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Terrorism

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TERRORISM

Professor Malvina Halberstam

Terrorism — by which I mean indiscriminate attacks on civilians in the name of some political cause, such as the recent attacks at the Vienna and Rome airports, the seizure of the Achille Lauro, or the bombings in Melbourne we heard about on the news this morning — is perhaps the greatest challenge to international law today. Unfortunately, there are very major gaps in the international law on terrorism.

First, there is no generally accepted definition of terrorism under international law. Although the U.N. established an Ad Hoc Committee on International Terrorism in 1972, and the committee finally issued a report in 1979, it did not succeed in either defining terrorism or producing a draft convention prohibiting terrorism.

Second, there is no convention making it an offense under international law to murder, assault, or injure anyone other than an internationally protected person. There are several multilateral treaties which address specific aspects of terrorism. Treaties presently in effect apply to certain criminal and noncriminal acts aboard aircraft that interfere with its safety; to the seizure of aircraft; to acts which jeopardize the safety of aviation; to acts of violence against representatives of states and international organizations; to the taking of hostages; to the sending of explosives by mail; to piracy; and to certain acts involving nuclear materials. Most of those conventions were adopted within the last ten or fifteen years. A number of these conventions require designated states to take the necessary measures under their internal law to establish jurisdiction over those who engage in the proscribed conduct and provide that the state in whose territory the terrorist is found must either extradite him or try him. There is no treaty, however, making the threat or use of force against members of the general public an offense under international law.

Third, even with respect to acts covered by the conventions, there is no assurance that states will either extradite or prosecute as required by the conventions, and no clear mandate for state action to prevent terrorist acts before they occur.

a. The conventions do not provide that the political offense exception, included in many extradition treaties, does not apply to the offenses defined by these conventions. Therefore, if the state in which the offender is found determines that it is a "political offense," it may take the position that it is not required to extradite. Since most present-day acts of terrorism are allegedly committed for political ends, the conven-

tions may not impose meaningful extradition obligations, even with respect to those acts covered. While the state in which the offender is present is required to "submit" the case to its competent authorities for prosecution if it does not extradite, there is no assurance that those authorities in turn will not decide that the case cannot be prosecuted under the state's law because of its political nature.

b. The conventions do not provide any sanctions for a state's failure to extradite the offender or to submit the case to its authority for prosecution. None of the conventions specifically include conspiracy in the definition of the offense, and only the hostage-taking convention requires states to prohibit groups and organizations that encourage, instigate, organize, or engage in the prohibited conduct.

c. None of the conventions specifically include conspiracy in the definition of the offense and only the Hostage Taking Convention requires states to prohibit "groups and organizations that encourage, instigate, organize or engage" in the prohibited conduct. Terrorist activities, though carried out by individuals, are generally planned by organizations. While the accomplice provision may apply to co-conspirators under the internal law of some jurisdictions, and the Montreal, Internationally Protected Persons and Hostage Taking Conventions require states to take measures to prevent the proscribed conduct, which could, arguably be a basis for criminalizing conspiracy and outlawing organizations that plan, fund, or otherwise aid or abet terrorism, the failure to specifically include conspiracy in the definition of the offense and to require states to outlaw organizations that plan, fund or otherwise aid and abet in the commission of the prohibited conduct is a serious weakness.

d. The conventions do not provide for jurisdiction by the state of the victim, except for the Hostage Convention, which makes it discretionary, and the Internationally Protected Persons Convention, which provides for jurisdiction by the state on whose behalf the victim performed the functions that establish the status of an internationally protected person. More and more, citizens of particular states are singled out for terrorist attack, either to compel that state to do something or to express disapproval of something that state is doing or has done.

Fourth, it is not clear whether terrorist acts on the high seas, such as the seizure of the Achille Lauro, constitute piracy. Piracy has long been considered *hostis humanis generis*, a threat to all nations. It is one of the oldest, and perhaps only, crimes for which universal jurisdiction is generally accepted under international law.

