ARTICLES

TERRORISM AS IMPERMISSIBLE POLITICAL VIOLENCE: AN INTERNATIONAL LAW FRAMEWORK

Kevin J. Greene*

INTRODUCTION

A gunman assassinates an American NATO employee in Turkey.[1] A car bomb explosion kills a high-level government official on a busy street in Sri Lanka.[2] Government troops murder eleven civilians in a village in Uganda.[3] A Palestinian man stabs four Israeli women to death in Jerusalem.[4] A clash between police and African National Congress supporters results in twelve deaths, including that of a twelve-year-old boy and a nine-year-old girl.[5] A United States Stealth aircraft releases a bomb that kills over four

---

* Associate, Cravath, Swaine & Moore, New York City; J.D. 1989, Yale Law School; B.A. 1986, State University of New York, College at Old Westbury. The author would like to thank Professor Paul Kahn and Beth Pardo for their invaluable commentary and criticism on earlier drafts of this article.

1. Joe Swickard, *Retired Detroit Airman Slain by Terrorist Group in Turkey*, DET. FREE PRESS, Feb. 8, 1991, at A1. A caller to Turkish news agencies claimed that the employee was an agent of the Central Intelligence Agency. The caller explained that the shooting was in retaliation for the use of Turkish air bases by the United States in their war against Iraq. *Id.*

2. *Official and Eighteen Others Die in Sri Lanka Bombing*, N.Y. TIMES, Mar. 3, 1991, § 1, at 4. The official was a deputy defense minister in charge of a government anti-insurgency campaign against Tamil separatists. The attackers remain unknown. *Id.*

3. Jane Perlez, *Army in Uganda Accused of Slaying Civilians*, N.Y. TIMES, Mar. 4, 1991, at A5. The shootings resulted from a clash between government troops and antigovernment rebels. A report by Amnesty International cited in the article stated that "no soldiers alleged to have committed human rights violations while on duty are known to have been charged or brought to trial." *Id.*

4. Joel Brinkley, *After the War: Israel; Four Israelis Slain on Eve of Baker's Visit*, N.Y. TIMES, Mar. 11, 1991, at A8. Israeli police surmised that the attack was related to the impending visit of United States Secretary of State James Baker. *Id.*

5. Christopher S. Wren, *Twelve Killed in South Africa as Blacks Fight Police*, N.Y. TIMES, Mar. 25, 1991, at A2. The police spokesman claimed that they were "forced to defend themselves," while local officials of the African National Congress claimed that the police had surrounded the rally and fired tear gas, rubber bullets and shotgun pellets to disperse the crowd. *Id.*

hundred Iraqi civilians in a Baghdad shelter.[6]

These incidents, and numerous others that occur regularly, underscore the fact that politically related violence, ranging from spontaneous individual acts to organized warfare, is a pervasive feature of worldwide politics. Since the end of World War II, the international community of states has enacted legal restrictions on the use of force between states as a means of resolving disputes.[7] Similarly, it has used legal instruments as a mechanism to delineate minimum norms of acceptable conduct for combatants engaged in interstate conflicts.[8]

Since the 1970's, the international community has sought to define and prohibit a subset of political violence amorphously called "terrorism."[9] As legal commentators have recognized, however, terrorism has "no precise or widely accepted definition."[10] In fact, the lack of consensus surrounding the concept of terrorism has led one widely quoted commentator to lament that "[w]e have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose."[11]

---

6. Patrick E. Tyler, *U.S. Stands Firm on Bomb Attack and Says Investigation Is Closed*, N.Y. TIMES, Feb. 15, 1991, at A1. The United States claimed that the shelter was a legitimate military target that housed military telecommunications. *Id.*

7. U.N. CHARTER art. 33, ¶ 1 (requiring that "[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice").

8. The four 1949 Geneva Conventions are: (1) Convention for the Amelioration for the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; (2) Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; (3) Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; and (4) Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

9. The emergence of terrorism as an important political issue was sparred by an attack on 11 Israeli athletes who were murdered at the Olympic Village in Munich, Germany by Palestinian perpetrators. *See* Geoffrey Pridham, *Terrorism and the State in West Germany during the 1970s: A Threat to Stability or a Case of Political Over-reaction*, *in* TERRORISM: A CHALLENGE TO THE STATE 11, 30-37 (Juliet Lodge ed., 1981).

10. Brian Jenkins, *International Terrorism: A New Mode of Conflict*, *in* 48 CALIFORNIA SEMINAR ON ARMS CONTROL AND FOREIGN POLICY 1 (1975); *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring) (noting that "the nations of the world are so divisively split on the legitimacy [of terrorism] as to make it impossible to pinpoint an area of harmony or consensus"), *cert. denied*, 470 U.S. 1003 (1985).

11. R.R. Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON L. REV. 380,

The author agrees that the term "terrorism" has acquired such politically charged connotations that it serves little operative purpose.[12] Instead of endeavoring to define terrorism yet again, however, this article proposes an analytical framework for evaluating both private and public political violence under international law.[13] The proposed framework sets forth a method for determining when, and under what conditions, political violence constitutes impermissible conduct or "terrorism."

Under the analytical framework presented, impermissible political violence consists of acts committed by government or private actors who violate fundamental human rights without justification or excuse.[14] Terrorism, therefore, is committed by use of impermissible methods, reliance on impermissible motivations, or attacks on impermissible targets. This framework, unlike those previously proposed, applies to violence undertaken by states as well as by private actors. Thus, this proposal supplies a symmetry for the treatment of private and state actors that was missing from prior international efforts which sought to deter impermissible violence.

The proposed framework synthesizes the various existing international legal norms and standards that are based upon universally recognized values. International law should require both governments and private actors who resort to violence to respect these values, or face certain sanctions. Human rights, humanitarian law,

---

380 (1974).

12. *See* W.M. Reisman, *The Tormented Conscience: Applying and Appraising Unauthorized Coercion*, 32 EMORY L.J. 499, 543-44 (1983). The author notes:

> The word "terrorist" is used now to refer to virtually all who resort to unauthorized violence to secure political objectives . . . . [Its undifferentiated use] may serve the purposes of the elite who oppose the methods and objectives of those resorting to coercion, but for intellectual and policy clarification, it is self-defeating.

Id.

13. *See* Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 669 (1986). The author notes that "[i]nternational law is traditionally defined as the body of rules governing the relations of nation-states. Those rules are divided into two major categories—treaty law and customary international law." *Id.* Customary international law has been described as that "result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation." 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986).

14. The legal concepts of justification and excuse reflect a recognition that normally criminal acts do not merit criminal sanctions when committed under mitigating circumstances, such as self-defense or duress. As "general principles of law," these legal concepts comprise a subsidiary source of international law. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 45 (Little, Brown & Co. eds., 1987).

and international legal norms restricting the use of force as a means of dispute resolution presently contain the means to construct an effective and morally compelling framework to define the contours of impermissible political violence.

Although modern private "terrorism" arguably arose, in part, as a tactic in wars of national liberation,[15] it remains highly probable that the use of violence to address political grievances will continue well into the twenty-first century. A realistic (but scarcely exhaustive) list of situations likely to generate private and public political violence in future years includes: the ethnic and racial strife in the Soviet Union, the United States, Northern Ireland, and Sri Lanka; the resistance to repressive regimes in South Africa, Central America, and South America; and the intractable Arab-Israeli conflict in the Middle East. Under existing international conditions, political violence by private actors is likely to result in a state responding with force and violence. In turn, repressive measures by states reacting to private violence furthers political instability and human rights abuses.[16]

This article contains three sections. The first section outlines international legal efforts designed to address "terrorist" violence through multilateral and regional agreements. This section also presents an academic perspective on the characteristics of terrorism that render it a unique form of political violence.[17] These academic commentaries are divided into two perspectives: those which analyze terrorism as criminal violence and those which analyze ter-

---

15. *See* G. SMITH, COMBATING TERRORISM 4, 4 (1980). "The collapse of colonial empires following the Second World War, coupled with the subsequent rise of nationalism and the emergence of Third World nations, played a significant role in the evolution of modern terrorism." *Id.*

16. For example, political violence poses grave dangers to regimes in the Third World countries that have attempted to incorporate democratic governments. *See* Mark B. Baker, *The South American Legal Response to Terrorism*, 3 B.U. INT'L L.J. 67 (1985) (noting that "expedient governmental response [to terrorism] may, in turn, damage the internal stability of a country as it strives for democracy . . . the problem is often compounded by the dearth of resources available to combat terrorism as well as by the fragility of the political order"). *See also* Nathaniel C. Nash, *Terrorism Jolts a Prospering Chile*, N.Y. TIMES, Apr. 9, 1991, at D1 (discussing nervousness over "whether the recent spate of terrorist actions will upset the political stability of the country and threaten the Chilean economic miracle").

17. The opinions of academic commentators are often utilized in solving international disputes. *See, e.g.*, The Statute of the International Court of Justice, art. 38(1)(b), as annexed to the U.N. CHARTER. "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law." *Id.*

rorism in a political context.

The second section critiques the international legal instruments and academic perspectives that prescribe criminal sanctions as the core solution to eradicating "terrorist" violence. Views which suggest criminal sanctions for both private and state violence alike fail to address the underlying social, political, economic, and cultural grievances which conceivably justify resorting to private violence.[18] In contrast, political-context perspectives probe the underlying causes of terrorism and recognize that unequal access to social and economic resources fosters violent responses. Because political-context perspectives recognize the underlying problems that foster violence, they are analytically superior to purely criminal approaches. However, political-context perspectives fail to acknowledge that certain modes of violence merit universal condemnation and sanction, regardless of underlying political grievances or objectives.

The third section presents an alternative three-pronged analysis that outlines the contours of impermissible political violence. Impermissible political violence, or terrorism, exists where a politically motivated actor uses impermissible methods, asserts impermissible political objectives or justifications, or attacks impermissible targets. The impermissibility of each prong is determined by human rights values and norms embodied in treaties, conventions, and declarations of the international community. The proposed framework establishes a narrow sphere of per se impermissible violence relative to specific acts, motivations, or targets. It also provides a procedural and substantive framework to evaluate situations in which actors can permissibly resort to violence, consistent with humanitarian and human rights norms. The conclusion of the third section outlines suggestions for mitigating politically motivated violence by providing alternatives and incentives for nonviolent solutions.

