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# The Meaning of Terrorism--Jurisprudential and Definitional Clarifications

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# The Meaning of Terrorism—Jurisprudential and Definitional Clarifications

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ABSTRACT

*This Article examines contemporary definitions of terrorism and determines that they are inadequate. The author describes five specific types of problems with current definitions and offers an appropriate scholarly remedy. This Article concludes,* inter alia, *that the United States should reject narrow, geopolitical definitions of terrorism. Instead, it should articulate and apply a single unambiguous standard that incorporates the requirements of just cause and just means. Absent evidence of these two elements, the insurgent use of force should be regarded as terrorism. This clearer and more objective definition will enable the United States to approach and address adversarial uses of force in a more effective manner.*

Despite the increasingly large volume of publications addressing terrorism, it is regrettable that little if any serious progress has been made in suitably distinguishing terrorism from other uses of force in world politics and from other related crimes under international law.[1] Indeed, judging from the standard

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1. Part of the problem here is the conglomerate nature of the crime of terrorism. For example, Congress has made terrorism in the United States and abroad subject to criminal prosecution in United States courts. One statute is directed toward aircraft hijackers, regardless of where the terrorist activity occurs. *See* Aircraft Sabotage Act, Pub. L. No. 98-473, tit. II, ch. XX, pt. B, 98 Stat. 2187 (1984) (codified as amended at 18 U.S.C. §§ 31-32 (1994)). Another statute imposes punishment for hostage-taking, wherever located, if either the terrorist or the hostage is a United States citizen, or if the purpose is to influence the United

definitions of terrorism currently in professional use—definitions that offer no operational benefit for scholars or practitioners—the term has become so broad and so imprecise that it embraces even the most discrepant activities. For example, under certain prevailing definitions of terrorism adopted by United States government agencies and some scholars, the United States War for Independence, the Gulf War (Desert Storm), the Contra insurgency in Nicaragua, and the anti-Castro insurgency supported by the United States[2] are all examples of terrorism.

The following is a list of typical official and unofficial definitions of terrorism:[3]

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

2. ". . . the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives." (U.S. Federal Bureau of Investigation).

3. ". . . premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents."[4] (U.S. Department of State).

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

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States government. *See* Act for the Prevention and Punishment of the Crime of Hostage-Taking, 18 U.S.C. § 1203 (1994). Yet another statute makes terrorist assaults or murders of United States nationals a crime, wherever the event takes place. *See* Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 896 (codified as amended at 18 U.S.C. § 2332 (1994)).

2. The anti-Castro insurgency supported by the United States is also in violation of the United States Neutrality Act. *See* 18 U.S.C. § 960 (1994).

3. These definitions are found in R. Kidder, *Unmasking Terrorism: The Fear of Fear Itself, in* VIOLENCE AND TERRORISM 14 (B. Schechterman & M. Slann eds., 3d ed. 1993).

4. An authoritative source seems to have used this definition as the basis of a definition of international terrorism. *See* James P. Terry, *Legal Aspects of Terrorism, in* INTERNATIONAL MILITARY AND DEFENSE ENCYCLOPEDIA 2732 (1993) (defining international terrorism as "the premeditated, politically motivated violence perpetrated against noncombatant targets in or from a second state by subnational groups or individuals").

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

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

What is wrong with these definitions? First, although a few of the definitions attempt to demarcate between lawful and unlawful uses of force, the reader must determine which criteria of legality should be applied. Are the references to national law criteria? Are the references to international law criteria? Do they refer to both criteria? Once the applicable criteria of legality are determined, the pertinent criteria under national or international law still remain unclear.[5]

Second, the above-listed definitions of terrorism, which make no explicit reference to legality,[6] also omit the essential elements

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5. Under national law, pertinent penal provisions (such as murder, assault, theft, the illegal detention of persons, the taking of hostages, and arson) normally contain no actual reference to terrorism and are applicable despite any reference to terrorism. Under international law, criteria of lawfulness are more or less present in pertinent treaty provisions, but these criteria are one step removed from judgments regarding terrorism. Accordingly, the analyst must first understand that terrorism is a conglomerate crime under international law and then must understand which particular penal components constitute terrorism. Even with such understanding, authoritative contradictory expectations, especially in regard to standards of just cause, may still confound analysis.

