above cases, aircraft were not hijacked for political reasons, in that the hijackers were not aiming to change government policies, or to advance a political cause. Rather, the reason for action was escape from persecution. If terrorism is defined by its political motives, the absence of a political motive deprives the act of its terrorist character.

In difficult cases, mixed motives may underlie an act—an intent to avoid imminent peril, coupled with broader political objectives. The concurrent presence of incidental political motives will not negate a genuine claim of duress, as long as the act is the only effective means of avoiding the peril. Conversely, where an act is committed predominantly for political motives, a claim of duress will be likely to fail.

(b) A complete defence to terrorism?

The 1998 Rome Statute departs from Erdemovic (Appeal), since it excuses responsibility and is not limited to mitigation.238 This position was criticized for undermining deterrence,239 but it recognizes that in extreme cases, ordinary concepts of reasonableness may not apply.240 Criminal law should not require heroism and it may not always be more harmful to kill an innocent.241 As argued in dissent in Erdemovic (Appeal), sometimes refusing to kill will save neither the innocent nor the refuser, so there is no real choice between self-preservation and self-sacrifice.242

A different situation is where killing one innocent will save two or more lives.243 The problem with the ‘lesser evil’ is the ‘danger of citizens trying to justify all manner of conduct by reference to overall good effects’.244 Yet

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238 Cassese, n 2, 251.
239 Amnesty, n 227, para 3.2.3.
240 Ehrenreich Brooks, n 232, 869–873.
241 Cassese, n 2, 247; Smith, n 188, 255–256; Ehrenreich Brooks, n 232, 880.
242 Such cases of ‘forced choice’ typically involve a military instruction to shoot a civilian which, if refused, would be likely to result in the objector being shot along with the civilian.
243 Ashworth, n 175, 153. (As where a person frozen in fear in a sinking ship blocks an escape route.)
244 ibid.
in some cases ‘the autonomy of everyone simply cannot be protected’ and
difficult choices must be made.\textsuperscript{245} Clear cases do not require choosing one
innocent victim from others;\textsuperscript{246} in other cases, a fair procedure for choosing
the victim may be the least worst alternative.

The 1998 Rome Statute does not exclude duress/necessity for even the most
serious international crimes. If it is available as a complete defence,\textsuperscript{247} it must
be limited by strict conditions. Where the killing of innocents is involved, the
defence must be strictly construed and difficult to prove, and relevant factors
include whether the crime would be committed in any case by someone else,
so that self-sacrifice is futile.\textsuperscript{248} This realist position acknowledges that ‘criminal
liability and punishment are inefficacious where a person is subject to
such acute threats’.\textsuperscript{249}

If duress/necessity may excuse the most serious international crimes, then
it may potentially excuse some terrorist killings. Thus, if killing a hostage is
the only means of saving a significantly larger number of innocent persons,
there is a case for necessity. The graver the peril, the greater the range of acts
that may be proportionate, notwithstanding incidental political motives. But,
as with self-defence, the indiscriminate violence often associated with terror-
ism will rarely, if ever, be proportionate, since such killings are unlikely to
alleviate the peril. Often there will also be other means of redress available.

(c) Widening the range of threats?

Less serious or generalized threats—such as political oppression or foreign
occupation—are not sufficient grounds for claiming duress/necessity for kill-
ing innocents; there is no concept of ‘political necessity’.\textsuperscript{250} The requirement
of a threat of imminent death or bodily harm is restrictively interpreted as a
threat of external physical violence. In IHL, a person charged with war
crimes cannot plead ‘personal necessity relating to his own life or comfort,
such as that he deprived a protected person of food to preserve his own life’,
although this may be relevant in mitigation.\textsuperscript{251} English courts have similarly
held that admitting hunger or homelessness as an excuse for crime would
open the door to ‘all kinds of lawlessness and disorder’.\textsuperscript{252}

The privileging of freedom from physical violence (not other harms)

\textsuperscript{245} ibid, 154.
\textsuperscript{246} ibid.
\textsuperscript{247} See also \textit{Ohlendorf and others (Einsatzgruppen case)} (1953) 15 Ann Dig 656 (duress was a
defence to killing innocents).
\textsuperscript{248} Cassese, n 2, 250.
\textsuperscript{249} Ashworth, n 175, 233.
\textsuperscript{250} D Brown, ‘Holding Armed Rebel Groups and Terrorist Organizations Accountable for
Crimes against Humanity and War Crimes, and for “Terrorist Offences” under International
\textsuperscript{251} Green, n 41, 305.
\textsuperscript{252} \textit{Southwark London Borough v Williams} [1971] 2 All ER 175, 179 (Lord Denning).
reflects the dichotomy in human rights discourse between judicially protected rights (mainly civil and political rights, especially liberty and security of person), and those subject to progressive political realization (social, economic, and cultural rights, especially food and shelter). It also reflects western legal thinking about culpability, which underestimates the material and ideological handicaps which constrain the choices of the poor and powerless.253

Less spectacular affronts to bodily integrity—hunger, poverty, violations of economic, social, and cultural rights—are not considered worthy of protection by the defence of duress/necessity. This contrasts with situations arising outside the effective reach of a State’s jurisdiction—such as starvation on the high seas—where necessity may still be available.254 Within society, however, it is assumed that remedies for those ills lie in the realm of politics, policy choices, and welfare programmes.

Yet a minimum level of welfare cannot be assumed in less wealthy or benevolent societies, especially where a State fails to prevent hunger or homelessness, for reasons of ideology, discrimination, or incapacity. The greater the physical deprivation caused by poverty or hunger, the stronger the basis for necessity becomes. So much has been gradually recognized even in a developed State such as England:

‘Probably it is now the law that if the taking or the entry was necessary to prevent death or serious injury through starvation or cold there would be a defence of duress of circumstances; but if it were merely to prevent hunger, or the discomforts of cold or homelessness, there would be no defence.’255

Even so, it is a conceptual leap from excusing theft or burglary due to hunger to excusing the terrorist killing of innocents; such acts would normally be disproportionate. But the possibility cannot be ruled out in societies experiencing extreme hardship. For example, persons who, during a famine, and to avoid starvation, kill the driver of a government lorry transporting food elsewhere, might plead duress/necessity. Similarly, villagers who kill a local mayor or commissar, to signal to a repressive or negligent government that food aid is urgently required, might plead the defence,256 although its availability will depend on whether doing so can reasonably be seen as proximately capable of averting the threat of starvation.

In the first case, if terrorism is defined objectively as the killing of public officials, regardless of motive, then the defence may excuse terrorism. In the second case, if terrorism is defined subjectively as violence for coercive or

254 Dudley, n 231; US v Holmes 26 F Cas 360 (1842).
255 Smith, n 188, 169.
256 Consider Stalin’s forced famine in Ukraine in the early 1930s, in which 5 million died: R Conquest, The Great Terror (Pelican, Middlesex, 1971) 45–46.
intimidatory aims, then the defence also excuses terrorism. Even if terrorism is defined as politically motivated violence, then the second example, involving a political statement about government responsibility for food distribution, might still be excusable. The second example illustrates the earlier point that terrorist acts with mixed motives (political and self-preserving) may still be excusable, depending on the balance of motives.

The important point is that emergency situations with incidental political aspects may sometimes justify killing innocents, but wider moral or political agendas cannot. There is the greatest danger in arguing that the pursuit of abstract rights, not involving threats to life or limb, excuses the killing of innocents. As Berlin warns: ‘To cause pain, to kill, to torture are in general rightly condemned; but if these things are done not for my personal benefit but for an ism—socialism, nationalism, fascism, communism, fanatically held religious belief, or progress, or the fulfillment of the laws of history—then they are in order.’