Attempts by the international community to limit political violence should incorporate three related concepts: effectiveness, symmetry of treatment for state and private impermissible violence, and justice as defined in numerous humanitarian rights in-

18. The right of oppressed people to resort to violence in certain circumstances has been recognized pervasively in international law for many decades. *See* Ellery C. Stowell, Intervention in International Law 354 (1921) (stating that "the right of a people to revolt against tyranny is now a recognized principle of international law").

struments. A purely criminal approach to private political violence will prove ineffective if it fails to embrace the two latter qualities. States cannot realistically expect private actors seeking redress for social grievances to refrain from violence in the face of repressive state conduct. Therefore, attempts to specify impermissible political violence must include state, as well as private, conduct. The recognition that state repression constitutes as grave an international scourge as private attacks on civilian targets requires a rejection of the notion of absolute state authority within state boundaries. The international community should include, within the definition of terrorism, an explicit declaration that states, as well as private actors, have no authority to deprive individuals of essential human rights. Violators of this mandate should face international sanctions.[19]

Existing international norms provide the criteria to determine the impermissibility of politically motivated violence. The notion of absolute state sovereignty, however, impedes the universal application of these standards. No international criminal court exists to punish offenders of international law, and no international tribunal exists to adjudicate human rights violations. As long as states resist subordinating their sovereign interests to international standards of conduct,[20] and as long as private actors have restricted access to existing international institutions,[21] the cycle of private armed resistance and state repression will likely continue. These obstacles should not deter the formulation of standards for determining cases of impermissible violence pending the development of such institutions in the future.

---

19. *See* F. Michael Higginbotham, *International Law, the Use of Force in Self-Defense, and the Southern African Conflict*, 25 COLUM. J. TRANSNAT'L L. 529, 533 (1987) (arguing that "a United Nations-sponsored use of force against South Africa is legal").

20. *See* Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 26). The United States refused to accept jurisdiction of the World Court rather than to subject its foreign policy to international legal control. *Id.* Similarly, the government of Israel recently refused to accept a United Nations mission to investigate the killing of Palestinians by government security forces. Paul Lewis, *U.S. Presses the U.N. to Condemn Israel: Move Seems Intended to Maintain Backing of Arabs in the Gulf*, N.Y. TIMES, Oct. 10, 1990, at A1.

21. *See* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 12 (1982). Although the "human rights revolution [beginning in 1945 with the establishment of the United Nations] has deprived the sovereign states of the lordly privilege of being the sole possessors of rights under international law," it remains virtually impossible for individuals or non-state groups to petition such influential international forums as the United Nations Security Council or the International Court of Justice. *Id.*

I. Overview of International Legal Measures and Academic Perspectives on "Terrorist" Violence

A. Antiterrorist Resolutions and Conventions

The international community of states has struggled for many decades to define the characteristics of "terrorism." A "terrorist" incident, the assassination of the Archduke Ferdinand,[22] in part precipitated World War I. The League of Nations attempted, but failed, to develop a legal instrument to define and prohibit terrorist violence in the late 1930's.[23] The international community resumed efforts to regulate political violence in the 1970's and 1980's—decades rife with politically motivated violence such as hijacking and hostage taking.

While the international community of states has been unable to define terrorism precisely, the community has enacted five multilateral conventions: the Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention),[24] the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention),[25] the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention),[26] the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (Protection of Diplomats Convention),[27] and the Convention Against the Taking of Hostages (Hostage Taking Convention).[28] Under these conven-

---

22. *See* John F. Murphy, *Terrorism: Documents of International and Local Control*, 74 Amer. J. Int'l L. 711, 713 (1980) (book review) (noting that "the origin of the First World War can be traced to an act of transnational assassination arising out of revolutionary terrorism").

23. Thomas M. Franck & Bert B. Lockwood, Jr., *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 Am. J. Int'l L. 69, 70 (1974). Due to World War II the legal instrument in question, the Convention of 1937 for the Prevention and Punishment of Terrorism, never entered into force. *Id.* The relevant portion of the convention is art. 1(2), and is contained in *League of Nations Official Journal.* 19 League of Nations O.J. 23 (1938).

24. The Convention on Offenses and Certain Other Acts Committed on Board Aircraft, *done* Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter *Tokyo Convention*].

25. The Convention for the Suppression of Unlawful Seizure of Aircraft, *done* Dec. 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 151 [hereinafter *Hague Convention*].

26. The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *done* Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 [hereinafter *Montreal Convention*].

27. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, *opened for signature* Dec. 14, 1973, 28 U.S.T. 1975, 13 I.L.M. 41 [hereinafter *Protection of Diplomats Convention*].

28. Convention Against the Taking of Hostages, S. Exec. Doc. N, 96th Cong., 2d Sess.

tions air hijacking, attacks on diplomatic personnel, and hostage taking became international crimes. Although only the Hostage Taking Convention specifically refers to terrorism,[29] all five multilateral conventions attempt to regulate acts of violence which are popularly perceived as terrorist. The overarching enforcement mechanism of each of these conventions is the requirement that states either extradite or prosecute the offenders. This pervasive "extradite or prosecute" scheme indicates that the purpose of the multilateral antiterrorist conventions is to punish and deter private actors rather than agents of states. A state which directs agents to attack a diplomat abroad or to take hostages within its own borders obviously will not order the extradition or prosecution of these perpetrators.[30] As a result, barring extraordinary international intervention, state representatives can escape criminal sanctions for the conduct outlined in the antiterrorist conventions.

Three of the five conventions—the Tokyo Convention, the Hague Convention, and the Montreal Convention—address violence directed against aircraft and air passengers.[31] All three reflect a solid international consensus among states that hijackings, bombings, and other attacks on commercial aircraft pose a serious problem to international transportation.

The antihijacking conventions make attacks on commercial aircraft a crime under international law. They require state parties either to extradite or prosecute offenders in their territory[32] and to return abducted aircraft to the state where the plane is registered.[33] Like their domestic criminal counterparts, the three antihijacking conventions do not recognize political motivation as a

---

(1980), 18 I.L.M. 1456 (entered into force Jan. 6, 1985) [hereinafter *Hostage Taking Convention*].

29. *Id.* at 1 (1980), 18 I.L.M. at 1457.

30. A similar situation occurred during the Iranian hostage crisis of 1979, when militant students, with the acquiescence of the Iranian government, seized the United States Embassy and 43 hostages in Tehran. The International Court of Justice held that the seizure violated two treaties on consular relations, but did not refer to the Hostage Convention. *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

31. *See supra* notes 24-26.

32. *Tokyo Convention*, *supra* note 24, art. 3, 20 U.S.T. at 2944, 704 U.N.T.S. at 222-24; *Hague Convention*, *supra* note 25, art. 7, 22 U.S.T. at 1646, 10 I.L.M. at 134-35; *Montreal Convention*, *supra* note 26, art. 7, 24 U.S.T. at 571, 974 U.N.T.S. at 182.

33. *Tokyo Convention*, *supra* note 24, art. 11, 20 U.S.T. at 2947-48, 704 U.N.T.S. at 230; *Hague Convention*, *supra* note 25, art. 9, 22 U.S.T. at 1647, 10 I.L.M. at 135; *Montreal Convention*, *supra* note 26, art. 10, 24 U.S.T. at 571-72, 974 U.N.T.S. at 183.

justification or excuse for the proscribed conduct.

The Protection of Diplomats Convention[34] also reflects a consensus among states that those who attack heads of state and diplomatic personnel should be punished. The preamble of the Convention asserts that attacks on diplomatic personnel "create a serious threat to the maintenance of normal international relations . . . necessary for co-operation among States."[35] The Convention makes it a crime under international law to attack an internationally protected person. The Convention defines an internationally protected person as "a Head of State, . . . a Head of government or a Minister of Foreign Affairs . . . [or] any representative or official of a State or any official . . . of an international organization."[36] The Convention prohibits a broad variety of acts, including "murder, kidnapping or other attack upon the person or liberty of an internationally protected person [and] . . . violent attack upon the official premises, the private accommodation or the means of transport [of protected persons]."[37] The Protection of Diplomats Convention, like the antihijacking conventions, does not count political motivation as a justification or excuse for the proscribed acts and requires state parties to extradite or prosecute individual offenders.[38]

In the Hostage Taking Convention[39] the international community made hostage taking a crime under international law. The Hostage Taking Convention was preceded by the Geneva Conventions[40] and the Universal Declaration of Human Rights,[41] both of which expressed abhorrence of hostage taking.[42] Consistent with the earlier instruments, the Hostage Taking Convention explicitly describes "all acts of taking of hostages as manifestations of international terrorism."[43] It also implies that such acts violate the ba-

34. *See supra* note 27.

35. *Protection of Diplomats Convention*, *supra* note 27, pmbl., 28 U.S.T. at 1977, 13 I.L.M. at 43.

36. *Id.* art. 1(1), 28 U.S.T. at 1977-78, 13 I.L.M. at 43.

37. *Id.* art. 2(1)(a)-(b), 28 U.S.T. at 1978, 13 I.L.M. at 44.

38. *Id.* arts. 3, 8, 28 U.S.T. at 1979, 1981, 13 I.L.M. at 44, 46.

39. *See supra* note 28.

40. *See supra* note 8.

41. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/180 (1948).

42. Geneva Conventions, *supra* note 8; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 73, U.N. Doc. A/180 (1948).

43. *Hostage Taking Convention*, *supra* note 28, pmbl., S. EXEC. DOC. N, 96th Cong., 2d Sess. at 1, 18 I.L.M. at 1457.

sic "right to life, liberty, and security of person."[44] The Convention's definition of a hostage taker alludes to the political objective of the offender by defining such a person as one "who seizes or detains and threatens to kill, to injure or to continue to detain [a hostage] . . . in order to compel a third party, namely, a State . . . to do or abstain from doing any act as . . . [a] condition for the release of the hostage."[45]

The extradite or prosecute scheme of the Hostage Taking Convention indicates an intent to punish private parties who resort to hostage taking as a means of attempting to influence the conduct of a state. Although a "number of states specifically cited the Protection of Diplomats Convention and the then still draft Hostages Convention as major elements in their conclusion as to the illegality" of the Iranian seizure of American hostages in 1979,[46] the International Court of Justice held only that the hostage seizure violated the Vienna Convention on Diplomatic Relations[47] and a bilateral diplomatic treaty between the United States and Iran.[48] The Hostage Taking Convention, like the other multilateral antiterrorist conventions, requires state parties to criminalize the prohibited conduct under their domestic law,[49] and to extradite or prosecute offenders.[50]

In addition to the five antiterrorist conventions, a group of Western European nations enacted a regional convention explicitly to address the problem of terrorism. This document was entitled the European Convention on the Suppression of Terrorism (European Antiterrorist Convention).[51] The Convention provides for extradition between contracting states where acts of terrorism are involved.[52] The Convention explicitly states that certain acts will

---

44. *Id.*

45. *Id.* art. 1(1), S. EXEC. DOC. N, 96th Cong., 2d Sess. at 1, 18 I.L.M. at 1457.