6. The definitions of terrorism that do explicitly refer to legality do not, in any effective or identifiable way, include the elements of just cause and just means. Although it is conceivable that these elements may somehow be embedded in the reference to legality, no one can ever know for certain. Hence, definitions of terrorism that contain references to lawful or unlawful force are assuredly not per se more useful than definitions without such references. Indeed, definitions that do contain references to legality may be more problematic because they display a certain circularity not evident in other definitions. Terrorism here is defined, *inter alia*, as unlawful force, and unlawful force is defined, in turn, as terrorism.

of "just cause" (*jus ad bellum*)[7] and "just means" (*jus in bello*).[8] These indispensable elements distinguish permissible from impermissible insurgencies under international law.[9] Moreover, in view of the supremacy of some international law over national or domestic law,[10] these elements are relevant whichever realm of

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7. The principle of just cause maintains that an insurgency may justify the exercise of law-enforcing measures under international law. This argument is deducible from the existence of an authoritative human rights regime in international law and from the corollary absence of a central enforcement mechanism for this regime. It is codified, *inter alia*, in the *Report of the Ad Hoc Committee on International Terrorism*, U.N. GAOR, 29th Sess., Supp. No. 28, at 1, U.N. Doc. A/9028 (1973). *See also* Art. 7 of the U.N. General Assembly's 1974 Definition of Aggression, G.A. Res. 3314, U.N. GAOR 29th Sess., Supp. No. 31, at 144, U.N. Doc. A/9631 (1974), *reprinted in* 13 I.L.M. 710, 714 (1974). Article 7 refers to the October 24, 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970), *reprinted in* 9 I.L.M. 1292 (1970).

8. The standard of just means has been brought to bear upon non-state actors in world politics by Article 3, which is common to the four Geneva Conventions of August 12, 1949, and by the two protocols to these Conventions. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 (hereinafter Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 606 (hereinafter Protocol II). Protocol I applies humanitarian international law to conflicts fought for self-determination. Protocol I, *supra*. Protocol I, which was a product of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts that ended on June 10, 1977, brings irregular forces within the full scope of the law. *Id.* Protocol II addresses the protection of victims of non-international armed conflicts. Protocol II, *supra*. Protocol II thus applies to all armed conflicts that are not covered by Protocol I and that take place within the territory of a state between its armed forces and dissident armed forces. *Id.*

9. Although it may appear at first that definitional references to political motives or objectives satisfy the just cause criterion because these references seek to exclude ordinary criminality as a motive for insurgency, this view is exceedingly problematic because antecedent definitional questions concerning precise meanings and parameters of the word "political" and various associated issues of fact remain unresolved.

10. According to Article VI of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the

law or combination of realms is implicitly under consideration. Without the elements of just cause and just means, a definition of terrorism necessarily includes both permissible and impermissible forms of insurgency.[11] Such a definition of terrorism is useless.

The third problem with the above-listed definitions of terrorism is that the definitions that refer to "threatened use of force or violence" or "threat of violence" never establish identifiable thresholds of threat. When, exactly, is the threat sufficient to argue convincingly for the presence of terrorism? In the absence of settled, unambiguous thresholds, inclusion of the word "threat" within the definition can serve only propagandistic or geopolitical purposes.

Fourth, the above-listed definitions that do not refer specifically and exclusively to insurgent organizations broaden the meaning of terrorism to unmanageable and operationally useless levels. As a crime under international law,[12] terrorism cannot be committed by states *qua* states.[13] This exclusion is very sensible because the alternative would lead to an unwieldy conceptual expansion—a blending of terrorism with other related

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> Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI. In the *Paquete Habana*, 175 U.S. 677, 700 (1900), the Supreme Court declared:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . . For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. . . .

*Id.* Thus, customary international law is also incorporated into United States common law, although subject to being overridden by subsequent statute or treaty. Whitney v. Robertson, 124 U.S. 190, 194 (1888); L. Littlejohn & Co. v. United States, 270 U.S. 215 (1926).