(d) Attenuating ‘imminence’?

A further question is whether the standard of ‘imminent’ serious threats to life or limb is satisfactory. If imminence is regarded as wider than an immediate threat, then terrorism against an oppressive State, which potentially causes future, unspecified, but not immediate harm, may be excused. In the Einsatzgruppen case, it was held that a peril need not be as imminent as a loaded gun pointed at a person’s head for the defence to be available. The threat must simply be ‘imminent, real and inevitable.’

What is less clear is how far beyond such a concrete threat the idea of imminence extends. In cases involving cannibalism by shipwrecked persons adrift on the high seas, starvation was not as immediate a threat as a loaded gun—after all, a rescue ship might have sailed by at any moment. There is always room for doubt, so the question is one of probability. National courts have held that an imminent threat need not be immediate, and may occur in the future, although remote threats of future harm are insufficient. Persons under compulsion must first resort to protection of the law, but this may be no comfort where the State itself is the source of the threat. As stated in Abdul-Hussein: ‘if Anne Frank had stolen a car to escape from Amsterdam and been charged with theft, the tenets of English law would not, in our judgment, have denied her a defence of duress of circumstances, on the ground that she should have waited for the Gestapo’s knock on the door’.

The less imminent the threat, the more an act assumes a pre-emptive character and loses its basis in necessity. At the same time, the requirement of imminence cannot be so narrowly drawn as to destine an individual to certain death. Acts of a terrorist nature committed to avoid a vaguely anticipated threat—such as that arising from hostile but generalized political statements directed against a social group, falling short of incitement to an international crime—would seldom be excused by necessity.

(e) An individual defence

A final constraint is that necessity does not excuse a person who voluntarily and knowingly joins a group that intends to violate IHL or international criminal law. The person must have knowledge of the nature of the group, and an awareness of the risk of compulsion, although it is not necessary to foresee the particular crime. In an English case, duress was not a defence to a robbery committed due to IRA threats because the defendant had freely and knowingly joined the IRA. The law is similar on the defence of superior orders, which cannot excuse a person who ‘voluntarily and consciously joined’ a criminal organization like the Gestapo.

Thus persons who voluntarily and knowingly join an unlawful terrorist group cannot plead necessity or superior orders, since such persons have elected to place themselves at risk of criminal compulsion. The fairness of this exclusion depends on the proper identification of groups as criminal, and accordingly, consideration of defences available to group actors is now necessary.

D. CIRCUMSTANCES PRECLUDING GROUP RESPONSIBILITY

Much modern terrorism is planned, financed, committed, or facilitated by organizations of different structures, composition, and objectives. Such organizations have increasingly become subjects of international and national legal regulation, independently of the liabilities of their individual members. Since the early 1990s, the international community, through the Security Council, has designated certain groups as terrorist, outlawing them and authorizing the freezing or confiscation of their assets. The international legal personality of these entities has been denied, since they have been regarded as objects of regulation, without any procedural entitlements.

266 Cassese, n 2, 245; Einsatzgruppen, n 247, 91; Amnesty, n 227, para 3.2.3; see also Sharp [1987] QB 853 (Lane LCJ); Shepherd (1988) 86 Cr App R 47.
269 Sipo-Brussels case, Brussels Court Martial, 1519.
270 See Ch 4 below.
The counterpart of the international criminal law of defences is consideration of the pleas available to group actors accused of terrorism. Whereas international criminal law supplies defences to individual liability for terrorism, there is a normative gap in relation to defences available to group actors. The denial of legal agency to group actors in the international legal system contrasts with the rights of States under the law of State responsibility. A State may plead circumstances precluding the wrongfulness of a breach of an international obligation. Yet the International Law Commission’s (ILC’s) Articles on State Responsibility are silent on the responsibility of non-State entities, noting merely that they are ‘without prejudice’ to the responsibility of international organizations (Article 57) or individuals (Article 58) under international law. The responsibility of other entities—whether corporations or non-government, charitable, or civil society organizations—is not contemplated. This is true of international law historically and it is doubtful whether any general regime of responsibility has developed to cover such groups. Moreover:

The Security Council often addresses recommendations or demands to opposition, insurgent, or rebel groups—but without implying that these have separate personality in international law. Any international responsibility of members of such groups is probably limited to breaches of applicable international humanitarian law or even of national law, rather than general international law.

As Higgins observes, ‘individuals are extremely handicapped in international law from the procedural point of view’ and the fiction, under the diplomatic protection model, that an injury to a national is assimilable to an injury to their State is unrealistic for entities falsely proscribed as terrorist. Some other remedy is necessary to protect entities or individuals from arbitrary interference with their privacy, home, honour, and reputation, resulting from erroneous proscription. The marginalization of UN treaty bodies in the ‘war on terror’ makes this all the more necessary.

Proceeding by analogy, it is arguable that at least some of the circumstances precluding wrongfulness under the law of State responsibility should be available to entities proscribed as terrorist under international law. Of particular relevance are self-defence (Article 21) and necessity (Article 25). These defences might be raised where groups breach the international law from the procedural point of view and the fiction, under the diplomatic protection model, that an injury to a national is assimilable to an injury to their State is unrealistic for entities falsely proscribed as terrorist. Some other remedy is necessary to protect entities or individuals from arbitrary interference with their privacy, home, honour, and reputation, resulting from erroneous proscription. The marginalization of UN treaty bodies in the ‘war on terror’ makes this all the more necessary.

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obligation, affirmed in the practice of the General Assembly and the Security Council, not to engage in terrorist activity.\textsuperscript{277}

It is difficult to see why non-State actors should not be entitled to similar equitable dispensations as States in situations where they are being held responsible for international wrongs. This is not to treat non-State groups as international legal persons equivalent to States.\textsuperscript{278} As the International Court of Justice (ICJ) stated in \textit{Reparation for Injuries}: ‘The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community.’\textsuperscript{279}

A group actor is,\textsuperscript{280} like a State, ‘capable of possessing international rights and duties’ and has the ‘capacity to maintain its rights by bringing international claims’.\textsuperscript{281} The degree of participation of group actors depends ‘on the particular area of the international legal system concerned and the activity and involvement of entities in that area’.\textsuperscript{282} For entities proscribed as terrorist, the serious personal and financial consequences of proscription give rise to an expectation that those affected are entitled to a fair and transparent procedure before their vital interests are impaired.

\textbf{I. Self-defence}

ILC Article 21 precludes the wrongfulness of a lawful act of self-defence in conformity with the UN Charter. Self-defence does not preclude the wrongfulness of conduct contrary to IHL and non-derogable human rights provisions.\textsuperscript{283} As stated in the \textit{Nuclear Weapons Advisory Opinion}, customary IHL is ‘intransgressible’.\textsuperscript{284} Acts of self-defence must respect any rules of ‘total restraint’ applying in armed conflict, as well as satisfying customary requirements of necessity and proportionality.\textsuperscript{285}

National self-defence has historically been thought of only as a right of States, or of para-Statal entities such as self-determination movements forcibly denied their rights, and as a Charter right it can only be claimed by States.\textsuperscript{286} Yet on ethical grounds, Rodin questions ‘why the right to use collective violence should be limited to States’, and not be extended to other

\textsuperscript{277} See Ch 4 below.
\textsuperscript{278} Indeed, some modification of the concepts applicable to States may, however, be necessary in transposing circumstances precluding wrongfulness to non-State entities.
\textsuperscript{280} McCorquodale, n 271, 302.
\textsuperscript{281} \textit{Reparation for Injuries}, n 279.
\textsuperscript{282} McCorquodale, n 271, 303.
\textsuperscript{283} \textit{Legality of the Threat or Use of Nuclear Weapons} (1996) ICJ Reports 226, para 25.
\textsuperscript{284} ibid, para 79.
\textsuperscript{285} ibid, para 41; \textit{Nicaragua}, n 95, paras 176, 194; J Gardam, ‘Proportionality and Force in International Law’ (1993) 87 AJIL 391.
\textsuperscript{286} Cassese, n 33, 197.
human communities which ‘do not coincide with the boundaries of States’\(^{287}\) (nor even with the boundaries of self-determination units).