46. Robert Rosenstock, *International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism*, 9 DENV. J. INT'L L. & POL'Y 169, 170 (1980).

47. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

48. Lloyd N. Cutler, *Some Reflections on the Adjudication of the Iranian and Nicaraguan Cases*, 25 VA. J. INT'L L. 437, 438 n.3 (1985).

49. *Hostage Taking Convention*, *supra* note 28, art. 2, S. EXEC. DOC. N, 96th Cong., 2d Sess. at 1-2, 18 I.L.M. at 1457.

50. *Id.* art. 8, S. EXEC. DOC. N, 96th Cong., 2d Sess. at 3-4, 18 I.L.M. at 1460.

51. European Convention on the Suppression of Terrorism, *opened for signature* Jan. 27 1977, 15 I.L.M. 1272.

52. *Id*, art. 7, 15 I.L.M. at 1273.

subject the actor to extradition. These acts include air piracy, air hijacking, attacks on diplomats and other internationally protected persons, kidnaping, hostage taking, and offenses "involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb."[53] Thus, the purpose of the Convention is to ensure that private offenders are captured and punished. The European Antiterrorist Convention, like the five multilateral antiterrorist conventions, does not define terrorism.

United Nations documents also reflect the international community's disapproval of terrorism.[54] The 1979 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States,[55] stated that it is the duty of all states "to refrain from organizing, instigating, assisting or participating in . . . terrorist acts in another State."[56] Similarly, a 1986 General Assembly Resolution entitled, in part, Measures to Prevent International Terrorism,[57] "[*u*]*nequivocally condemn*[*ed*], as criminal, all acts, methods and practices of terrorism wherever and by whomever committed . . . ."[58] However, these resolutions and declarations do not define terrorism, and thus, provide scant insight into the essential characteristics of terrorist violence. These declarations are similar to the five multilateral antiterrorist conventions in that they reflect a pragmatic, ad hoc approach that criminalizes specific practices without reference to the underlying political objectives of

---

53. *Id.* art. 1, 15 I.L.M. at 1272.

54. The legal effect of General Assembly declarations and resolutions remains a matter of some debate. Nevertheless, few question that at least some declarations, such as the Universal Declaration of Human Rights and pronouncements against genocide, are persuasive evidence of international norms. *See* Trials of War Criminals before the Nuremberg Military Tribunals under Council Control Law No. 10, 1946-49, vol. III (1951) (holding that the General Assembly resolution on genocide comprised "persuasive evidence" that genocide is an international crime).

55. 1979 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

56. *Id.* at 123.

57. Measures to Prevent International Terrorism, G.A. Res. 61, U.N. GAOR, 40th Sess., Supp. No. 53, at 301, U.N. Doc. A/40/53 (1986).

58. *Id.* at 302 (underlining in original). *See also* Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms and 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, in an Attempt to Effect Radical Changes, G.A. Res. 38/130, U.N. GAOR, 38th Sess., Supp. No. 47, at 266-67, U.N. Doc. A/38/47 (1984); Security Council Resolution Condemning Hostage Taking, S.C. Res. 579, U.N. SCOR, 40th Sess., at 24-25, U.N. Doc. S/INF/41 (1985).

the offenders.

While the international community of states has succeeded in formally outlawing three specific practices—hijacking, attacks on aircraft, and attacks on diplomats—it has failed to achieve a genuine consensus as to the essential features of terrorist violence. As the following discussion demonstrates, ideological and geopolitical differences between states regarding the permissibility of violence in various political contexts merely obscure the fact that numerous states resort to clearly impermissible violence when convenient to or desirable for state objectives.

The underdeveloped nations of the Third World and the formerly communist Eastern European bloc nations historically have rejected attempts to condemn or criminalize all political violence irrespective of the political context of the act or the political motivation of the actor. One commentator noted:

> [W]hile terrorism may be perceived in the West . . . as a humanitarian problem, this is *not* the way it is perceived by most of the rest of the world. Most countries regard international terrorism as basically a political manifestation of the struggles against regimes such as South Africa, Rhodesia, and Israel . . . .[59]

Many, if not a majority, of Third World and communist nations achieved independence from colonial domination through wars of national liberation or from established regimes by violent revolutionary struggle. Not surprisingly, many of these nations have argued that otherwise impermissible violence may be legitimate in the context of revolutionary or anticolonial struggle. The representative of Mauritania expressed this view during a debate in the United Nations General Assembly, when he stated:

> ["terrorism" should not] be held to apply to persons denied the most elementary human rights, dignity, freedom, and independence . . . and whose countries objected to foreign occupation . . . such peoples should not be blamed for committing desperate acts which in themselves were reprehensible; rather the real culprits were those responsible for causing such desperation.[60]

---

59. Ernest H. Evans, *American Policy Response to International Terrorism: Problems of Deterrence*, *in* INTERNATIONAL TERRORISM IN THE CONTEMPORARY WORLD 376, 381-82 (Marius H. Livingston ed., 1978) (emphasis in original).

60. U.N. GAOR, General Comm., 27th Sess., 19th mtg., at 24, U.N. Doc. A/C.6/SR/1362

Similarly, the 1979 United Nations Ad Hoc Committee on Terrorism Report[61] underscored ideological or geopolitical divisions which centered around the efforts of Third World nations to distinguish national liberation movements from acts of international terrorism.[62] The Committee recommended instead that the United Nations try to eliminate the causes of terrorism, including colonialism, racism, and situations involving alien occupation; the United States rejected this position.[63]

Despite their anticolonial, pro-liberation rhetoric, many Third World and communist states have themselves amassed unenviable domestic human rights records. The pro-liberation rhetoric of numerous Third World and communist nations apparently extends to struggles abroad, but not at home. The violent excesses of regimes in China, Liberia, Romania, and Ethiopia provide examples of this contradiction between rhetoric and action.

For their part, the governments of the democratic capitalist nations, led by the United States, have generally rejected the notion that the political context of anticolonial or revolutionary situations should comprise a factor in determining the contours of terrorism. In addition, these governments have accused Third World and communist states of fomenting terrorism.[64] However, in marked contradiction to their espoused "antiterrorist" rhetoric, a number of democratic capitalist states have provided material aid or moral support to private actors or states that engage in impermissible acts of violence. The United States, for example, directed covert agents to mine harbors and arm Contra rebels in Nicaragua, in violation of international law.[65] West German companies, apparently with government acquiescence, sold chemical weapons technology to the alleged "terrorist" states of Libya and Iraq.[66] The "antiterrorist" activities of Western states also have violated international norms. The European Court of Human Rights held that

---

(1979).

61. U.N. GAOR, 34th Sess., Supp. No. 37, U.N. Doc. A/34/37 (1979).

62. *Id.* at 32.

63. *Id.*

64. *See, e.g.*, RAY S. CLINE & YONAH ALEXANDER, TERRORISM: THE SOVIET CONNECTION 20-22 (1984); CLAIRE STERLING, THE TERROR-NETWORK 256-97 (1981) (charging Soviet and Third World complicity in fomenting terrorism).

65. *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 26).

66. William Tuohy, *Senator Assails Bonn in Libya Scandal*, L.A. TIMES, Jan. 29, 1989, at 6.

interrogation techniques of United Kingdom forces in Northern Ireland, used on suspected Irish Republican terrorists, violated the European Human Rights Convention.[67]

A number of ostensibly antiterrorist Western states also have engaged in internationally impermissible violence directly to advance foreign policy goals. Some analysts have charged that the 1985 air bombing of Tripoli, by United States armed forces, was an assassination attempt aimed at the Libyan head of state.[68] Similarly, the French government covertly dispatched agents to New Zealand to bomb a ship of the environmental group GreenPeace, in order to prevent GreenPeace activists from monitoring French nuclear weapons testing in the South Pacific.[69]

Irrespective of their asserted ideological differences, the evidence shows that Third World, communist, and Western nations have supported or directly committed acts of impermissible political violence to advance national or regional interests. Paradoxically, ideological differences between nations lead them to characterize private actors they support abroad as "freedom fighters," while designating similar actors whom they oppose at home criminal "terrorists." Whether politically motivated or not, acts of violence against the constituted government are always violations of the local law.[70] Accordingly, governments seek to punish private actors engaged in violence in their territories under domestic criminal law. However, private actors committed to remedying perceived injustice through violence predictably reject the "criminal

---

67. The convention which the British were accused of violating was the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950. The text of the Convention can be found in Council of Europe, Directorate of Information, European Convention on Human Rights (1952); 45 AM. J. INT'L L. Supp. 24 (1951); and HENRY W. DEGENHARDT, TREATIES AND ALLIANCES OF THE WORLD 147 (4th ed. 1986). *See also* Jeff Gerth, *Report Says Mercenaries Aided Colombian Cartels*, N.Y. TIMES, Feb. 28, 1991, at A20. A United States Senate report which found that "[g]roups of British and Israeli mercenaries provided paramilitary assistance to Colombian drug-trafficking organizations in 1988 and 1989." *Id.*

68. Bert Brandenburg, Note, *The Legality of Assassination as an Aspect of Foreign Policy*, 27 VA. J. INT'L L. 655, 690 (1987). The author contends that "the bombing of [Libyan leader Mohammar Quaddafi's] personal compound suggests that the [air] raid should be assessed as an assassination attempt by the United States." *Id.*

69. *See* Roger S. Clark, *State Terrorism: Some Lessons from the Sinking of the Rainbow Warrior*, 20 RUTGERS L.J. 393, 393 (1989).