11. Under international law, of course, not all uses of insurgent force are terrorism. Just cause for the inalienable right to self-determination and for the enjoyment of peremptory human rights is an integral part of customary and conventional norms. The right of insurgency is affirmed, *inter alia*, in the first part of the second paragraph of the Declaration of Independence of the United States (a document that qualifies as lawmaking under the authoritative provisions of Article 38 of the Statute of the International Court of Justice). But insurgency is unlawful, irrespective of just cause, if the means used fail to satisfy just means criteria. For example, if the use of force is indiscriminate, disproportionate, or beyond the codified boundaries of military necessity, the insurgency is unlawful.

12. An authoritative listing of offenses that constitute the crime of terrorism can be found in the *European Convention on the Suppression of Terrorism*, Nov. 10, 1976, Eur. T.S. No. 90, *reprinted in* 15 I.L.M. 1272 (1976).

13. Terrorism, of course, can be supported by states.

crimes[14]—and a consequent dilution of the crime. Moreover, in the simultaneous absence of precise just cause and just means criteria on the use of force, virtually all force exercised by governments could conceivably be construed as terrorism.

Fifth, the definitions listed above that refer to political violence or objectives fail to demarcate clearly the boundaries of politics. When exactly is violence unambiguously political? What, indeed, is the difference between political violence and ordinary criminal violence? As a jurisprudential matter, these questions have existed for a long time, especially in connection with the international law of extradition[15] and the pertinent criteria of the "political offense exception" to extradition.[16]

Today, some states conclude that politically motivated violence, by definition, cannot be terrorism. Under this view, acts of violence that are committed on behalf of national liberation, self-determination, or anticolonialism fall outside the definition of terrorism. Hence, "[u]nder this approach, sending letter bombs through the mails, hijacking airplanes, kidnapping or attacking diplomats and international business people, and indiscriminate slaughter of civilians could never constitute terrorism if the revolutionary groups committed them on behalf of a just cause."[17]

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14. For example, terrorism could be blended with aggression. *See Resolution of the Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975), *reprinted in* 14 I.L.M. 588 (1975).

15. The "extradite or prosecute" formula, which should be applied more systematically to crimes of terrorism, derives from the peremptory norm of *nullum crimen sine poena* ("no crime without a punishment"). Developed in antiquity, this formula has roots both in natural law and in positive law. *See* JEAN BODIN, THE SIX BOOKES OF A COMMONWEALE (Kenneth D. MacRae ed., Richard Knolles, trans., 1962) (1576); HUGO GROTIUS, DE JURE BELLIS AL PACIS LIBRI TRES (Francis W. Kelley, trans. 1925): EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (Charles G. Fenwick trans., Carnegie Inst. 1916) (1758). The norm of *nullum crimen sine poena* distinguishes between criminal and non-criminal law. Without punishment, there can be no distinction between a penal statute and any other statute. *See* Redding v. State, 85 N.W. 2d 647, 652 (Neb. 1957) (concluding that a criminal statute without a penalty clause is of no force and effect).

16. The "political offense exception" permits a state to refuse an extradition request from another state if the offense charged in the request is of a "political nature." For an excellent treatment of this principle, see Christopher L. Blakesley, *The Practice of Extradition From Antiquity to Modern France and the United States: A Brief History*, 4 B.C. INT'L & COMP. L. REV. 39 (1981). *See also* CHRISTOPHER L. BLAKESLEY, TERRORISM, DRUGS, INTERNATIONAL LAW AND THE PROTECTION OF HUMAN LIBERTY 75-89 (1992).

17. *See* John F. Murphy, *Cooperative International Arrangements: Prevention of Nuclear Terrorism and the Extradition and Prosecution of Terrorists, in* PREVENTING NUCLEAR TERRORISM 361 (Paul Leventhal & Yonah Alexander eds., 1987). This book represents the Report and Papers of the International Task

From the standpoint of international law, this approach ignores that the criterion of just cause[18] is always augmented by the criterion of just means. As already noted, the just means standard has been made applicable to insurgent resorts to force by Article 3 of the four Geneva Conventions of 1949 and by Protocols I and II of 1977 to the Geneva Conventions. Furthermore, the Martens Clause of the 1899 and 1907 Hague Conventions confirms that ". . . civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience."[19] Indeed, even if the authoritative extensions of humanitarian international law represented by the Geneva Conventions and Protocols had not been enacted, the Martens Clause would apply in many circumstances.