State practice does not necessarily furnish a principled answer, because it is in the interests of States to limit the right to use violence to themselves; this is also true of the Charter system of collective security, which is an expression of an international community constructed primarily by States and usually in their interests. The issue is important because non-State violence is often characterized as terrorist, especially where it is below an armed conflict, and even if humanitarian restraint is exercised.

Restricting the use of force to States is usually justified because the State embodies ‘a genuine community capable of exercising a form of collective autonomy’\(^{288}\). But the legal fiction of a homogenous ‘people’ expressing self-determination is exploded by a cursory examination of the many other communities which attract an individual’s allegiance—religious, ethnic, social, or political. It is ‘difficult to see why such groups should be denied an analogous right to defend their integrity with force’\(^{289}\) (Consider violent State persecution of ethnic or religious groups, as in Kosovo, to which civil society groups respond in ‘self-defence’.) The nation is but one expression of identity deserving protection, if necessary by force.

Further, the traditional objective criteria of Statehood—political independence, territorial control, and a permanent population\(^{290}\)—are morally ‘empty’,\(^{291}\) or embody the peculiar morality of realpolitik: ‘The only test is internal naked power’\(^{292}\). States need not be coextensive with self-determination units, and the people’s sovereignty has not yet displaced the sovereign’s sovereignty.\(^{293}\) As such, it is hard to appreciate the moral basis on which to privilege the use of force by States over other social units.

Limiting the right to use force to States might be defended because a State monopoly limits the spread of international violence. Certainly there is pragmatic appeal in preventing the privatization of violence, and the entrenchment of communal fragmentation or tribalism by force. The field of lawful violence is limited to less than 200 States, rather than encompassing many thousands of group actors. Too much diversity, if imposed by force, is objectionable on public order grounds.

Yet the opposite might equally be true: too little diversity, backed up by force, is also dangerous—if not more so. By concentrating the authority to use force in States, the destructive potential of violence is vastly magnified, since States often command greater resources and organizational capacities than other communities. Violence may occur less often, but it may cause greater harm. A group right of self-defence may help to deter the abuse of

\(^{287}\) Rodin, n 61, 160, 158.  
\(^{288}\) ibid, 160.  
\(^{289}\) ibid.  
\(^{290}\) 1933 Montevideo Convention on Rights and Duties of States, Art 1.  
\(^{291}\) Rodin, n 61, 119.  
\(^{292}\) Reisman, n 124, 874.  
\(^{293}\) ibid, 869.
power by States. Groups will act defensively when attacked anyway, so it is better to decriminalize and structure their use of force.

At present, international law considers the use of force by non-State actors (outside armed conflict) largely as an internal affair, subject to basic human rights obligations. There is no right to collective ‘self-defence’ by sub-State communities. Yet if terrorism is internationally criminalized, international law can no longer ignore claims to self-defence by non-State groups, since group self-defence may be a vital justification for violence characterized by States as terrorist. The same is true of acts of group self-defence which occur across a frontier, below the level of an armed attack. A legal system that confers duties without rights will struggle to maintain legitimacy, particularly given the limited application of individual criminal defences.

Group self-defence is conceptually closer to individual self-defence than national self-defence, since requiring an ‘armed attack’ on a non-State community as a precondition of self-defence sets the threshold too high. For example, a State policy of genocide, or violent persecution, against an ethnic group may not amount to a conventional, military ‘armed attack’, yet it is clearly serious enough to trigger group self-defence. Whether conduct is necessary in self-defence should be based on a strict and objective assessment, leaving no room for discretion by the group itself, just as these requirements apply to State actors. Collective group self-defence might also be admitted, where a group requests assistance from other groups (domestic or international), particularly given the failure of States to fulfil obligations to prevent genocide, or to prevent mass human rights violations through the Security Council.

2. Necessity: Knowing the law

ILC Article 25 provides that necessity may not be invoked by a State unless it (a) ‘is the only means for the State to safeguard an essential interest against a grave and imminent peril’ and (b) it ‘does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole’. Necessity may not be invoked if the international obligation excludes it, or the State has contributed to the situation of necessity. While the ‘existence and
limits’ of the plea have been controversial, on balance it is considered available.²⁹⁸

A claim of necessity precludes wrongfulness and is thus a justification.²⁹⁹ It is subject to stringent conditions due to its exceptional nature. Whether an act is justified ‘depends on all the circumstances, and cannot be prejudged’.³⁰⁰ The peril must be ‘objectively established and not merely apprehended as possible’ or ‘contingent’, and it must be ‘imminent in the sense of proximate’.³⁰¹ There must be no lawful means available to avert the danger, and any action taken must strictly necessary.³⁰² The State’s interest must objectively outweigh other competing considerations.³⁰³

Similar ethical considerations apply to the plea of necessity by non-State communities as apply to self-defence. It is possible to conceive of grave and imminent perils to the essential interests of other human communities,³⁰⁴ particularly peril caused by States. State decision-making, about whether an act is required to safeguard an essential interest, is not necessarily more valid than corresponding decisions by groups. States do not always represent the interests of their populations, and smaller social units may be more responsive to the essential interests of their members.

On the other hand, the problems of recognition and representativeness of non-State groups are well known,³⁰⁵ and caution against a simple extension of necessity to non-State groups. Less structured groups may have fewer lines of accountability and restraint in decision-making, although the same may be true of authoritarian States. Further, non-State actors may not be constrained by the tradition of Westphalian ethics³⁰⁶ and strategies of containment and deterrence which shape State conduct.

If it were admitted, a group defence of necessity would seldom justify the killing of innocents to avert imminent danger. The dictum that ‘necessity knows no law’³⁰⁷ is not part of the modern law, which is circumscribed by strict legal conditions. In particular, a breach of a norm of jus cogens remains wrongful and unjustifiable.³⁰⁸ As Lauterpacht notes, necessity ‘has been
invoked as justifying all the horrors of war, the sacrifice of human life, and the destruction of property and devastation of territory. The intentional targeting of civilians is very hard to justify and requires ‘a substantial case that it is highly likely to prevent worse horrors’, and there is always a danger of ‘moral monstrosities threatened by unbounded consequentialism’.

Further, necessity ‘is not intended to cover conduct which is in principle regulated by the primary obligations’. Importantly, IHL expressly excludes reliance on military necessity, including forbidding reprisals against protected persons under Protocol I, which would now render area (or ‘terror’) bombing, as in the Second World War, unlawful. However, the customary law on reprisals against civilians remains controversial. While the provisions on reprisals in the 1949 Geneva Conventions arguably reflect customary law, the wider prohibitions in Protocol I are less well established. Reprisals against civilians in unoccupied enemy territory are probably still permitted under customary law. The 2004 International Committee of the Red Cross (ICRC) study of customary IHL does not claim the existence of any customary prohibition on such reprisals, merely stating in rule 145 that ‘belligerent reprisals are subject to stringent conditions’ where they are not prohibited by international law. Some major States continue to assert that a belligerent may violate IHL in proportion to an initial severe violation of IHL by another belligerent, to compel the violator to terminate the unlawful conduct. In internal conflicts, even the relevant treaty law (Protocol II) contains no

309 Lauterpacht (vol II), n 112, 208–209.
310 Glover, n 65, 85.
312 Crawford, n 298, 185.
313 ibid; Green, n 41, 305; Morris and Scharf, n 180, 279.
315 cf Green, n 41, 353. For ethical arguments against area bombing in the Second World War, see Walzer, n 81, 255–263.
prohibitions at all on reprisals, although the ICRC study asserts in rule 148 that parties to non-international armed conflicts ‘do not have the right to resort to belligerent reprisals’.