70. Daniel G. Partan, *Terrorism: An International Law Offense*, 19 CONN. L. REV. 751, 760 (1987). The author suggests that violations of local law by private political actors do not become international offenses unless they are "so reprehensible" as to concern the international community. *Id.*

terrorist" label that states attach to their conduct, and appeal to higher concepts of social justice for justification.

B. Academic Perspectives on "Terrorist" Violence

In contrast to the pragmatic, ad hoc approach of the multilateral and regional antiterrorist conventions, legal scholars have diligently attempted to pinpoint the essential features of terrorist violence. Legal commentaries on terrorism fall into two analytical camps: criminal violence perspectives and political-context perspectives. Commentators in the former camp describe terrorism as criminal violence or activity that is unjustified by its underlying political objectives.[71] In contrast, commentators in the latter camp analyze terrorism as political violence, and believe that the labeling of terrorism as "criminal" is merely a result of a politically value-laden process. Despite attempts by scholars from both analytical camps to define the characteristics of terrorism, it remains true that "no generally accepted authoritative meaning [exists] for the term 'terrorism' . . . [and the] term is often used in a general, rhetorical, everyday sense to include a wide range of sins committed by private and state actors."[72]

Similar to political-context perspectives on terrorism, which track the misgivings of left-wing nations in designing a purely criminal approach to private political violence, the views of commentators who categorize terrorism as criminal violence conform in substance to the multilateral efforts to regulate terrorism through the criminal statutes discussed above. Criminal perspectives share at least one of four prominent characteristics. First, just as criminal law in general focuses on individual conduct, these perspectives focus on "individualistic terrorism"—political violence perpetrated by "non-state actors for [] public-purpose goal[s]."[73] Commentators from criminal perspectives describe terrorism as "acts committed by private individuals or groups employing strategies of terror

---

71. *See, e.g.*, Thomas E. Carbonneau, *The Political Offense Exception as Applied in French Cases Dealing with the Extradition of Terrorists*, 1183 MICH. Y.B. INT'L LEGAL STUD. 209. "[T]he view that terrorist acts constitute a non-criminal means of expressing dissenting political opinions is deemed to be an untenable position—at least in terms of the articulation of applicable legal norms and the elaboration of applicable juridical [sic] standards." *Id.* at 210.

72. Clark, *supra* note 69, at 394-95.

73. Martin C. Boire, *Terrorism Reconsidered as Punishment: Toward an Evaluation of the Acceptability of Terrorism as a Method of Societal Change or Maintenance*, 20 STAN. J. INT'L L. 45, 58-59 (1984).

and violence which affect the international community and world order."[74] Criminal perspectives view state terrorism not as internal state repression, but as externally instigated acts by states "unwilling or unable to mount [] conventional military challenge[s]" against their (external) adversaries.[75]

Second, those who adopt criminal perspectives characterize terrorism as acts of violence by private actors against state institutions. Under these views, terrorist violence is intended to inflict psychological trauma and to subvert governments, if not democratic capitalism itself.[76] Criminal perspectives also stress the psychological aspect of terrorism that inspires fear in a targeted population. A primary aspect of terrorist conduct has been said to involve the use of force where "terror as a mode of psychological warfare is explicitly intended and planned."[77] Psychological warfare is used to coerce or intimidate policymakers through fear,[78] and to generate wide media attention for their acts of violence.[79]

---

74. Jeffrey A. McCredie, Comment, *The Responsibility of States for Private Acts of International Terrorism*, 1 TEMP. INT'L & COMP. L.J. 69, 69 (1985); *See also* Public Report of the Vice President's Task Force on Combatting Terrorism 3 (1986) (available through U.S. Gov't Printing Office).

75. *See, e.g.*, Brian M. Jenkins, *New Modes of Conflict*, 28 ORBIS 5, 12 (1984).

76. *See, e.g.*, Robert A. Friedlander, *When Will the Madness End?*, 18 TOL. L. REV. 125, 126 (1986). "[T]errorism seeks destablization of existing free, pluralistic governments. Its purpose is fundamentally that of total destruction, including the obliteration of free government, individual liberty, and human dignity. It is, at its base, a monstrous assault upon law and the legal process." *Id. See also* JULIET LODGE, INTRODUCTION TO TERRORISM: A CHALLENGE TO THE STATE 1, 5 (Juliet Lodge ed., 1981). Lodge defined terrorism as

> the resort to violence for political ends by unauthorized, non-governmental actors in breach of accepted codes of behaviour regarding the expression of dissatisfaction with, dissent from or opposition to the pursuit of political goals by the legitimate government authorities of the state whom they regard as unresponsive to the needs of certain groups of people.

Id.

77. PAUL WILKINSON, TERRORISM AND THE LIBERAL STATE 48 (1977). *See also* Oscar Schachter, *The Extraterritorial Use of Force against Terrorist Bases*, 11 HOUS. J. INT'L L. 309, 309 (1989) (arguing that the "core meaning that all definitions [of terrorism] recognize [is] the threat or use of violence in order to create extreme fear and anxiety in a target group").

78. Anne Falvey, Comment, *Legislative Responses to International Terrorism: International and National Efforts to Deter and Punish Terrorists*, 11 B.C. INT'L & COMP. L. REV. 323, 325 (1986).

79. GRANT WARDLAW, POLITICAL TERRORISM 76-77 (1981). "One of the most important aims of a terrorist attack is to gain publicity for a particular cause. In some cases, publicity is the sole aim." *Id. See also* Brian M. Jenkins, *International Terrorism: Trends and Potentialities*, *in* LEGAL AND OTHER ASPECTS OF TERRORISM 439, 463 (E. Nobles Lowe & Harry D. Shargel eds., 1979). "Terrorist tactics are . . . [used because] . . . they are an effective means of getting publicity, gaining world wide recognition, winning some tactical victories, and financing further struggles." *Id.*

Third, criminal conduct perspectives of terrorism reject an examination of the underlying political motivation which leads individuals or non-state groups to resort to violence, and argues that "[t]he essence of criminal terrorism lies not in the motivations, values, and goals of the terrorist forces, but in the specific acts committed by opponents of governments."[80] Commentators on criminal perspectives argue that an analysis of terrorism which attempts to account for the underlying political motivation of an actor who resorts to violence renders determinations of impermissibility hopelessly subjective.[81]

Fourth, criminal perspectives on terrorism describe the use of indiscriminate, random, or disproportionate violence against innocent targets as a core characteristic of terrorism.[82] In this view, a feature that distinguishes terrorism from other types of political violence "is the *willful and calculated* choice of innocents as targets. . . . terrorists choose to attack weak and defenseless *civilians* . . . anyone in fact *except* soldiers, if they can avoid it. Civilians, then are the key to the terrorists' strategy."[83]

Because proponents of criminal perspectives consider terrorism an international criminal offense, they prescribe tough crimi-

---

80. *See* Daniel G. Partan, *Terrorism: An International Law Offense*, 19 CONN. L. REV. 751, 754 (1987).

81. *See* Laurence A. Streckman & Timothy D. Aldridge, Comment, *Terrorism, Ideology, and Rules of Law*, 1 TOURO J. TRANSNAT'L L. 213, 230 n.87 (1988). "[M]aking [the] application of the concept 'terrorism' depend on the motive of the actor . . . allows no possibility of reaching beyond the [actor's] personal point of view. . . . [N]owhere in criminal law does the motive of the attacker determine the legality . . . or . . . the proper characterization of the act." *Id.*

82. *See* Sherry L. Jetter, Note, *International Terrorism: Beyond the Scope of International Law:* Tel-Oren v. Libyan Arabic Republic, 12 BROOK. J. INT'L L. 505, 521 (1986). "[T]errorist acts are outlawed under essential human rights principles . . . [because they] endanger [] the safety, freedom and property of innocent persons who are in no way responsible for the original violation sought to be redressed." *Id. See also* David F. Forte, *Terror and Terrorism: There Is a Difference*, 13 OHIO N.U. L. REV. 39, 42 (1986). "[Terrorism is] . . . the systematic and primary use of randomly focused violence by organized groups against civilian targets to effectuate a political objective." *Id.*

83. Benjamin Netanyahu, *Defining Terrorism*, *in* TERRORISM: HOW THE WEST CAN WIN 7, 9-10 (Benjamin Netanyahu ed., 1986). *See also* W.T. Mallison & S.V. Mallison, *The Concept of Public Purpose Terror in International Law: Doctrines and Sanctions to Reduce the Destruction of Human and Material Values*, *in* INTERNATIONAL TERRORISM AND POLITICAL CRIMES 67 (M. Cherif Bassiouni ed., 1974). "[A terrorist group's] targets are civilians, noncombatants, bystanders or symbolic persons and places. Its victims generally have no role in either causing or correcting the grievance of the terrorists. Its methods are hostage taking, aircraft piracy, sabotage, assassination, threats, hoaxes, indiscriminate bombings or shootings." *Id.*

nal sanctions, including the death penalty, for "terrorist" activity.[84] They also propose stricter enforcement of existing criminal sanctions and call for more effective extradition of terrorists.[85] Additionally, these proponents suggest that "[c]ounter-force is the most obvious remedy" for combatting terrorism.[86] Other commentators recommend civil damage suits against terrorist organizations.[87]

In contrast to criminal perspectives, commentators in the second analytical camp examine the political context in which terrorism occurs. These commentators address the underlying causes of terrorism, and are skeptical about the effectiveness and appropriateness of purely criminal solutions.[88] In addition to ineffectiveness, commentators question the proposal of criminal solutions themselves as the end result of a politically value-laden process.[89] Commentators in this group have described terrorism as a hybrid form of violence, "distinguishable from both crime and warfare, although bearing a family resemblance to both."[90] Moreover, political-context commentators view the labeling process itself as a decision with some political import: "[t]o assert that a violent act is essentially criminal is to have concluded that it is *not* integral to a process of legitimate political transformation."[91]

In a similar vein, one commentator has analyzed terrorism as a societal "disorder" occurring in three distinct contexts.[92] The first

---

84. *See, e.g.*, Robert A. Friedlander, *Punishing Terrorists: A Modest Proposal*, 13 OHIO N.U. L. REV. 149, 150 (1986).