It must also be understood that all law is rooted in natural law and that natural law could never countenance violence against the innocent as permissible. Cicero's classic expression of natural law in *De Republica* clearly indicates why politically motivated violence by insurgents must be unlawful if the insurgents ignore the obligations of discrimination, proportionality, and military necessity dictated by "right reason":

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. . . . It is a sin to try to alter this law, nor is it allowable to repeal any part of it, and it is impossible to abolish it entirely.[20]

For more than two thousand years, natural law has served as the ultimate standard of right and wrong, of lawfulness and unlawfulness. In Sophocles' *Antigone* and Aristotle's *Ethics and Rhetoric*, the principle of natural law—tied closely to theology for

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Force on Prevention of Nuclear Terrorism and includes a chapter by the author, Louis René Beres, a participant in the Task Force.

18. Moreover, it is by no means certain that all politically motivated violence is necessarily expressive of national liberation, self-determination, or anticolonialism objectives—the only objectives properly associated with just cause. Likewise, it is not certain that national liberation, self-determination, and anticolonialism are necessarily expressive of just cause in all circumstances.

19. The Martens Clause, named after the Russian delegate at the first Hague Conferences, is included in the Preamble of the 1899 and 1907 Hague Conventions. The Clause is designated a higher status in Protocol I, in which it is included in the main text of Article I. *See* Protocol I, *supra* note 8. In Protocol II, the Martens Clause was again moved to the Preamble. *See* Protocol II, *supra* note 8. The Martens Clause extends the law of armed conflict to all types of liberation wars.

20. *See* MARCUS T. CICERO, THE REPUBLIC: BOOK III, *reprinted in* SOCIETY, LAW, AND MORALITY 35-36 (Frederick A. Olafson ed., 1961).

many centuries—placed law above lawmaking. At the same time, it is obvious that humankind has not only been generally indifferent to the law of nature, but has often coupled this indifference with adherence to so-called laws that reject justice. This phenomenon is evident, *inter alia*, in the use of the word "political" to excuse terrorism and to exclude from the realm of terrorism a number of resorts to insurgent force that are simply not excludable under natural law.

We live at a moment in history in which the realm of politics and the realm of crime are interpenetrating, overlapping, and even interchangeable at times. For example, who killed President Kennedy, "terrorists" or "criminals"? The interrelationship between politics and crime was understood by St. Augustine at the beginning of the fifth century. In *City of God*, St. Augustine described human history as a contest between two societies, the intrinsically debased City of Man and the eternally peaceful City of God. St. Augustine characterized the former society as little more than "a large gang of robbers."[21] In an oft-quoted passage, St. Augustine set forth a conversation between Alexander the Great and a captured pirate. When asked by Alexander what right the pirate had to infest the high seas, the pirate replied, "The same right that you have to infest the world. But because I do it in a small boat I am called a robber, while because you do it with a large fleet you are called an emperor."[22]

Of course, even if the concept of terrorism were suitably clarified and improved, unless the states in world politics—especially major states such as the United States[23]—begin to take their counterterrorism responsibilities seriously, the benefits of clarification and improvement of the definition of terrorism will be moot. For example, the recent United States validation of the Palestine Liberation Organization (PLO) regarding the Oslo agreement with Israel[24] and the

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21. *See* LOUIS RENÉ BERES, PEOPLES, STATES, AND WORLD ORDER 114-15 (1981) (discussing St. Augustine's political philosophy); *see also* GEORGE H. SABINE, A HISTORY OF POLITICAL THEORY 308 (1961) (discussing St. Augustine's pertinent phrase: "highway robbery on a large scale").

22. BERES, *supra* note 21, at 115.

23. The argument for special or enlarged major power responsibility is based on codifications expressed in nineteenth and twentieth century peace settlements and international organizations—particularly the role of permanent members of the United Nations Security Council—and is deducible from the more or less persistently decentralized authority structure of international law.