Moreover, in the Nuclear Weapons Advisory Opinion, the ICJ found that, under the law of self-defence, the use of nuclear weapons might not be unlawful in an extreme case where the survival of a State is at risk. If the use of nuclear weapons by States is not always unlawful, then their similar use against civilians by non-State groups might analogously be justified where the group’s survival is at risk. However, the ICJ did not clarify whether IHL norms, including those on reprisals and proportionality, could be breached (such as permitting the targeting of non-military objectives), or if preemptive nuclear strikes to ensure a State’s survival are permitted. The prohibition on reprisals in Protocol I is controversial in part because of its potential challenge to the legal validity of strategic nuclear deterrence by major States. Reprisal is not precluded as a defence before the ICC.

The ICJ further did not explain whether the ‘survival’ of a State referred to the physical survival of the State’s inhabitants, or whether it also refers to its political survival. If ‘survival’ refers merely to maintaining political independence or territorial integrity, it is difficult to see how the destruction and irradiation of enemy civilians, territory and environment, and future generations, is justified simply to preserve a local government over a foreign one. Despite the importance of a State’s political survival and the values it sustains, the common life is not a ‘source of value independent of its value for individual persons’, or as important as their survival.

(a) Terror of necessity: suicide bombing

In conflicts beneath an armed conflict, where IHL does not apply, or it applies but liberation forces are unrecognized, necessity may preclude the responsibility of non-State groups. Honderich defends Palestinian suicide bombing against Israel as a moral right—‘terrorism for humanity’—as the only effective means for freeing Palestinians from Israeli domination. A right of self-determination is meaningless without a remedy and terrorism is

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320 Cassese, n 102, 337.
321 Oeter, n 316, 207.
324 Rodin, n 61, 143.
325 Williams, n 323, 35; cf Walzer, n 81, 254, who believes that ‘the survival and freedom of political communities . . . are the highest values of international society’.
326 Although like the argument about ‘non-innocent civilians’ discussed above, the argument for suicide bombing also challenges the foundations of IHL itself.
327 Honderich, n 146, 151, 170; see also T Honderich, ‘Is There a Right to Terrorism?’, Lecture at the University of Leipzig, 19 Oct 2003; see also Weinberg et al, n 237, 146 (summarizing similar arguments by Hamas and Islamic Jihad).
thought justifiable where it has a decent probability of achieving its ends at a
cost that makes it worthwhile. Honderich relies on analogies with the delib-
erate killing of innocents by western States in the naval blockade of Germany
in the First World War and by terror and atomic bombing in the Second
World War.

While Israel is not party to Protocol I, Palestinian attacks on Israeli
soldiers, which may be treated as terrorism under domestic law, are plainly of
a different moral order than Palestinian attacks on Israeli non-combatants.
On the other hand, the ‘necessity’ argument for Palestinian suicide bombing
of Israeli civilians fails for at least five reasons. First, Palestinians do not
face a ‘grave and imminent peril’ of the kind envisaged as necessity. The
weight of opinion holds that Palestinians suffer from an oppressive military
occupation, unlawful settlements, economic privations, and serious rights
violations. A denial of self-determination is the denial of a peremptory norm.
But Palestinians are not experiencing genocide, extermination, or a threat to
their survival as grave as that anticipated by the law of necessity. Foreign
occupation is an insufficient threat, and is, moreover, dealt with by the
primary rules of IHL, although the absence of reciprocity as a constraint in
situations of occupation may encourage more radical, exceptional responses
to breaches of IHL by the occupier.

Second, permitting the deliberate targeting of Israeli civilians would
impair a countervailing essential interest of both Israel and the international
community as a whole—the right to life of innocent civilians. Deliberately
killing Israelis is a means disproportionate to the peril it seeks to alleviate.
Third, killing civilians may be too remote from the political end sought, since
terrorist acts have steeled Israel’s will and have probably increased, not
reduced, Israeli domination of Palestinian lives. Due to the political, secu-
ry, and religious motives underpinning Israel’s persistent claim to Palestine,
Israel responds to terrorism with excessive and escalating violence of its own.
This is a difficult question of political judgment; Israel’s withdrawal from
Gaza in 2005 might be seen as a tangible gain from decades of Palestinian
terrorism. Contrarily, Israel’s construction of a ‘security’ barrier in the West
Bank, its continued expansion of unlawful settlements there, and its retreat
from promises made in the Oslo Accords indicate that terrorism has not far
advanced the Palestinian cause.

Fourth, unlike States, which monopolize national political decision-
making, it is not clear that terrorists express the will of the Palestinian people.

328 Honderich, n 146, 184–185.
329 ibid, 162.
330 Wilkinson, n 8, 186; Weinberg et al, n 237, 146, though noting, at 141, the strategic suc-
cesses of suicide bombing by Hamas and Islamic Jihad (which has a psychological effect on
Israelis and Palestinians; narrowed the ratio of Israeli-Palestinian fatalities in the conflict since
2001; and helped to disrupt peace negotiations between the rival Fatah-led Palestinian Authority
and Israel, contributing to the defeat of the Peres government).
Fragmentation and factionalism make it difficult to identify clear lines of Palestinian political authority. Some terrorist attacks are launched by secret militant groups outside political or civilian control. Other attacks derive from extreme quasi-religious justifications of self-sacrifice and martyrdom, rather than from the political goal of self-determination. Finally, it is not obvious that alternatives to suicide bombing—including the faltering but not extinct peace process—have been exhausted. Suicide bombing to improve one’s bargaining position may be strategic, but it is not of necessity.

Arguments for suicide bombing rely on a fundamental objection to the asymmetry of power between States and non-State actors. Terrorism is considered the only effective weapon available to the weak and disempowered, who cannot hope to win by regular methods against modern, well-resourced, militarized States. There is intuitive appeal to this view, which assumes that power disparity is unfair and that the law should redistribute power. There is also a policy argument that terrorism minimizes violence, where liberation forces tactically choose not to escalate a dispute into an armed conflict, and instead employ low-intensity terrorist methods, although it is rarely possible to predict the level of violence that is likely to ensue.

Yet, it is difficult to see why the fact of unequal resources triggers an entitlement to use irregular methods, to even up the odds. Nothing in IHL presupposes equality of power between adversaries (as opposed to procedural ‘fair play’). Conflict is intimately founded on achieving superiority of power, and to manipulate IHL to equalize power differences is simply unrealistic. There would no longer be any incentive for States to comply with IHL, and any exceptions accorded to liberation movements would be reciprocally resorted to by States.

Further, equalizing power might perversely prolong conflict and make it more destructive, since evenly matched forces may fight for longer. Focusing on asymmetry of power also conceals the extent to which tactics and strategy (such as lawful guerrilla warfare) can challenge superior power. The objections to targeting ‘non-innocent’ civilians were described earlier. Allowing new methods of violence would also widen the sphere of violence, without sufficient justification.


333 See, eg, R Young, ‘Political Terrorism as a Weapon of the Politically Powerless’ in Primoratz (ed), n 173, 55, 61. As Yasser Arafat said: ‘Nobody knows how the mechanism of war develops’: quoted in Fisk, n 166, 553.