85. *See* Miriam E. Sapiro, Note, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. REV. 654, 657 (1986) (arguing for outright elimination of the political offense exception to extradition).

86. *See* Schachter, *supra* note 77, at 316.

87. *See, e.g.*, Harold H. Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169 (1987); William R. Slomanson, *I.C.J. Damages: Tort Remedy for Failure to Punish or Extradite International Terrorists*, 5 CALIF. W. INT'L L.J. 121 (1974).

88. *See generally* John F. Murphy, *Legal Controls and the Deterrence of Terrorism: Performance and Prospects*, 13 RUTGERS L.J. 465 (1982).

89. *Cf.* RICHARD E. RUBENSTEIN, ALCHEMISTS OF REVOLUTION: TERRORISM IN THE MODERN WORLD 228-36 (1987) (recognizing that there is no solution to the problem of terrorism that does not address the underlying political causes of terrorist violence).

90. *Id.* at 22.

91. *Id.* at 33. *See also* Alfred P. Rubin, *Terrorism and the Laws of War*, 12 DENV. J. INT'L L. & POL'Y 219, 219-20 (1983). "Attaching the label 'terrorist' or 'soldier' to an individual engaged in violence for what he considers to be a public purpose is in the first instance a political as well as a legal act." *Id.*

92. *See* Ali Khan, *A Legal Theory of International Terrorism*, 19 CONN. L. REV. 945 (1987).

context involves "political disorders," which occur when disaffected groups resort to acts of violence to attain political objectives.[93] The second context involves "ideological disorders," which occur when disaffected groups resort to violence to "register . . . ideological disapproval of a perceived menace such as capitalism, communism, nuclear weapons or imperialism."[94] The commentator describes the third context as "refugee disorders," which occur when "refugee groups resort to terrorist activity in order to assert their right to have a home state or return to their home state."[95] This commentator has also argued that the process by which states label political violence as "terrorist" resembles "a kind of psychological warfare between supportive and suppressive states. In order to discredit an aggrieved group, both in the eyes of its own public and the international community, a suppressive state uses words like 'terrorism' or 'terrorist' that have negative emotion[al] dimensions."[96]

Proponents of political-context perspectives are skeptical of the effectiveness of purely criminal sanctions and schemes to reduce terrorism. They argue that "the terrorist, by definition, is an ideologically motivated offender who rejects the legal characterization of his acts as criminal and who may regard the prospect of a prison term as a small price to pay for furthering his cause."[97]

These commentators also note that attaching the "terrorist" label to private political violence discourages private actors from conforming their conduct to permissible norms. One commentator, for example has argued that labeling conduct "terrorist" can lead to this perverse and ironic situation where

> a captured member of a regular armed force is accorded prisoner of war status regardless of crimes committed by the captive . . . while captured partisans . . . or "terrorists" engaged in a domestic conflict . . . are denied prisoner of war status no matter how scrupulously they . . . adhere to the humanitarian laws and customs of war.[98]

In contrast to commentators seeking criminal categorization of

---

93. *Id.* at 953.
94. *Id.*
95. *Id.* at 955.
96. *Id.* at 947.
97. Murphy, *supra* note 88, at 465.
98. Rubin, *supra* note 91, at 223.

political acts labeled "terrorism," political-context perspectives acknowledge power disparities between state and private actors and question the underlying causes of political violence. A proponent of these perspectives, has posited that "[a]s long as the world consists of 'haves' and 'have nots,' of those in power and those out of power, of countries which permit gradual and peaceful change and those which prohibit them, a total disavowal of violence is visionary."[99] Political-context perspectives of terrorism also attempt to connect the phenomenon of terrorism to social, economic, or political inequality. One commentator notes that "[c]onfronting these hard questions [about the causes of terrorism] means paying attention to terrorism's internal causes: the constellation of economic, social, political, and psychological factors . . . [that incite] . . . violence."[100] The recognition that "terrorist" violence has a political dimension not completely amenable to criminal solutions distinguishes these perspectives from criminal perspectives.

II. Critique of the Antiterrorist Conventions and Academic Perspectives on Terrorism

A. *Conceptual Defects in the Antiterrorist Conventions' Approach to Terrorist Violence*

The multilateral antiterrorist conventions reflect a consensus by a community of states that the acts of air hijacking, hostage taking, and attacks on diplomats comprise per se impermissible forms of violence, regardless of the actor's political motivation or underlying grievance. Accordingly, the community of states treats these acts as criminal. In regulating political violence, the antiterrorist conventions contain five structural deficiencies. First, the "extradite or prosecute" enforcement scheme of the antiterrorist conventions singles out private actors for acts of violence against state interests. By focusing exclusively on criminal enforcement of private actors, the conventions appear to exalt two state interests: 1) maintaining social order, and 2) ensuring the survival of regimes instead of promoting the interests of private actors who seek to

---

99. Nicholas N. Kittrie, *Patriots and Terrorists: Reconciling Human Rights with World Order*, 13 CASE W. RES. J. INT'L L. 291, 302-04 (1981). The author suggests maintaining a balance between world order and human rights by "rejecting the proposition that all forms of violence are justified if supported by political goals." The author also rejects the notion "that violent opposition to an established regime is never permissible by international standards." *Id.*

100. RUBENSTEIN, *supra* note 89, at 52.

redress their political grievances. The criminal focus of the antiterrorist conventions, therefore, appears to reinforce the "crucial self-perception and deception of state elites . . . that only the state apparatus may lawfully use high levels of coercion."[101]

Second, the antiterrorist conventions fail to provide compelling humanitarian or human rights reasons to justify why the acts of hijacking, hostage taking, and attacks on diplomats merit special international criminal sanction as per se impermissible violence. Although the antiterrorist conventions define the forms of private political violence that are impermissible, they do not address why such violence is impermissible.[102] Absent rationales to indicate why specific acts are classified as "criminal," private actors may perceive no compelling moral constraints to preclude them from engaging in the prohibited acts as a means of securing fundamental rights or redressing human rights violations.

Third, the international criminal prohibitions against hijacking, hostage taking, and attacks on diplomats punish offenders regardless of political motivation or the political context of the conduct. The omission of political motive facilitates the application of penal sanctions and provides an appearance of neutral enforcement. However, private actors resorting to violence as a method of change will inevitably reject criminal labels for their explicitly political conduct. One international law scholar notes:

> Insistence on non-violence and deference to all established institutions in a global system with many injustices can be tantamount to confirmation and reinforcement of those injustices. In certain circumstances, violence may be the last appeal or the first expression of demand of a group . . . for some measure of human dignity.[103]

Fourth, while the antiterrorist conventions specify criminal penalties for prohibited acts, they provide no means for airing the underlying political grievances which lead to violence.[104] Criminal

---

101. W. Michael Reisman, Nullity and Revision—The Review and Enforcement of International Judgments and Awards 837 (1971).

102. *Id.*

103. W. Michael Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 Va. J. Int'l L. 1, 6 (1973).

104. It has been noted that

> [n]one of the multilateral antiterrorist conventions provides for economic or other sanctions against states that assist terrorists or offer them a safe haven. . . . [H]owever, in the Bonn Declaration on Hijacking, 17 I.L.M. 1285 (1975),

penalties, combined with the lack of international institutions to judge, arbitrate, or punish human rights violations by states, leave the antiterrorist conventions open to charges of maintaining the status quo of state oppression and human rights deprivations.

Fifth, and perhaps most importantly, the scheme of penal sanctions against private actors reinforces the idea that private actors, rather than states, are the primary perpetrators of impermissible political violence. However, persuasive evidence exists that "terror is a procedure for neutralizing opposition, probably used more often by official elites than by those opposing them."[105] The assumption that private actors engage in political violence more often than state actors, emphasized throughout the conventions, runs counter to the original concept of terrorism as organized and widespread violence by a government against its population.

In Guatemala, for example, "an estimated 50,000 people have been killed or disappeared by the army or police forces in the past 20 years."[106] Similarly, a recent report issued by the Chilean government found that the secret police killed more than 2,000 civilians during the seventeen years of military dictatorship under General Augusto Pinochet.[107] Government agents in a number of countries frequently order the assassination, execution, and torture of political opponents,[108] yet when these acts do not involve "internationally protected persons" international law does not currently define such conduct as terrorist.

Private actors subject to repressive state practices may have a principled basis to reject the criminal prohibitions of the antiterrorist conventions as asymmetrical and morally illegitimate. The asymmetry exists in the antiterrorist conventions' requirement

---

> . . . the United States, Japan, and four Western European states have agreed to halt air traffic service with any country that refuses to extradite or prosecute airplane hijackers or refuses to return the aircraft, passengers and crew.

LOUIS HENKIN ET AL., INTERNATIONAL LAW, CASES AND MATERIALS 370 (2d ed. 1987).

105. Reisman, *supra* note 12, at 544. *See also* Boire, *supra* note 73, at 71. "In striking contrast to the comparatively light amount of carnage resulting from individualistic terrorism . . . state terrorism is responsible for millions of deaths and is far more pervasive and destructive." *Id.*

106. Steven Donziger & Grant W. Fine, Note, *Police Aid and Central America: The Reagan Years*, 2 HARV. HUMAN. RTS. Y.B. 197, 200 n.18 (1989).

107. *See Chile Details Over 2,000 Slayings under Pinochet*, N.Y. TIMES, Mar. 6, 1991, at A8.

108. *See, e.g.*, Matthew Lippman, *Government Sponsored Summary and Arbitrary Executions*, 4 FLA. J. INT'L L. 401 (1989).

that states extradite or prosecute politically motivated private actors who commit impermissible violent acts, while no corresponding convention exists to punish state officials.

This type of official repression clearly violates existing international human rights norms,[109] and occurs more frequently than do hostage taking and other "terrorist" acts by private actors.[110] Although theoretically repressive conduct by state actors is an international violation, it seldom, if ever, carries the risk of prosecution or extradition. In contrast, international criminal sanctions require prosecution of private actors who engage in impermissible acts of violence. This state/private asymmetry undercuts the moral legitimacy of the antiterrorist conventions as a means of addressing political violence.