24. *See* Louis René Beres, *International Law Requires Prosecution, Not Celebration, of Arafat*, 71 U. DET. MERCY L. REV. 569 (1994).

subsequent Nobel Prize celebration of PLO leader Yasser Arafat[25] fundamentally undermine the obligatory war against terrorism and indicate that the United States is not taking its counterterrorism responsibilities seriously.[26] Therefore, scholars must do their part to refine the terrorism concept,[27] and political leaders must also do their part in honoring the incontrovertible commands of national and international law.[28]

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25. *See* Louis René Beres, *No Peace—Or Prize—Without Justice,* USA TODAY, Oct. 17, 1994, at 10A.

26. In addition to crimes of terrorism, Yasser Arafat gave his blessing to crimes of war, crimes against peace, and crimes against humanity committed by Saddam Hussein during the 1991 Gulf War. Units of the Palestine Liberation Army served with Hussein's forces in occupied Kuwait, making them—and Arafat personally—complicit in multiple crimes of extraordinary horror and ferocity. On the principle of command responsibility, or *respondeat superior,* see *In re* Yamashita, 327 U.S. 1 (1946); United States v. Von Leeb ("The High Command Case"), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1, 71 (1949); Major William H. Parks, *Command Responsibility for War Crimes,* 62 MIL. L. REV. 1 (1973); William V. O'Brien, *The Law of War, Command Responsibility and Vietnam,* 60 GEO. L.J. 605 (1972); U.S. DEP'T OF THE ARMY, ARMY SUBJECT SCHEDULE NO. 27-1 (GENEVA CONVENTIONS OF 1949 AND HAGUE CONVENTION NO. IV OF 1907) 10 (1970). The direct individual responsibility of Yasser Arafat for crimes is clear in view of the authoritative 1945 London Agreement denying defendants any right to the act of state defense, a right which would be even more unavailable for the leader of a non-state insurgent organization. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

27. For writings by the author on the terrorism concept, see Louis René Beres, *Terrorism and International Law,* 3 FLA. INT'L L.J. 291 (1988); Louis René Beres, TERRORISM AND GLOBAL SECURITY: THE NUCLEAR THREAT (2d ed., 1987); Louis René Beres, *Confronting Nuclear Terrorism,* 14 HASTINGS INT'L & COMP. L. REV. 129 (1990); Louis René Beres, *The United States and Nuclear Terrorism in a Changing World: A Jurisprudential View,* 12 DICK. J. INT'L L. (1994); Louis René Beres, *On International Law and Nuclear Terrorism,* 24 GA. J. INT'L & COMP. L. (1994); Louis René Beres, *International Terrorism and World Order: The Nuclear Threat,* 12 STAN. J. INT'L STUD. (1977); Louis René Beres, *Terrorism and International Security: The Nuclear Threat,* 26 CHITTY'S LAW JOURNAL 73 (1978); Louis René Beres, Hic Sunt Dracones: *The Nuclear Threat of International Terrorism,* 9 PARAMETERS: J. U.S. ARMY WAR COLLEGE 11 (1979); Louis René Beres, *International Terrorism and World Order: The Nuclear Threat, in* STUDIES IN NUCLEAR TERRORISM 360-78 (Augustus R. Norton & Martin H. Greenberg eds., 1979); Louis René Beres, *Is Nuclear Terrorism Plausible?, in* NUCLEAR TERRORISM: DEFINING THE THREAT 45-53 (Paul Leventhal & Yonah Alexander eds., 1986); Louis René Beres, *Preventing Nuclear Terrorism: Responses to Terrorist Grievances, in* PREVENTING NUCLEAR TERRORISM 146-59 (Paul Leventhal & Yonah Alexander eds., 1987); Louis René Beres, *Responding to the Threat of Nuclear Terrorism, in* INTERNATIONAL TERRORISM: CHARACTERISTICS, CAUSES CONTROLS (Charles W. Kegley Jr., ed., 1990); Louis René Beres, *The Threat of Palestinian Nuclear Terrorism in the Middle East,* 15 INT'L PROB. 48 (1976).