Finally, analogies with naval blockade, or terror and atomic bombing, are anachronistic. Starving an enemy population, as in the First World War, or indiscriminately area bombing or atomic bombing civilians, as in the Second World War, are no longer acceptable means of warfare. Because such means are forbidden by the primary rules of IHL, necessity is not available as a circumstance precluding the wrongfulness of such acts. Such analogies are also flawed, because at the time, terror and atomic bombing were justified more by arguments about targeting legitimate military objectives, and/or reprisals, than by arguments of necessity.

Even if necessity-based arguments for terror and atomic bombing are considered, such arguments fail. Such methods were used later in the war—after the ‘supreme emergency’ had passed—not to ensure Nazi or Japanese defeat, or even to prevent genocide—but merely to improve the speed and price (in Allied lives saved) of victory. It is also difficult to appreciate how killing German civilians, to undermine morale, was related to the end of a Nazi defeat, since it may have contrarily steeled the German will to resist (although exterminating a population inevitably defeats it).

At the same time, unless divine or natural law is accepted, an absolute prohibition on killing innocents is difficult to defend, since it embodies a poor sense of proportion if refusing to kill some innocents leads to the death of many more. Despite the danger of ‘moral monstrosities threatened by unbounded consequentialism’, it is ‘paradoxical to justify fighting a bloody war by saying Hitler must be defeated, and then to accept absolute restrictions which may mean the war is followed by Hitler’s victory’. It is clear that States have often vacillated between the desirability of absolute moral prohibitions on certain types of violence and the necessity of exceptions, often justified by consequentialist reasoning. Yet, if terror bombing was not

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335 Walzer, n 81, 261, 263–268; Glover, n 65, 83, 89–112; F Taylor, Dresden (Bloomsbury, London, 2004) 403. Walzer distinguishes area bombing earlier in the war as justified by necessity, when it was the only offensive weapon available to Britain to avert the evil of a Nazi victory. By early 1945, Japan’s economy was close to collapse and the US knew that Japan had approached Stalin to sue for peace.

336 Glover, n 65, 75; S Garrett, ‘Terror Bombing of German Cities in World War II’ in Primoratz (ed), n 173, 141, 153; Further, in a secret police State, political authority does not depend so much on civilian support; Hitler fought on regardless of German morale, until the Soviets reached Berlin.


338 Horder, n 223, 156.

339 Glover, n 65, 85.
justified by necessity in the extreme case of Nazi aggression, the justification for Palestinian suicide bombing is even less convincing, given the lesser seriousness of the Israeli threat. Prudentially, if necessity is thought to excuse terrorism, then it might equally excuse other sorts of severe harm, such as torture or the use of chemical, biological, or nuclear weapons.

E. ‘ILLEGAL BUT JUSTIFIABLE’ TERRORISM

While there is broad support for the view that political violence is sometimes justified, there remains disagreement on when it is justified. Insisting on non-violence in the face of chronic injustices ‘can be tantamount to confirmation and reinforcement of those injustices’. From the foregoing analysis, individual criminal defences and group defences seldom justify or excuse terrorist acts, due to stringent requirements of imminence and proportionality. Further, there is no combatant immunity for internal rebels or unrecognized self-determination forces, nor in situations of internal dissent below an armed conflict. The question now is whether there is some other way of accommodating reasonable arguments for ‘terrorist’ violence.

One method is to regard terrorist acts as ‘illegal but justifiable’, where they are collectively committed in defence of fundamental human rights against an oppressive State. Recognizing such a plea is preferable to attenuating the strict conditions of existing defences to accommodate justifiable terrorist claims. Treating certain terrorist acts as criminal but justifiable is also less ambitious than developing a positive international right to rebel, or extending combatant immunity to rebels and unrecognized liberation forces. Regarding conduct as ‘wrongful but excused’ also strengthens the normative pull of international law.

The NATO bombing of Kosovo has been defended as a case of humanitarian necessity, justifying a breach of the prohibition on the use of force. Morality-based, equitable exceptions to legal rules, ‘in unforeseeable and extraordinarily grave circumstances’, ensure the law’s legitimacy, and hence

341 M Reisman, ‘Private Armies in a Global War System: Prologue to Decision’ (1973) 14 Van JIL 1, 32–33; see also Ignatieff, n 57, 1149.
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encourage compliance with it. The legal effect of considering an act illegal but justifiable is mitigation of sanctions, rather than exculpation. The justifiability of an act may be determined by the ‘global jury’ of UN organs. That the doctrine is open to abuse is not fatal, just as abuse of self-defence does not render that right untenable.

In General Assembly debates in the 1970s, there was some support for the view that terrorism is sometimes illegal but justifiable. Some States suggested that ‘terrorism directed at democratic regimes where institutional means of redress existed’ should be distinguished from ‘popular upsurge against oppressive regimes’. On this view, ‘although terrorism was never justified, resort to violence was particularly inadmissible in democratic societies’. The implication was that rebellion against oppressive regimes is less ‘inadmissible’ than violence against a democracy. Further, some States noted that while motive is irrelevant to the commission of a crime, it may be a mitigating factor determining punishment.

The foremost difficulty in accepting the idea of ‘illegal but justifiable’ terrorism is ascertaining the criteria for distinguishing oppressive regimes from democratic (or rights-respecting) ones, particularly given the variation in degree of both oppression and democracy, and subjective differences of perception. Thus, in Tehran Hostages, Judge Tarazi argued in dissent that in weighing Iran’s responsibility for the US embassy occupation, factors that should be taken into account included popular dissatisfaction with links between the Shah of Iran and ‘the exigencies of American worldwide and Middle-East strategy’, ‘the context of the revolution’, and its ‘break with a past condemned as oppressive’.

In spite of the subjectivity of ‘oppression’, international human rights law, coupled with the law of the Charter, supplies a minimum legal framework of evaluation for international organs, although the degree of oppression justifying resistance remains a matter of appreciation in a particular case. It is also possible to draw on debates about the right of rebellion, and humanitarian intervention, which have grappled with the same basic problem of when

345 ibid, 178; 175, 177, 185, 197, 190.
346 ibid, 179.
347 ibid, 186.
348 ibid, 185.
349 Ad Hoc Committee Report (1979), n 8, 23–24, para 80; 19–20, para 67.
350 ibid, 23–24, para 80.
351 ibid, 7–8, para 24.
352 Honoré, n 85, 48.
354 Tehran Hostages (Merits) case, (1980) ICJ Reports 3, paras 62–63 (opinion of Tarazi J), although such ‘links do not in any way justify the occupation’.
355 S Chesterman, Just War or Just Peace? (OUP, Oxford, 2002) 229–232, distils the conditions of intervention from the literature, including: (1) severe and immediate rights abuses; (2) no realistic peaceful alternative; (3) collective action must have failed; (4) action must be limited to what is necessary to prevent further violations; and (5) the actor must be relatively disinterested, acting predominantly for humanitarian objectives.
rights abuses are serious enough to warrant action. At a minimum, serious, repeated, and sustained violations of fundamental rights are necessary,\footnote{Ignatieff, n 57, 1156; B Palmer, ‘Codification of Terrorism as an International Crime’ in Bassiouni (ed), n 83, 507, 512–513; MC Bassiouni, ‘Criminological Policy’ in A Evans and J Murphy (eds), Legal Aspects of International Terrorism (ASIL, Washington, DC, 1979) 523, 530; Bassiouni, n 353, xlv; Franck and Lockwood, n 119, 88.} even if violations are limited to ‘systematic disenfranchisement of minorities’.\footnote{Ignatieff, n 57, 1155.} Even in democracies, the preferences of minorities may not always be sufficiently accommodated.\footnote{Eubank and Weinberg, n 220, 163.}