While there was no generally accepted definition of piracy prior to

the adoption of the Geneva Convention on the High Seas, there is substantial support in the writings of publicists and in the practice of states for the position that terrorist acts on the high seas, such as the seizure of the *Achille Lauro*, would constitute piracy under customary international law.

Courts in the United States and Britain and a number of prominent publicists took the position that unauthorized acts of violence committed on the high seas constitute piracy. For example, Oppenheim's *International Law*, edited by Lauterpacht, states:

If a definition is desired which really covers all acts that are in practice treated as piratical, piracy must be defined as every unauthorized act of violence against persons or goods committed on the open sea, either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.

In a landmark English decision, *In re Piracy Jus Gentium*, the court said, "Possibly the definition of piracy which comes nearest to accuracy coupled with brevity is that given by Kenney, where he says, 'Piracy is any armed violence at sea which is not a lawful act of war.'"

One of the more controversial areas under customary law concerned the treatment to be accorded to insurgents who had not achieved the status of recognized belligerents. In *The Ambrose Light*, a U.S. court refused to exempt insurgents from the laws of piracy. Hall, on the other hand, argued that it was improper to treat insurgents fighting for political independence as pirates. Attacking the state ships at sea was one of the ways in which such independence could be established. The essence of piracy was that it was for private, as contrasted with public, ends; and insurgents seeking to overthrow their government were not a threat to all nations, their attacks being limited to ships of the state from which they were seeking independence. He said, contrasting the insurgent with the pirate, "The man who acts with a public object may do like acts (as the pirate) to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well marked bounds. *He is not only not the enemy of the human race, but he is the enemy solely of a particular State.*"

Most of those who took the position that insurgents fighting for independence should be exempt from the laws of piracy stressed that the exemption applied only if the acts were directed solely against a particular state, and nationals and vessels of all other states were unharmed. Hyde, for example, states that the United States has at various times expressed reluctance to treat as piratical the operations of insurgent vessels engaged in furthering a public end, and when directed

solely against persons and property associated with the government sought to be overthrown. He cites a memorandum from the Solicitor of the United States, Department of State, in which he says that "the question whether a vessel in the hands of insurgents is piratical depends upon its actions; that is, whether it confines itself to depredations against its own country or commits depredations against vessels of other countries." Similarly, Whorton wrote, "Armed cruisers which, though claiming to be commissioned by insurgents, prey on merchant vessels of all nationalities, indiscriminately, are to be regarded as pirates."

Thus, while there was no authoritative definition of piracy, it may fairly be concluded that under the prevailing view of piracy in customary international law, terrorist acts such as the seizure of the *Achille Lauro* and the murder of its passengers would not have been exempt. Even those publicists who urged, and those states that accepted, an exemption for insurgents extended it only to insurgents whose acts are directed against a particular state. The exclusion would therefore not apply to present-day terrorists such as the hijackers of the *Achille Lauro*, who held its passengers hostage and killed one of them, since their acts are clearly not limited to the ships or nationals of a particular state.

However, under the Geneva Convention on the High Seas and the U.N. Convention on the Law of the Sea, piracy is defined as an act "committed for private ends . . . by the crew or passengers of a private ship against . . . another ship." It is argued that terrorist acts, such as the seizure of the *Achille Lauro*, do not constitute piracy under these conventions, since such acts, having a political motive, are not for "private ends." It is arguable, based under *Travaux Préparatoire*, that the for-private-ends proviso was not intended to exclude terrorist acts from piracy.

The International Law Commission Draft of what ultimately became the Geneva Convention relied heavily on the Harvard Draft on piracy and the supporting research thereto. While there is language in the Comment to the Harvard Draft and the summary records of the International Law Commission contrasting "private ends" with "political ends," a careful analysis of the Comment to the Harvard Draft and of the statements of the Reporter for the International Law Commission suggest a narrower definition of "private ends."