28. The generic imperative to punish crimes under international law—crimes that include terrorism—was reaffirmed in Principle I of the Nuremberg Principles (1946): "Any person who commits an act which constitutes

For the United States, both of these complementary expectations are drawn from a higher law tradition. Deducible, in turn, from a still-earlier tradition of natural law, the tradition of a higher law is one of the enduring and canonical principles in the history of the United States. According to Sir William Blackstone in his celebrated *Commentaries*, United States leaders are expected, in all circumstances, "to aid and enforce the law of nations, as part of the common law: by inflicting an adequate punishment upon offenses against that universal law. . . ."[29] Understood in terms of terrorism, higher law imposes a distinct legal obligation on the United States to oppose and punish terrorist crimes. Even apart from its higher law obligations, the United States is fully bound by international law as expressed in the Supremacy Clause of the United States Constitution and reaffirmed by various decisions of the United States Supreme Court.[30]

During the Cold War, both United States and Soviet leaders accepted a narrow, geopolitical definition of terrorism. The United States characterized any insurgent force operating against an allegedly pro-Soviet regime as lawful,[31] regardless of the means used in the insurgency. Reciprocally, any activity by an insurgent force operating against a pro-United States regime was automatically characterized as terrorism. The Soviet leaders believed that the United States was using the term "terrorism" to discredit what the Soviets alleged were legitimate movements for self-determination and associated human rights. Under the Soviet view, insurgency against what the United States freely called authoritarian regimes—for example, the regimes in El Salvador, Guatemala, and Chile—was not terrorism, as the United States had maintained, but national liberation.

For the future, the United States, as the sole remaining superpower, must reject altogether any narrow, geopolitical definition of terrorism. Aware that the Cold War is now over and

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a crime under international law is responsible therefore and liable to punishment."

29. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *73.

30. *See* The Paquete Habana, 175 U.S. 677, 700 (1900); *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781, 788 (D.C. Cir. 1984) (per curiam) (Edwards, J., concurring) (Judge Edwards concurred in the majority's dismissal of the action but made several references to domestic jurisdiction over extraterritorial offenses), *cert. denied*, 470 U.S. 1003 (1985); Von Dardel v. U.S.S.R., 623 F. Supp. 246, 254 (D.D.C. 1985) (stating that the "concept of extraordinary judicial jurisdiction over acts in violation of significant international standards has also been embodied in the principle of "universal violations of international law").

31. "Freedom fighting" was the operative term.

that the settled jurisprudential criteria discussed above are consistent with its own incontrovertible norms and traditions, the United States should immediately begin to articulate and to apply a single set of standards to insurgent resorts to force. If a resort to force is supported by both just cause and just means, the use of force should be recognized as permissible. However, if the use of force lacks either just cause or just means, the use of force should be recognized as terrorism and opposed.[32]

This recommendation is offered for pragmatic operational reasons, as well as for purely academic reasons of respect for justice and law. Once government officials and pertinent enforcement agencies are better able—with the help of the work of scholars—to distinguish between permissible and impermissible insurgencies under national and international law, they will be better able to allocate precious counterterrorism resources in a rational, cost-effective way. Rather than dedicate a substantial fraction of scarce resources in a zero-sum environment to purposeless or counterproductive geopolitical diversions, these officials and agencies should be positioned to focus on real threats to safety.

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32. The opposition to such a use of force should extend beyond tactical measures involving armed force to include criminal prosecutions within United States federal courts. Federal courts are competent to prosecute such acts because federal law confers jurisdiction "to try *any* person who, by the law of war, is subject to trial by a military tribunal . . . ." 10 U.S.C. § 818 (1994) (emphasis added). In addition, federal law grants jurisdiction to the federal district courts for all offenses against the laws of the United States. 18 U.S.C. § 3231 (1994). Since the United States was founded, the United States has reserved the right to enforce international law within its own courts. The United States Constitution confers on Congress the power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." U.S. CONST. art. 1, § 8, cl. 10. Pursuant to this constitutional prerogative, the first Congress, in 1789, passed the Alien Tort Statute, Judiciary Act of 1789, ch. 20, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1350 (1994)). This statute authorizes the United States federal courts to adjudicate civil claims by aliens alleging acts committed "in violation of the law of nations or a treaty of the United States" when the alleged wrongdoers can be found in the United States. *Id.* Understood in terms of the United States obligations to prosecute terrorists or to bring terrorists into United States courts as defendants in civil proceedings, this means that terrorists, when in the territory of the United States, can be brought into federal courts for civil remediation of terrorist crimes.