A second criterion, advanced in the Ad Hoc Committee, is the availability of effective means of peaceful redress, which must be exhausted before terrorism is justifiable.\footnote{Ad Hoc Committee Report (1979), n 8, 19–20, para 67; see also Walzer, n 81, 204; Ignatieff, n 57, 1153, 1156; Bassiouni, n 353, xxxi; MC Bassiouni, ‘Methodological Options for International Legal Control of Terrorism’ in Bassiouni (ed), n 83, 485, 491; Palmer, n 356, 512–513.} This condition minimizes non-State violence by regarding it as a remedy of last resort, consistent with the regulation of force in international law generally. Exhaustion of remedies is an established juridical standard in other branches of law, such as regional human rights systems,\footnote{ECHR, Art 35(1); 1969 ACHR, Art 46(1)(a).} and in diplomatic protection claims.\footnote{Interhandel case (1959) ICJ Reports 6, 26–27; Ambatielos Arbitration (1956) 12 RIAA 83; Finnish Ships Arbitration (1934) 3 RIAA 1479, 1535; Panevezys–Saldutiskis Railway case (1939) PCJ Series A/B, No 76; El Oro Mining and Railway Co case (1931) 5 RIAA 191; Brownlie, n 30, 496–506.}

While it is easier to determine whether legal mechanisms are exhausted (ie has a final decision been made? Is appeal futile? Has a judgment been enforced or obeyed?), the exhaustion of non-legal redress is more difficult to discern. For example, to resort prematurely to violence might be unjustified while a peace process is under way, but consider the sporadic Middle East peace process—at what point is it safe to judge that the process is exhausted?

This leads to a further problem in evaluating claims of justification—who genuinely represents a non-State group, entitled to make judgments about the resort to violence? With States, this is (usually) clear, since the lines of political authority are neatly drawn (excepting in civil conflicts where there are problems of recognition). For a valid claim of self-determination, there must be a body representative of the ‘people’,\footnote{Cassese, n 33, 146–147.} a ‘radically indeterminate’ term\footnote{Crawford, n 35, 18.} only partially clarified by the practice of recognition by the relevant regional organization and UN organs.\footnote{Cassese, n 54, 94.}

Non-State groups are frequently riven with competing factions claiming to represent the group—consider fragmented loyalties among Palestinians, or competition between the ANC and Inkatha under apartheid. As Ashrawi says of suicide bombings: ‘Nobody gave Hamas or Jihad the mandate to
carry out these actions in the name of the Palestinians.\textsuperscript{365} The problem is accentuated where well-organized movements assume trappings of political authority (control of territory and a population, and structures of governance), yet are not widely supported by the people they claim to represent—consider the Tamil Tigers, or the IRA.

Who speaks or acts in the name of whole groups of people is fundamental to the problem of terrorism. It is commonly small, radicalized sub-groups of larger populations experiencing oppression which resort to indiscriminate violence. Participatory decision-making is rarely—if ever—part of the process leading to terrorism, and clandestine, militarized operations are a hallmark of terrorist groups. While participatory politics may not always produce restraint, it is likely to generate more restraint on random killings than an absence of participation altogether.

It must be noted, however, that some groups regarded as terrorist by the international community have been popularly elected by their own constituents. For example, in mid-2005, Hezbollah and the more moderate Amal organization won all 23 seats in southern Lebanon in the first general election after the withdrawal of Syrian forces.\textsuperscript{366} While this may be perceived as popular endorsement of terrorism, many voters supported Hezbollah as a defensive militant group against any future Israeli incursions into Lebanon. Over time, it is possible that Hezbollah’s participation in regular political processes may help to civilize its methods. Such a view underlies moves by some States to negotiate with Hamas after it won Palestinian elections in early 2006. Again, while Hamas has engaged in suicide bombing, its electoral support is probably more attributable to its humanitarian efforts and dissatisfaction with corruption and maladministration in the Fatah-dominated Palestinian Authority. Even so, terrorism may still be politically popular; an opinion poll by the British Ministry of Defence found that 65 per cent of Iraqis believed suicide attacks against British and American troops were justified.\textsuperscript{367}

A defensible theory of justification for terrorist acts requires further conditions to be met. Logically, if the justification for violence is resistance to oppression, then the purpose of any terrorist acts must be to replace oppression with freedom, rights violations with rights protection, and tyranny with democracy.\textsuperscript{368} Thus an important measure of the legitimacy of terrorist violence must be the lawful end to which it is directed. The defence does not justify special interest terrorism, nor terrorism which pursues objectives other than core legal values such as self-determination and human rights (thus

\textsuperscript{365} H Ashrawi, Interview on ABC TV (Australia), Foreign Correspondent, 16 Sept 2003.
\textsuperscript{366} ‘Hezbollah sweeps to victory in south Lebanon’, \textit{Sydney Morning Herald}, 7 June 2005.
\textsuperscript{368} Ignatieff, n 57, 1151.
excluding reactionary assassinations of democratic leaders or peace-makers). To the extent that violent groups make excessive or unreasonable claims, out of proportion to the cause, accommodation of such demands cannot be expected.

Cumulatively satisfying the four foregoing conditions (serious rights violations; exhaustion of alternatives; representativeness; and a rights-based end) is still not adequate to justify terrorism. Unless all means are admitted, any theory of justifiable terrorism must construct outer limits on the permissible means and targets of violence. Ignatieff argues that liberation violence, below an armed conflict, must analogously follow IHL on civilian immunity.369 Yet the problem of non-innocent civilians was discussed earlier. In that light, Honoré argues that, while generally observing IHL, rebels may also target the State and responsible officials.370 Indiscriminate attacks on non-governmental civilians would always be prohibited, and proportionality, as a general principle of law, must be respected.

Where violence satisfies the foregoing five conditions, it could be considered ‘illegal but justifiable’, perhaps under the umbrella of a ‘collective defence of human rights’. The five conditions provide clear, narrow, and prospective criteria for internationally evaluating the moral or political justifiability of terrorism, even if they fall short of a formula for legality.371 While such a defence may be open to abuse, it is less open to abuse than the alternative of legalizing violence (by establishing a positive right to rebel, or conferring combatant immunity on rebels), and no more open to abuse than existing rights such as self-defence.372 In extreme cases of oppression, individuals are likely to resort to violence even if violence is absolutely prohibited. As such, this defence provides a fairer and more flexible mechanism for structuring the international response to reasonable claims.

F. DISCRETION AND LAW: NEVER NEGOTIATE WITH TERRORISTS?

Criminal law does not operate in a political vacuum and must clearly engage with discretionary political responses to individual criminal harms in some cases. Sometimes prosecution of terrorists may interfere with other national or international interests. Despite the maxim of some States to ‘never negotiate with terrorists’, realpolitik sometimes forces States to adopt a less stringent path. Negotiating with terrorists may be necessary to end peacefully or humanely particular terrorist incidents, or to resolve longstanding terrorist campaigns. At the former level, in the Achille Lauro hijacking in 1986, Egypt

369 ibid, 1153; Honoré, n 85, 54.
370 Honoré, ibid, 54.
371 Chesterman, n 355, 232 (referring to the conditions of humanitarian intervention).
and Italy attempted to negotiate an end to the crisis (and save the lives of hostages), while the US used military force and declared itself ‘completely averse to . . . any form of negotiation’. Conversely, in 1986 US President Reagan secretly agreed to sell arms to Iran in return for promises to seek the release of US hostages. It is a perennial humanitarian dilemma of governments whether to pay ransom to save hostages, in the light of fears that negotiation may encourage others to resort to political violence to secure a seat at the bargaining table.