As an example of this, the antihijacking conventions[111] do not establish humanitarian guidelines that would allow African National Congress guerrillas, engaged in an armed struggle to end apartheid, to attack South African Airways aircraft at home or in foreign countries. The antihijacking conventions define such attacks as per se impermissible, even assuming that no loss of life results. However, an aircraft hijacking that does not result in injuries to persons does not inherently violate fundamental human rights. Certainly, hijacking may sometimes lead to unforeseen injuries to innocent victims. However, comparable state acts intended to secure political objectives, such as military strikes and counterterrorist rescue operations, entail a high probability, if not certainty, of casualties to innocent civilians.[112] Yet international law

---

109. *See* Universal Declaration of Human Rights, *supra* note 41, at art. 9 (stating that "[n]o one shall be subject to arbitrary arrest, detention, or exile"). *See also* International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 15, at 54, U.N. Doc. A/6315/Rev.1 (1966) at art. 9(1) (entered into force Mar. 23, 1976).

110. *See* 1990 AMNESTY INTERNATIONAL, AMNESTY INT'L REP. 1. This report states:

> Thousands of people were imprisoned, tortured and killed in 1989 by governments seeking to repress or control ethnic and nationalist tensions in their country. . . . Peaceful protesters in many countries were arbitrarily arrested in vast numbers. . . . [and] tens of thousands of people became victims of security operations resulting in 'disappearances' and extrajudicial executions.

Id.

111. The antihijacking conventions are the *Tokyo Convention*, *supra* note 24, the *Hague Convention*, *supra* note 25, and the *Montreal Convention*, *supra* note 26.

112. *See* Eric Schmitt, *Air Strike on Iraq, the Favored Strategy, Means Big Risks for Both Sides*, N.Y. TIMES, Oct. 23, 1990, at A10. U.S. Defense Department officials noted that American-led air strikes against Iraq would "risk[] thousands of civilian casualties and caus[e] billions of dollars in property damage." *Id.*

neither regards this behavior as per se impermissible nor provides an "extradite or prosecute" scheme to deter these kinds of violations.

The rationale for creating an international criminal offense for hijacking rests on the ostensibly neutral goal of protecting international transport. Private actors, however, may perceive two reasons why this goal is not neutral. First, only states, or large corporate entities as agents of states, own and possess aircraft. To private actors who seek redress for their political grievances, they are tangible symbols of state power. Private actors who are unable to achieve humanitarian or human rights objectives through peaceful means may perceive no reason to subordinate their interests to states' interests in safe international travel.

Second, large disparities between rich and poor nations create a perception that the criminal prohibition on attacking air transportation, as opposed to buses, trains, or oxcarts, protects transnational class interests. Only a minuscule percentage of the world's population can take advantage of international air travel. Although many poor nations have national passenger airlines, the vast majority of their populations derive little, if any, benefit from their existence. To "have not" private groups seeking redress for grievances, criminalizing air hijacking is an unfair assertion of state and economic class interests over competing, and perhaps morally superior, interests in remedying injustices.

The Protection of Diplomats Convention[113] also exalts the interest of states in protecting international diplomacy over private interests in obtaining justice. To states, the protection of diplomatic personnel is essential to maintaining international relations and offers tangible benefits to the world community. To private actors, on the other hand, diplomats and embassies may represent the most tangible, and perhaps the only available, targets of foreign powers hostile to the private actor's humanitarian and human rights objectives. Private actors seeking redress for human rights grievances therefore may question the moral legitimacy of the criminal ban on attacks on diplomats as primarily a protection of state interests, and by extension, a status quo of repression or deprivation. It is well known, for example, that secret state agencies like the Central Intelligence Agency operate under the cover of

113. *See Protection of Diplomats Convention*, *supra* note 27.

diplomatic status.[114] Thus, diplomats may not in all cases merit protection as "innocent" victims to a conflict.

Of the multilateral antiterrorist conventions, the Convention Against Hostage Taking[115] is the least state biased. Hostage takings usually involve human rights deprivations of innocent, secondary targets. As such, they deserve universal and absolute international prohibition. However, when a hostage taking involves a target who is an official of a regime responsible for policies that deprive human rights, the normative value of the prohibition on hostage taking is weakened. Punishing hostage taking, irrespective of the culpability of the target, reinforces the appearance of status quo maintenance and asymmetry of treatment. State officials can, and do, kidnap and hold hostage political opponents under color of municipal law; yet, these incidents of illegal kidnapping by states escape the international sanctions outlined in the Hostage Taking Convention.

The policy of abducting suspected terrorists from abroad by purportedly "antiterrorist" governments, such as the United States, also undercuts the moral legitimacy of the antihijacking conventions.[116] It is difficult to distinguish analytically a state practice of abducting suspected "terrorists," such as the United States interception of an Egyptian commercial jet in 1985,[117] or the seizure of other unpopular "criminals"[118] from acts of hostage taking by private actors. The asymmetry of treatment by the interna-

---

114. *See* HARRY ROSITZKE, THE CIA'S SECRET OPERATIONS: ESPIONAGE, COUNTERESPIONAGE, AND COVERT ACTION (1977).

115. *See Hostage Taking Convention*, *supra* note 28.

116. *See* John Quigley, *Government Vigilantes at Large: The Danger to Human Rights from Kidnapping of Suspected Terrorists*, 10 HUM. RTS. Q. 193, 213 (1988) (arguing that forcible abduction violates "freedoms protected under the conventional and customary law of human rights").

117. *See* Mark D. Larsen, Note, *The Achille Lauro Incident and the Permissible Use of Force*, 9 LOY. L.A. INT'L & COMP. L.J. 481 (1987).

118. *See* Stephen J. Hedges et al., *Kidnapping Drug Lords: The U.S. Has Done It for Decades, but It Rarely Causes Trouble*, U.S. NEWS & WORLD REP., May 14, 1990, at 28, 30. The author notes that

> [t]he practice of kidnapping criminal suspects in foreign countries and spiriting them to the United States for trial is more than a century old, and U. S. courts have found it perfectly legal. . . . U. S. officials have made it clear that they will not let the niceties of international law stand in the way of things they believe are in the national interest.

Id. See also Ker v. Illinois, 119 U.S. 436, 444 (1886) (holding that "forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him" and where the abduction did not violate a law or treaty of the U.S.).

tional community undercuts the prohibition of hostage taking as an international violation.

As discussed above, the multilateral antiterrorist conventions favor state actors engaging in impermissible acts of violence over private actors who seek redress for their grievances. The inherent bias results from the conventions' focus on protecting state interests, such as international air travel and state officials who become targets of hostage takings. Thus, the conventions provide an inadequate framework for mitigating the underlying causes of terrorist violence.

B. Critique of Academic Perspectives

Many of the deficiencies of the criminal approach, as reflected in the multilateral antiterrorist conventions, are replicated in academic perspectives stressing a criminal approach. Many commentators regard the intent to create psychological trauma in a target audience, by use of spectacular acts of violence, as a distinguishing feature of terrorism.[119] Accordingly, an American president's threat to dispatch military forces abroad in order to intimidate a Third World regime would comprise terrorism. Commentators note that "the use of terror tactics is common in international relations and that the state has been and remains a more likely employer of terrorism within the international system than insurgents and with much greater effect."[120] Distinguishing terrorism as psychologically traumatic violence fails to recognize other forms of violence most commonly undertaken by states. These other forms of violence have as much capacity to inspire terror as sensationalized attacks on aircraft or other public targets.

War, covert state operations,[121] and other non-publicized acts of repression, such as secret mass arrests, assassinations and the planned "disappearances" of political enemies[122] have an equal, if

---

119. *See, e.g.*, Schachter, *supra* note 77.

120. Michael Stohl, *International Dimensions of State Terrorism*, *in* THE STATE AS TERRORIST: THE DYNAMICS OF GOVERNMENTAL VIOLENCE AND REPRESSION 43 (Michael Stohl & George A. Lopez eds., 1984). "[F]or the most part it is clear that international relations scholars have steered clear of the use of the term *terrorism* to describe state behaviors in international affairs." *Id.*

121. *See* VICTOR MARCHETTI & JOHN D. MARKS, THE CIA AND THE CULT OF INTELLIGENCE 108 (1974) (noting that covert special operations are, "[b]y definition . . . violent and brutal").

122. *See, e.g.*, Maureen R. Berman & Roger S. Clark, *State Terrorism: Disappearances*,

not greater, potential to "terrorize" large target populations as do isolated actions by private actors. Similarly, violent military operations often terrorize large target populations. Arguments that such terror is merely incidental, rather than primary, seem specious.[123]

Criminal perspectives of political violence suggest that the targeting of innocent civilians comprises a feature distinguishing terrorism from other forms of violence. Although few would dispute that "[i]nnocent victims are on equal footing, no matter what ideology or motive is used to rationalize their slaughter,"[124] it nonetheless remains difficult to determine the characteristics of an "innocent" civilian in all contexts. Few commentators have attempted to define such a category, and it may be impossible to do so in a universal fashion.[125]

The failure of criminal perspectives to account for political motives is a more serious deficiency than its failure to define the characteristics of an innocent civilian. Political violence logically occurs in response to political, cultural, economic, and other social grievances. International criminal sanctions against private actors who resort to violence as a means of obtaining fundamental human rights, or preventing human rights deprivations, merely maintain a status quo of repression, injustice, and inequality. It is evident that

---

13 RUTGERS L.J. 531 (1981) (arguing that systematic disappearances as a means of eliminating political opposition should be viewed as a crime against humanity and an international law offense).

123. *See* Christopher L. Blakesley, *The Modern Blood Feud: Thoughts on the Philosophy of Terrorism*, 33 CATH. LAW. 176, 193 (1990). Blakesley notes the similarities between "terrorism" and the concept of total war:

> Terrorism and "total" war are parallel concepts in the sense that they have parallel results and rationales. In total war, where innocent civilians are used as targets for military victory, war becomes quintessentially criminal terrorism. Thus, it was considered acceptable to drop the atomic bomb on Hiroshima and Nagasaki, which left "[p]eople in rags of hanging skin, wandering about and lamenting aloud the dead bodies."

Id. See also Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759, 761 (1965).