A review of the Comment to the Harvard Draft and of the authorities quoted therein indicates that the Harvard Draft was primarily concerned to exclude from the definition of piracy acts by insurgents

who had not achieved belligerent status — the position advocated by Hall and other publicists — but on which authorities were divided, as the Comment to the Harvard Draft acknowledged, and that the term “for private ends” was used for that purpose. However, as indicated earlier, even those who advocated that position limited it to insurgents who did not harm nationals or ships of the United States.

The discussion before the International Law Commission indicates that the members of the Commission were primarily concerned with whether acts by state vessels could be considered piratical, in view of events then occurring in the China Sea. A majority of the Commission voted to retain the for-private-ends proviso, interestingly enough, in order to reject the position of Communist Bloc states that acts by state vessels could be considered piratical. It was never suggested in the Comment to the Harvard Draft, in the discussion of the piracy articles by the Commission, or in the Report of the Commission to the General Assembly, that acts by terrorists who attack ships of nationals of all states indiscriminately are not piratical.

Another problem under the Geneva Convention definition articles on piracy, insofar as the seizure of the Achille Lauro is concerned, is the requirement that the act be by one ship “against another.” While there is very little discussion of the requirement that the act be directed “against another ship,” its purpose clearly was to exclude from universal jurisdiction situations such as the murder of a passenger or crew member aboard a ship by another passenger or crew member, or a mutiny in which the crew removed the captain but continued to accept the authority of the flag State.

A careful reading of the Travaux Préparatoire would support a definition which might not limit it to acts by one ship against the other, but again, what we would have to do is rely on the work product or the history rather than the exact language of the Convention. That in itself poses a problem.

Surely whether acts by terrorists seizing ships, holding people hostage, killing passengers should or should not be the subject of a state’s right to arrest and punish the perpetrators should not depend on whether they happen to seize the ship disguised as crew members or passengers or by using another ship.

So, while the apparent limitation of the Geneva Convention language may not be as limiting as it appears on its face, when the legislative history is considered, I think a new convention, which would specifically prohibit terrorist acts on the high seas and grant jurisdiction to specific states along the lines of the Hostage Convention, or provide for

universal jurisdiction, as in piracy, would be preferable.

Fifth, there is also disagreement among scholars whether a state may use force to rescue persons being held or threatened by terrorists when the state in whose territory they are either unable or unwilling to protect the victims.

Customary international law has long recognized a right of self-help and of humanitarian intervention when there is an imminent threat to life and the state in whose territory it occurs is either unable or unwilling to prevent it. Some scholars have argued — erroneously, I believe — that self-help and humanitarian intervention are prohibited by the U.N. Charter.

Article 2(4) of the Charter provides that all members shall refrain “from the threat or use of force *against the territorial integrity or the political independence of any State.*” When force is used to rescue persons whose lives are in imminent danger and the force is withdrawn as soon thereafter as possible, as required under customary international law rules, it is not used “against the territorial integrity or political independence” of a state. Moreover, article 51 of the Charter specifically provides, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs.” It is arguable that a state’s use of force to rescue its nationals from terrorist attack is a proper exercise of the right to self-defense. The argument is particularly strong when the attack is against the state’s representatives, whether diplomatic as in the Iranian hostage crisis, or military as in the attack on U.S. Marines in Lebanon, since the attack is clearly against the state. But the argument is also tenable when the victims do not formally represent the state, if they are seized and threatened by reason of their nationality.

Finally, the Charter proscription on the use of force by individual states was coupled with a provision for the collective use of force by the Security Council and based on the expectation that the latter would make the former unnecessary, an expectation that has, unfortunately, not been realized. An interpretation of the U.N. Charter that would bar humanitarian intervention, notwithstanding that the Security Council is paralyzed by the veto, would have the paradoxical result of denying those whose lives and freedom are in imminent danger the protection that they had prior to the adoption of the Charter, even though one of the primary purposes of the Charter was to promote the human rights and fundamental freedoms of all.

To the extent that state practice is a guide, states have apparently not interpreted the Charter as barring self-help and humanitarian in-

tervention. In three major instances in which persons were held hostage, and the state in which they were so held could not or would not take action, the state whose nationals were threatened used, or was ready to use, force to free them; Egypt in Malta, most recently; the United States in Iran; and Israel in Entebbe.