At the latter level, three iconic figures—Yasser Arafat (PLO), Gerry Adams (IRA), and Nelson Mandela (ANC)—were at some point arguably responsible for terrorism by their organizations. While their degree of responsibility differs (particularly in organizations with ostensibly separate political and military wings), it is startling how persons once regarded as terrorists were later embraced as legitimate representatives of political movements, entitled to a share of State power, or even to Nobel Prizes (Arafat in 1994, Mandela in 1993). All were absolved of criminal responsibility for terrorism, as a precondition of involvement in political settlements.

In Northern Ireland, under the 1998 Good Friday Agreement over 500 political prisoners were released by Britain and Ireland by July 2001, while amnesties were conferred for the decommissioning of armaments. Ahead of the IRA’s renunciation of armed struggle in July 2005, Britain released the convicted ‘Shankill Road bomber’, Sean Kelly, although the broader question of amnesties remains controversial, as it does in Spain, following ETA’s announcement of a ceasefire in March 2006. In contrast, the leader of...

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the Tamil Tigers (LTTE), Velupillai Prabhakaran, was sentenced to 200 years in prison, *in absentia*, while simultaneously negotiating a Norwegian-brokered peace settlement with the Sri Lankan government, while many foreign governments continued to treat the LTTE as a terrorist organization.

While domestic legal systems are infused with discretionary political concepts such as pardons, immunities, and amnesties, the availability of (domestic or international) amnesties for *international* crimes is an unsettled question, which is not directly addressed in the 1998 Rome Statute. International organizations have rejected and endorsed amnesties in different contexts, while State practice is variable. There is no customary rule against amnesties and international human rights law does not preclude them, as long as they do not result in impunity for serious rights violations.

There may, however, be a trend in practice towards the restriction of amnesties for serious international crimes. For example, in 2005, Argentina’s Supreme Court declared unconstitutional two laws of 1986–87 which effectively conferred amnesties on those responsible for violating human rights in Argentina’s ‘Dirty War’ of 1976–83. The Court reasoned that self-amnesty laws violated both international human rights law as well as the duty to prosecute serious international crimes under international law. Similarly, while the 1999 Lomé Peace Agreement in Sierra Leone conferred an

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382 *Lomé Amnesty* case, n 103, para 82; Cassese, n 2, 315. Some writers suggest that there is a trend and presumption against national amnesties: Gavron, n 380, 116–117.
383 See, eg, *Chumbipuma Aguirre et al v Peru (Barrios Altos case)* (2001) Series C, No 75, paras 41–44. In particular, self-amnesty laws were found to violate Arts 1(1) and 2 (general obligations to guarantee rights), 8 (right to a fair trial), and 25 (right to an effective remedy) of the Inter-American Convention on Human Rights; see also the concurring opinions of Judge Trindade, paras 10–11 and Judge García-Ramírez, paras 9–17; *Barrios Altos (Interpretation of Merits Judgment)*, IACHR (3 Sept 2001); *Castillo Páez (Reparations) case* (27 Nov 1998) Series C, No 43, paras 103–108 and concurring opinion of Judge García-Ramírez, paras 6–9; See also UNHR Committee, General Comment No 20 (1994).
384 *Simón* case, Argentine Supreme Court, causa No 17.768 (14 June 2005) S.1767.XXXVIII. The decision upheld the findings of lower courts on this issue and confirmed that Argentina’s Congress had validly annulled the amnesty laws in 2003; see C Bakker, ‘A Full Stop to Amnesty in Argentina’ (2005) 3 *JICJ* 1106.
‘absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives’ between 1991 and 1999, the Statute of the Special Court for Sierra Leone precludes amnesties for crimes within its jurisdiction. In the Lomé Amnesty case, the Special Court for Sierra Leone found that while the conferral of amnesties is within the sovereign discretion of States, a State cannot exercise that power to deprive other States of universal jurisdiction over international crimes. In March 2006, former Liberian President Charles Taylor was detained in Sierra Leone while attempting to leave Nigeria, where he had been granted asylum in an earlier agreement to end Liberia’s long civil war. While Taylor’s apprehension might be seen as a welcome elimination of impunity (since he had been indicted by the Special Court), it gives rise to other difficulties. If dictators know that peace agreements which protect them from prosecution will not be honoured in the future, then there is no incentive for them to relinquish power—and every incentive to hold on to it, whatever the cost. A puritanical insistence on bringing dictators to justice may thus come at the price of many thousands of additional deaths which could have been averted if an earlier end to conflict had been secured by a peace agreement conferring—and guaranteeing—amnesties or asylum.

Policy objections to amnesties are that they conflict with obligations to prosecute international crimes; thwart victims’ rights to a remedy; and undermine the rule of law. In some cases, far from promoting peace or reconciliation, amnesties may counter-productively foster perceptions of injustice and accentuate grievances. Yet, amnesties are not a capitulation to power politics, but a necessary and pragmatic concession to the political realities which bound the operation of law. A number of principles are relevant in evaluating the propriety of amnesties.

First, amnesties must be necessary, as a last resort, to secure fundamental objectives such as peace, national reconciliation, or to save lives; or alternatively, allowing prosecution would pose a ‘grave and imminent peril’. A discretion not to prosecute (or extradite) may need to be exercised, or amnesties or immunities conferred, to preserve fragile peace agreements or

385 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999, Lomé, UN Doc S/1999/777, Art 9 (and a freedom from any ‘official or judicial action’); Statute of the Special Court for Sierra Leone, Art 10.
387 Slye, n 379, 182–201.
388 Majzub, n 380, 278.
the survival of transitional governments. The cost of these approaches is that criminal justice—including punishment, retribution, deterrence, and satisfaction for victims—is rationally traded for other public goods.

Second, blanket amnesties are less acceptable than amnesties tailored to the specific circumstances of particular individuals following some kind of fair and transparent determination procedure, such as a national reconciliation process. Such processes may also ensure alternative forms of accountability and redress for victims. Further, amnesties are more legitimate where they operate in conjunction with prosecutions for the most serious international crimes, whether for offenders who fail to fully disclose their crimes (as in post-apartheid South Africa) or for more serious crimes (as in independent East Timor).

Third, amnesties conferred by national leaders upon themselves prior to leaving office are less likely to be objectively or rationally founded. Amnesties granted by democratic parliamentary processes, or through consultative processes which engage victims and the community, are more likely to produce more appropriate amnesties. As Judge García-Ramírez found in the Inter-American Court of Human Rights case of Castillo Páez (Reparations):

... a distinction must be made between the so-called ‘self-amnesty laws’ promulgated by and for those in power, and amnesties that are the result of a peace process, with a democratic base and reasonable in scope, that preclude prosecution for acts or behaviors of members of rival factions but leave open the possibility of punishment for the kind of very egregious acts ...

Similarly, amnesties conferred by one group that benefited from the crimes of others should be precluded for bias as in the case of self-amnesties. For example, the Reconciliation, Tolerance and Unity Bill 2005 (Fiji) proposed amnesties for those involved in a racialized coup by indigenous Fijians against a democratic Indian-led government in 2000. The Bill was spon-


391 Cassese, n 2, 316.


394 ‘Fiji’s indigenous leaders back release of coup plotters’, Sydney Morning Herald, 30–31 July 2005, 15. The new State of Israel also gave amnesties to ‘Stern Gang’ members who assassinated the UN mediator in Palestine in 1948; see Ch 5, n 175 below.
sored by an indigenous-led government which came to power as a result of the coup. In Palestine, Irgun leaders such as Menachim Begin, a future Israeli Prime Minister, were never brought to justice for ‘terrorist’ crimes committed during the violent struggle to establish Israel.