124. Blakesley, *supra* note 123, at 181.

125. *See* Reisman, *supra* note 12, at 541, 542. Reisman notes that limiting violence, "to combatants has become increasingly difficult to achieve operationally because of the increasingly permeable line between combatants and non-combatants," and because "'military' targets are no longer presented in splendid isolation from civilian contexts." Even when private actors attack clearly military targets, states often characterize these attacks as "terrorist." *Id. See also* Quigley, *supra* note 116, at 209-10. "When a U.S. Marine Corps barracks was dynamited in Beirut in 1983, the United States said that international terrorism was responsible, though the attack was directed at a military unit that was in another country to support its government against internal opposition." *Id.*

the mere existence of criminal sanctions will not deter political violence committed by revolutionaries and other advocates of social change when the violence is in response to injustice. In situations in which criminal sanctions do deter actors from resorting to violence, the underlying political grievances remain.

For these reasons, the political motive of an actor is a key factor in assessing the permissibility of resort to violence. Criminal law recognizes that, in some cases, criminal acts do not deserve criminal sanctions (i.e., when acts are done in self-defense or to protect others). A purely criminal approach to political violence is blind to the exigent circumstances that justify recourse to violence.

To the extent that it examines the political context of violence and links the eradication of political violence to the resolution of underlying political grievances, political perspectives of terrorism represent more reasoned, realistic, and humane approaches to the problem of terrorism. One commentator suggests that a sound starting point from which to address political violence under international law is to consider violence arising from political disorders as "disputes," as defined by the United Nations Charter.[126] Accordingly, these disputes would require peaceful negotiations. This commentator has argued that "an international political disorder that causes terrorism is a 'dispute' within the meaning of article 33 of the United Nations Charter, which mandates that the parties to any dispute shall, first of all, seek a solution by peaceful means including negotiation."[127] This approach recognizes that "[u]nless parties to a dispute . . . are willing to resolve the political disorder through a negotiated settlement, the problems of terrorism will remain."[128] Political perspectives also recognize that criminal sanctions alone may not constitute an effective or desirable method to address inherently political violence. However, political perspectives of terrorism fail to address adequately the fact that certain violence is not justified by any conceivable underlying political motivation or objective. The framework presented below attempts to bridge the gap between the criminal approach, which is often blind to political context, and the political-context approach, which is often blind to abuses of private actors.

---

126. Khan, *supra* note 92, at 949.
127. *Id.*
128. *Id.*

III. A Framework to Determine Politically Impermissible Violence

Since the founding of the United Nations, the international community has developed an extensive body of human rights law. The United Nations Charter,[129] the Universal Declaration of Human Rights,[130] and the Covenants on Political, Social and Economic Rights[131] embody this area of law. These international documents define basic and inalienable human rights. They also provide standards to determine those human rights deprivations which justify recourse to violence.

International humanitarian law, as embodied in the 1949 Geneva Conventions,[132] establishes rules of humane conduct for parties engaged in armed conflict. The norms of humanitarian law require that violent acts be consonant with fundamental human rights. Two principles underlie human rights and humanitarian law: first, "all peoples have a right to self-determination and . . . a right to engage in revolution"; and second, "international law . . . limits the permissibility of armed revolution and participation of individuals in revolutionary social violence."[133]

Additionally, United Nations Charter articles 2(3) and 2(4), contain widely recognized, although not universally practiced,[134] norms which restrict the use of force by states as a means of dispute resolution. These norms mandate that "[]all members shall settle their international disputes by peaceful means . . . [and require] . . . [a]ll Members [to] refrain in their international relations from the threat or use of force against the territorial integrity or

---

129. U.N. Charter, *supra* note 7.

130. Universal Declaration of Human Rights, *supra* note 41. *See also* Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. Cin. L. Rev. 367, 378 (1985) (stating that the Declaration "is now widely regarded as containing a universally recognized catalog of the human rights the UN deems fundamental").

131. International Covenant on Civil and Political Rights, *supra* note 109; and International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200, U.N. TDBOR, 21st Sess., Supp. No. 15, at 49, U.N. Doc. A/6315/Rev.1 (1966).

132. *See* 1949 Geneva Conventions, *supra* note 8.

133. Jordan J. Paust, *The Human Right to Participate in Armed Revolution and Related Forms of Social Violence: Testing the Limits of Permissibility*, 32 Emory L.J. 545, 547-48 (1983).

134. *See* Yehuda Z. Blum, *State Response to Acts of Terrorism*, 1976 Ger. Y.B. Int'l L. 223, 226-27 (1976) (noting that resort to force by states in circumstances other than self-defense has become widespread).

political independence of any state . . . ."[135]

International norms restricting the use of force as a means of dispute resolution under the United Nations Charter focus on regulating the use of force by and between states. This section suggests that international norms should apply equally to the conduct of private and government actors, and further suggests that both actors should exhaust peaceful remedies before resorting to force. Application of international human rights and humanitarian norms to private and government actors permits the world community to assess whether violence by these actors comports with the values of civilized society.

The proposed framework that determines the permissibility of political violence has three components. First, the framework identifies methods, motives, and targets of violence which are inherently violative of human rights. "Inherently violative" in this context means that which all humane and principled parties to a conflict agree comprises crimes against humanity that even political objectives linked to fundamental human rights can never justify.

Second, the proposed framework outlines the circumstances in which actors can justifiably resort to violence in the first instance. International norms restrict states in their first use of violence as a means to resolve grievances; no less should be required of private actors.

Third, the framework provides standards that identify compelling reasons that justify recourse to political violence. The standards outlined in the framework limit initial recourse to violence, provide viable standards of conduct once violent conflict begins, and require an examination of underlying political grievances.

However, before establishing procedural and substantive requirements for justifiable recourse to violence, the international community must first establish categories of per se impermissible

135. U.N. CHARTER, *supra* note 7, at art. 2(3), 2(4). *See also Uniting for Peace*, G.A. Res. 377A, U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950) (reaffirming "the primary duty of all Members . . . to seek settlement of [international disputes] by peaceful means"); *Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/2890 (1954); *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

conduct and provide harsh and certain criminal penalties for these violations. This category of per se impermissible conduct would preclude certain acts regardless of the political motivation of the actor, the political context of the violence, or the actor's state or private status. Violators of per se impermissible acts would, by definition, receive international approbation as unprincipled and inhumane.

International law identifies three acts or methods about which humane and principled regimes and private actors agree deserve universal condemnation and criminal sanctions. First, the act of genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide[136] is a per se impermissible act. The Genocide Convention specifically states that "[g]enocide . . . shall not be considered as [a] political crime[] for the purpose of extradition."[137] No principled and humane state or private actor can assert valid political objectives, consistent with human rights norms, which could ever justify the elimination of entire racial or ethnic groups. The elimination of whole segments of a population, of which the Nazi "final solution" is but one grim historical example,[138] is an evil of such dimension as to deserve certain criminal sanctions.

Second, torture, as defined in the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment,[139] is conduct which is inconsistent with legitimate political

---

136. Convention on Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, S. EXEC. DOC. No. 99-2, 99th Cong., 1st Sess. (1985), 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].

137. *Id.* at art. VII, S. EXEC. DOC. No. 99-2, 99th Cong., 1st Sess. at 10, 78 U.N.T.S. at 282.

138. *See* Robert A. Friedlander, Book Review, 79 AM. J. INT'L L. 479, 479-80 (1985) (reviewing THE STATE AS TERRORIST: THE DYNAMICS OF GOVERNMENTAL VIOLENCE AND REPRESSION (Michael Stohl & George A. Lopez eds., 1984)) (noting more recent occurrences of genocide in Kampuchea and Argentina).

139. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. TREATY DOC. No. 100-20, 100th Cong., 2d Sess. (1988), 23 I.L.M. 1027 (1984), *revised by* 24 I.L.M. 535 (1985) [hereinafter *Torture Convention*]. The Convention defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent of [sic] acquiescence of a public official or other person acting in an official capacity.

objectives and contrary to human rights and humanitarian norms.[140] As with genocide, principled and humane states and private actors should agree that torture is a per se impermissible crime against humanity. Torture, like genocide, is a "form[] of violence . . . which no revolutionary situation can justify because [such violence] negates the very end for which the revolution is a means."[141] Although the Torture Convention focuses on state actors, neither states nor private actors can ever justify the use of torture. Therefore, a prohibition on torture should extend to private as well as state actors, and should impose criminal sanctions on the manufacture and possession of instruments of torture.

Third, the international community should designate as per se impermissible the use of weapons of mass destruction including nuclear, chemical, and biological weapons.[142] Weapons of mass destruction are designed specifically to produce staggering casualties and inhumane consequences comparable to acts of genocide. The use of these weapons threatens not just humans, but humanity itself.[143] These weapons reap long-term damage to the environment, cause reproductive sterilization, and affect unborn generations. The United Nations General Assembly has condemned "[t]he use of nuclear and thermo-nuclear weapons [as] contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations."[144]

International norms against these weapons of mass destruction can be found in other international enactments.[145] The Protocol for

---

Id.

140. *See also* Universal Declaration of Human Rights, *supra* note 41. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.* at art. 5.

141. Herbert Marcuse, *Ethics and Revolution, in* REVOLUTION AND THE RULE OF LAW 46, 53 (Edward Kent ed., 1971).

142. Stohl, *supra* note 120. Stohl also notes that "[b]y convention, the threat of nuclear deterrence is not normally labeled 'terrorism' by international relations scholars despite the fact that it meets [the dictionary criteria of terrorism]." *Id.* at 48.

143. *See, e.g.*, Matthew Lippman, *Nuclear Weapons and International Law: Towards a Declaration of the Prevention and Punishment of the Crime of Nuclear Humancide*, 8 LOY. INT'L & COMP. L.J. 183 (1986).

144. *Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons*, G.A. Res. 1653, U.N. GAOR, 16th Sess., Supp. No. 17, at 5, U.N. Doc. A/5100 (1962) (stating that the use of nuclear weapons constitutes "a crime against mankind and civilization"). *Id.*

145. *See, e.g.*, Protocol for the Prohibition of Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, 26 U.S.T. 571, 94 L.N.T.S. 65 (entered into force for the United States Apr. 10, 1975); and Bacteriological (Biological) and

the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare[146] notes that the use of such weapons "has been justly condemned by the general opinion of the civilised world."[147] Because nuclear, chemical, and biological weapons will inevitably produce casualties among protected persons, their use amounts to an attack on impermissible targets. Conscientious private actors and regimes cannot justify use of these weapons as consistent with human rights or humanitarian norms. Therefore, the international community should criminalize the manufacture, possession, and use of weapons of mass destruction.