Terrorism as we know it today — the indiscriminate attack on civilians in the air, on land, or at sea, in many parts of the world, as an almost weekly if not daily occurrence — is a relatively recent development. The only phenomenon that I can think of that was a similar threat to civilians of all nations was piracy.

There, international law responded to the challenge by declaring pirates *hostis humanis generis*, the enemies of all mankind, and provided universal jurisdiction over pirates. That meant that all states had the right, and possibly the obligation, to seize, try and punish those who engaged in piracy regardless of the nationality of the offender or of the victim.

By contrast, the indiscriminate killing of civilians in the name of some political cause has not been made a crime under international law; quite the contrary. Even an act that would be piracy may arguably not be piracy under the Geneva Convention and under the U.N. Convention on the Law of the Sea if it is committed for alleged political motives, or if the act is committed by seizing control of a ship rather than by using two ships.

The argument is made that the international community cannot prohibit terrorism without first resolving the causes of terrorism. It is a dangerous and fallacious argument. The international community has not resolved the causes of war, but certain types of warfare have long been prohibited by international law, including the deliberate killing of civilians. The prohibition against indiscriminate, violent attacks on members of the general public cannot await the resolution of the causes of terrorism.

Every General Assembly resolution condemning terrorism includes a paragraph reaffirming the right to self-determination and independence of all people, the legitimacy of their struggles, and, in particular, the struggle of national liberation movements. Is the implication that, if people are fighting for self-determination, terrorism is permitted? If not, why is the condemnation of terrorism always coupled with a reference to the right of self-determination?

Certain conduct should be prohibited by international law regardless of the aim of those who engage in it. That principle was firmly established by the adoption of the Hostage Convention. The negotiating

history of the Hostage Convention also demonstrated that if the states that believe that certain conduct should be prohibited regardless of motive are persistent, other states may ultimately be persuaded to agree.

When the convention against the taking of hostages was first discussed, a number of Arab and African States argued that it should not apply to any act by "national liberation movements against colonial rule, racist and foreign regimes." The representative of one state went so far as to say, "There are two alternatives: Either there would be an internationally accepted convention against the taking of hostages which does not apply to acts carried out by recognized national liberation movements in the course of their struggles, or there would be no convention at all." The United States, Canada, the United Kingdom, and other Western States insisted that the prohibition against the taking of hostages had to be absolute and without exception, pointing out that hostage taking was prohibited even in time of war by the Geneva Convention. In the end, the Arab and African States were apparently persuaded. After two years of meetings by the ad hoc committee, the representative of Algeria explained,

in order to avoid any misunderstanding, he wished to make it clear that his delegation had no intention of giving a blank check for hostage taking to any group or entity whatever. As parties to international armed conflicts, national liberation movements were subject to the law of war, which in essence prohibited acts of hostage taking.

And the representative of the Soviet Union noted, "The debate in the ad hoc committee shows that no delegation intended to reserve to the national liberation movement the right to take hostages. The taking of hostages was generally recognized as a criminal act without exception."

The convention as finally adopted prohibited hostage taking absolutely and without exception and required any state in which the offender is present to either extradite or prosecute him, either under the Geneva Conventions and protocols, if they apply, or under the Hostage Convention if they don't apply. Indiscriminate attacks on civilians must similarly be prohibited by international law, absolutely and without exception.

The challenge to international law — the greatest challenge perhaps facing international law today — is to adopt a convention defining terrorism, prohibiting it absolutely and regardless of motive, and vesting jurisdiction to seize, try and punish terrorists either in specified states, as the Hostage Convention does, with the concomitant requirement that any state in which the offender is found must either extradite

or prosecute him, or establishing universal jurisdiction over terrorists in all states, comparable to the universal jurisdiction over pirates, since terrorists today, like pirates of old, are *hostis humanis generis*, a threat to all nations.