Fourth, in some situations, since international crimes are matters of international concern, no single State should be permitted to decide unilaterally whether to confer amnesties. Although the views of the affected State should be accorded significant weight, they are not the exclusive consideration. It may not be acceptable to other States, for example, for Afghanistan’s peace and reconciliation commission to offer an amnesty to insurgents fighting against the Afghan government and US forces where they extend to those suspected of serious crimes, such as Taliban leader Mullah Mohammad Omar and sectarian ‘warlord’ Gulbuddin Hekmatyar. Likewise, Britain’s willingness to negotiate secretly with Hamas and Hezbollah in 2005 was questioned by Israel and the US, although that case is more complex because of the success of those organizations in democratic elections in the West Bank, Gaza, and Lebanon in May and December of 2005 and January 2006. Electing terrorism may be democratic, but democracy is constrained by rights-based limits precluding terrorism.

In the light of these general principles, it is important to note that amnesties for terrorism may raise different issues from those applying to other international crimes. For example, war crimes or crimes against humanity are typically more widespread and affect larger sections of the population than terrorism, and so amnesties for terrorism may not be justifiable as necessary to achieve national reconciliation or to restore harmony between rival ethnic or religious groups in the community. Indeed, prosecuting terrorism is often necessary precisely because terrorists attack the institutions of the State and the community which the State protects. It may be questioned, for example, where it was proper in 2005 for the King of Morocco to pardon seven Islamists convicted of involvement in the May 2003 terrorist attacks in Casablanca, which killed forty-five people.

On the other hand, amnesties for terrorism may be appropriate where it is sectarian and affects significant parts of the population, or in specific cases where life is at imminent risk. In an effort to defuse a violent and widespread Islamist insurgency, in 1999 Algeria passed a Law on Civil Concord which offered immunity from prosecution for insurgents who demilitarized.

Immunity was not available for those who participated in collective massacres, rapes, or public bombings. Claimants were assessed by a three-member panel of judges and officials, and received housing and integration assistance if successful. The law was overwhelmingly approved by 98 per cent of Algerian voters. As a result, 4,500 insurgents laid down their weapons.

By 2005, Algeria estimated that around 1,000 insurgents remained and to entice them to demilitarize, the government put a Charter on Peace and National Reconciliation to referendum in September 2005, which was endorsed by 97 per cent of voters. The Charter pardons those convicted or imprisoned for armed violence or support of terrorism. If also offers amnesties to those who: renounce violence and disarm; were involved in networks of support for terrorism and who declare their activities to the authorities; and those sought in Algeria or abroad who present themselves to the authorities. Pardons and amnesties are not available to those involved in collective massacres, rapes, or public bombings. While human rights organizations have been critical of the Charter, the real concern is not so much its text as the apparent failure of Algeria to attempt seriously to bring to justice those suspected of committing the serious crimes exempt from pardon or amnesty.

Where terrorism affects multiple States, waiving prosecution or extradition should ‘only be exercised in agreement between the nation and the States whose citizens and property are the object of the terrorists’ acts’. (In relation to the ICC, the prosecutor has a discretion in Article 53 not to proceed if ‘an investigation would not serve the interests of justice’.) Illegitimate reasons for failing to bring terrorists to justice might include appeasement, fear of reprisals, or the protection of commercial interests. The more serious the terrorist acts involved, the stronger the justification must be for waiving prosecution or extradition. Such decisions should not be taken arbitrarily or unilaterally, but based on a careful balancing of vital community interests, such as humanitarian needs, justice for victims, long-term peace, or sustainable political solutions.

Where terrorism threatens international peace and security, the Security Council is the natural body in which to consider claims of amnesty or

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398 On a voter turn-out of 85%: Algerian Embassy (Washington, DC), Algeria Today, 30 Sept 2005. The credibility of such a high affirmative vote is, however, open to doubt.

399 On a voter turn-out of 80%: ibid; see Algerian Ministry of Foreign Affairs, ‘Projet de charte pour la paix et la reconciliation nationale’, 6 Sept 2005.


immunity. Indeed the Charter posits peace and security as higher values than justice, given its fleeting references to human rights, the preservation of domestic jurisdiction and sovereignty, and the absence of provisions on humanitarian intervention. Charter obligations prevail over other treaty obligations, and, as in the Lockerbie case, the certainty of treaty responses to terrorism may need to yield to security interests. In that case, however, it is arguable that the Council’s actions implicitly (and unlawfully) supported a breach of *jus cogens* by those States (the UK and the US) which had unlawfully threatened force against Libya if it did not comply with their demands.

In relation to ICC prosecutions, Article 16 of the Rome Statute explicitly recognizes that the Council may postpone the investigation or prosecution of an international crime for a renewable twelve-month period. The Council has relied on this provision temporarily to preclude the investigation or prosecution of ICC crimes by personnel from States not party to the Rome Statute engaged in UN operations. This measure has been criticized on a number of legal grounds, including failure to first determine a threat under Article 39 of the Charter, exceeding the scope of Article 16 of the Rome Statute, violation of *jus cogens*, inconsistency with UN purposes and principles, and unlawful interference in treaty regimes. At a minimum, the measure gives blanket immunity to a whole class of people, without specifically justifying the need for a postponement in the circumstances of an individual case.

Council interference with treaty frameworks is not to be lightly presumed, and the discontinuance of the Lockerbie case in the ICJ ensured that the availability and conditions of review of Council measures that conflict with other treaty obligations remain undecided. Like political decisions to grant pardons or amnesties generally, Council decisions of this kind are not outside the realm of law; indeed: ‘A discretion can only exist within the law.’ If a duty to prosecute terrorism were to emerge as a norm of *jus cogens*, then the Council may be prohibited from conferring amnesties, if it is accepted that

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403 UN Charter, Art 103.  
404 See Ch 4 below.  
406 Although under Art 103 of the UN Charter, the Council may impose obligations overriding States’ commitments under any other treaty, which may trump Article 16’s 12-month limitation period.  
410 Cassese, n 2, 316 (referring to international crimes generally).
the Council cannot lawfully override norms of *jus cogens*.411 State participation in anti-terrorism treaties may also be less attractive if they do not offer certainty and predictability, due to vulnerability to Council interference. There is the further danger that powerful States may attempt to circumvent treaty regimes by pursuing Council measures. At the same time, the Council’s broad discretion under the Charter cannot be unduly fettered in dealing with serious terrorist threats to security, and criminal law responses may not always be the appropriate solution.

G. CONCLUSION

Unless absolute liability is imposed for terrorism, sometimes acts commonly regarded as terrorism may be justifiable, or at least excusable: ‘in exceptional circumstances that which is commonly held to be wrong is found on reflection not to be wrong’.412 Political violence is committed for a wide range of reasons, and the law’s legitimacy depends on its capacity to differentiate between morally different reasons for action. IHL is an appropriate normative framework for dealing with self-determination claims and internal rebellions that cross the threshold of an armed conflict, effectively decriminalizing non-State violence that otherwise complies with the laws of war.

Outside armed conflict, the law of international criminal defences (self-defence, and duress/necessity), and the circumstances precluding the wrongfulness of group actors (drawn analogously from the law of State responsibility) may excuse a limited range of ostensibly ‘terrorist’ conduct. However, some acts widely considered justifiable by the international community may still fall outside the scope of these defences. To maintain the law’s legitimacy and fairness, limited acts of ‘terrorism’, in collective defence of human rights, could be regarded as ‘illegal but justifiable’. This would recognize that in the absence of collective international enforcement of human rights, it may be necessary to licence remedial violence by victims themselves.413 Such equitable consideration could be supplemented by a rational international policy on the conferral of pardons and amnesties for less serious terrorist violence, to recognize the overriding political importance in some cases of securing peace or reconciliation.


412 Cicero, n 149, 16.