Having delineated impermissible methods, the international community should similarly designate per se impermissible motives as a component of impermissible conduct. International law acknowledges an ethical right to rebel against repressive regimes.[148] However, the international community implicitly recognizes that certain motives for political violence are indefensible. Accordingly, international law should require violent actors to articulate their motives and objectives publicly, as a procedural prerequisite to committing acts of violence. Similarly, international law should sanction impermissible motives and acts.

The international community has implicitly designated discriminatory motives as impermissible reasons for resorting to violence. Anti-discrimination norms that prohibit discrimination based on sex, race, or religion, are found throughout human rights and humanitarian law. For example, a primary purpose of the United Nations Charter is to "promot[e] and encourag[e] respect for human rights . . . for all without distinction as to race, sex, language, or religion."[149] In addition, the rights contained in the Universal Declaration of Human Rights apply "without discrimi-

---

Toxin Weapons, 26 U.S.T. 583, 11 I.L.M. 309 (1972) (entered into force by the United States Mar. 26, 1975).

146. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 26 U.S.T. 571, 94 L.N.T.S. 65 (entered into force for the United States Apr. 10, 1975).

147. *Id.* at 575, 94 L.N.T.S. at 96.

148. *See generally* Marcuse, *supra* note 141.

149. *See, e.g.*, U.N. CHARTER, *supra* note 7; Universal Declaration of Human Rights, *supra* note 41; 1949 Geneva Conventions, *supra* note 8; *Genocide Convention, supra* note 136; Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Agenda Item 75, at 33, U.N. Doc. A/RES./34/180; and *Torture Convention, supra* note 139.

nation of any kind, such as race, colour, sex, language, religion."[150] The General Assembly has also declared that "apartheid . . . is a crime against humanity."[151] The international community has addressed discrimination explicitly by enacting two separate conventions designed to eliminate gender and racial discrimination: the Convention on the Elimination of All Forms of Discrimination Against Women,[152] and the International Convention on the Elimination of All Forms of Racial Discrimination.[153]

Consistent with these concerns of discrimination, violence that is predicated on racial or ethnic discrimination should be per se impermissible under international law. An exception to this general rule would permit separatist groups with race or ethnicity-based grievances to justify violence in self-defense, if such groups suffer persecution or repression by majoritarian regimes. However, hate groups, such as the neo-Nazis and the Ku Klux Klan, could not justify resorting to violence to achieve discriminatory objectives under any circumstances.

Just as the international community should designate per se impermissible forms of violence, it should also designate per se impermissible targets of violence. It has already done so in times of war through the Geneva Conventions.[154] The Geneva Conventions generally prohibit attacks on civilian populations, and designate other per se impermissible targets in times of war.[155] These prohibitions on indiscriminate attacks on civilian populations also should extend to conflicts below the threshold of actual war.

These targets would encompass those that humane and principled actors could respect as per se impermissible. Children and the infirm are excellent examples because neither group can be held accountable for political grievances. Similarly, attacks on medical facilities, peace-keeping groups, and humanitarian organizations violate basic norms of civilized society, and should be considered

---

150. Universal Declaration on Human Rights, *supra* note 41, at art. 2.

151. *See* International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, U.N. GAOR, 28th Sess., Agenda Item 53, at 50, U.N. Doc. A/RES./3068 (1973).

152. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Agenda Item 75, at 33, U.N. Doc. A/RES./34/180 (1980).

153. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 12, 1969, 660 U.N.T.S. 212.

154. *See* 1949 Geneva Conventions, *supra* note 8.

155. *Id.*

per se impermissible targets. Hospitals and medical facilities are clearly humanitarian institutions that reduce the suffering engendered by armed conflict and violence. Therefore, based on any underlying human rights or humanitarian political objective, attacks on these groups cannot be justified.

Once the international community determines per se impermissible violence, it should then formulate standards to determine why and when actors can resort to violence in the first instance. Existing international norms against the use of force illustrate that both a procedural and a substantive dimension restrict the use of violence for political objectives. Procedurally, recourse to violence is a drastic act which results from drastic circumstances; actors should turn to violence only as a last resort, after exhausting all reasonable peaceful efforts. International norms provide guidelines to create procedural and substantive standards that regulate the use of violence to achieve political objectives. The international doctrines of humanitarian intervention and reprisal illustrate this point.[156] The procedural criteria that justify humanitarian intervention, for example, require a fundamental human rights violation, the exhaustion of peaceful remedies, the existence of no reasonable prospect for timely action by an international organization, and the notification of the international community after intervention.[157] Political violence undertaken to secure human rights, and the doctrine of humanitarian intervention, are similar analytically in that they both contain measures to prevent egregious human rights abuses.

The doctrine of reprisal formerly allowed states to resort to force as a self-help measure to deter a violation of international law.[158] Private actors that resort to violence, when securing rights guaranteed by international law, have concerns similar to states that use force for self-help. Under the doctrine of reprisal, the state resorting to force was required to show the existence of a substantial legal violation and a need for immediate response, and to keep the amount of force used proportionate to the harm suf-

---

156. Brandenburg, *supra* note 68, at 673.

157. *Id.* at 673-74.

158. The Security Council has interpreted chapter seven of the U.N. Charter to prohibit reprisals during peacetime. *See* U.N. SCOR, 19th Sess., 1111th mtg. at 10, U.N. Doc. S/5650 (1964). The Security Council, responding to a complaint filed by Yemen regarding a British air attack on its territory, "*[c]ondemns* reprisals as incompatible with the purposes and principles of the United Nations." *Id.*

fered.[159] Logically, private actors who resort to self-help in response to international violations by states would also need to abide by the necessity and proportionality requirements of reprisal, where the act is illegal but for the initial violation.

These standards, and the requirement that states seek peaceful resolutions to disputes, should apply to states as well as private actors. In order to justify recourse to violence, the international community should establish five requirements. First, it should require the actor to document that recourse to violence is a last resort, that no peaceful alternatives exist to achieve the desired objectives, or that recourse to such alternatives would be futile.

Second, international law should require actors to articulate and document compelling reasons for resorting to violence. Compelling reasons include: literal self-defense (i.e., repelling armed attack or resisting occupation or invasion by a foreign power), as well as objectives designed to prevent fundamental human rights abuses or to secure fundamental human rights guaranteed under the United Nations Charter, the Universal Declaration of Human Rights, and other human rights instruments. International law should require actors who resort to violence to provide clear and convincing evidence that the violence is rationally related to the prevention of fundamental human rights violations.

Third, international law should provide incentives that encourage actors who resort to violence to tailor such violence narrowly, in order to secure concrete objectives. Indiscriminate violence, or violence disproportionate to the goal sought, would violate this requirement, as would violence substantially certain to kill or injure seriously per se impermissible targets. The bombing of a police station where torture of prisoners occurred could meet this requirement, whereas the bombing of a discotheque frequented both by security agents and civilians would not.

Fourth, international law should establish that the assertion of valid political objectives will not justify or mitigate the use of per se impermissible conduct, as outlined above.

Fifth, international law should require actors who use violence to notify a designated international institution immediately and to explain the reasons for their actions. This notification could be confidential in cases where the disclosure of the actors' identity

159. *See generally* Brandenburg, *supra* note 68, at 671-77.

would lead to unlawful prosecution.

The foregoing framework is viable only if the international community explicitly and specifically designates specific forms of conduct as per se impermissible. This per se impermissible conduct would, of course, apply both to states as well as private actors. Only after per se impermissible conduct is defined can the international community engage in the next step—the establishment of procedural requirements that allow any actor, state or private, to resort to force.

Conclusion

International standards already exist to assess instances of impermissible violence. However, international institutions which judge, mediate, and punish such conduct remain woefully underdeveloped. A basic premise of this article is that criminal sanctions alone are an inadequate and often inappropriate tool for addressing political violence.

The "indirect control scheme" approach of international criminal law, which requires extradition or prosecution for international crimes, suffers from numerous deficiencies. These include the failure to provide authoritative control over the states in order to insure compliance, and the failure to develop a policy of even application for criminal sanctions, subject to domestic political considerations that affect the enforcing state.[160] Moreover, criminal sanctions lack the means to address the legitimate underlying political objectives of private actors who resort to violence.

For these reasons, the international community needs to establish an institution to judge and arbitrate human rights grievances that lead to political violence. This human rights tribunal would provide access to non-state parties, including private actors. It would also allow parties to exhaust nonviolent remedies, and thus discourage recourse to violence as a means of securing fundamental human rights. Finally, the tribunal would determine whether violent acts comport with civilized values, and would give a voice to victims of state oppression.

The fact that terrorism exists indicates that many politically

160. M. Cherif Bassiouni, *Introduction to Symposium on the Teaching of International Criminal Law*, 1 Touro J. Transnat'l L. 129, 135 (1988).

aggrieved groups feel that they are without a voice to air their grievances. For this reason, they commit spectacular acts of violence, generally to attract media attention. Assuming that publicity is the primary goal of those who engage in violent acts, providing them with greater access to institutional media should lessen the need to resort to violent acts. The creation of an international tribunal to mediate political grievances would provide one means of media access. Another means would be a fund to sponsor media activities for aggrieved groups.

In addition to providing greater media access, the international community should provide actors who are contemplating acts of political violence with access to legal counsel. Legal counsel, theoretically, could steer actors away from violent acts inimical to human rights. It could also help devise permissible strategies of protest as well as nonviolent means of countering state repression.

These measures will reduce impermissible political violence by private actors, and subject state practices of repression and use of force to greater scrutiny and accountability. The maintenance of order cannot supersede the right to oppose repression. "Neither the existence of social unrest, nor a desire to control it, lessens the obligation upon any government to respect fundamental human rights."[161]

Human rights are more of a reality in the papers of international human rights conventions than they are in the lives of millions of people. Despite the complex and varied reasons why state and private actors engage in violent acts, it is indisputable that injustice breeds violence. Where widespread and systemic injustices exist, actors may permissibly resort to violence. The international community needs to address the underlying causes of these injustices, and punish states as well as private actors for acts of per se impermissible violence.

---

161. *See* 1990 AMNESTY INTERNATIONAL, *supra* note 110 at 2.