

# TWO JUSTIFICATIONS FOR TERRORISM

## A moral legal response

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The story of attempts to define 'terrorism' in international law is well known, as are the related attempts to exempt liberation violence from any definition of terrorism. The highly charged political atmosphere surrounding international discussions of terrorism has tended to entrench opposing ideological and rhetorical positions, often leading to neither side taking the arguments of the other seriously. This article pauses to take seriously two specific claims of justification for terrorist violence: firstly, that some civilians are not 'innocent' and deserve to be killed; and secondly, that suicide bombing is excused by the defence of necessity. It unravels each of these claims and subjects them to the scrutiny of existing international legal principles (particularly International Humanitarian Law (IHL)) and the moral framework underlying those principles. While there are a range of justifications presented for terrorism, this article concludes that neither of these two specific claims is legally sustainable.

### 'Non-innocent' civilians

One justification for terrorism rests on a challenge to IHL norms concerning the distinction between military and non-military targets. On this view, some non-combatants are not 'innocent' and therefore become legitimate targets of violence<sup>1</sup>: Israeli settlers in the Palestinian Occupied Territories,  *pied-noirs*  in Algeria, or white South Africans during apartheid. These cases involve unlawful occupations or gravely unlawful acts under international law. Foreign settlers may be seen as instruments or beneficiaries of the state's unlawfulness. As Fanon writes:

The appearance of the settler has meant... the death of the aboriginal society, cultural lethargy, and the petrification of individuals. For the native, life can only spring up again out of the rotting corpse of the settler.<sup>2</sup>

The argument for 'non-innocence' is most persuasive for voluntarily settlers with knowledge of the international unlawfulness (regardless of domestic legality). Children of settlers ought also be excluded, since they may have no choice but to follow their parents, and their minority may preclude informed choice.

On one hand, law sometimes prohibits violence but accepts it as morally excusable: 'when the victim is Hitler-like in character, we are likely to praise the assassin's work'.<sup>3</sup> Assassinations of oppressive politicians, which avoid innocent casualties, are distinguishable from random murders of innocents.<sup>4</sup>

Courts have even recognised assassinations as proportionate political acts exempt from extradition.<sup>5</sup> While settlers are not oppressive politicians, they are voluntary, knowing agents of oppression, displacing and impoverishing local populations. The protection of civilians in general does not disappear if the targeting of such a limited class is accepted, just as targeting oppressive officials need not endanger ordinary citizens.<sup>6</sup>

Yet the argument for killing 'non-innocent' civilians is still unacceptable. The killing of combatants in armed conflict is justified because soldiers are militarily dangerous to an adversary, and civilian munitions workers are lawful targets for the same reason.<sup>7</sup> Violence against combatants aims to disable them so they can no longer keep fighting.<sup>8</sup> In contrast, settlers are not militarily harmful, although some may be if they engage in hostilities and hence lose their civilian immunity.

The argument for targeting settlers rests on a different argument about their moral or legal culpability, not their military threat.<sup>9</sup> But allowing settlers to be killed for moral, political or legal wrongdoing is little more than vigilante justice. Punishment is a judicial function, requiring procedural fairness, and not easily given over to summary justice. Extra-judicially evaluating immunity, or guilt, by standards of morality, or suspected illegality, renders civilian protection highly subjective.

Even in ideal cases of 'just assassination' as that of Hitler, assassins are entitled to moral respect, but can still be prosecuted; whereas combatants are objectively harmful, 'the unjust or oppressive character of the official's activities is a matter of political judgment'.<sup>10</sup> IHL provides objective criteria of combatancy which identify harmful people in conflicts. While there are likewise human rights standards by which to measure the conduct of officials or settlers, such judgments entail a margin of appreciation far exceeding that involved in factually identifying a combatant.

Even more tenuous than the argument for killing settlers is al-Qa'ida's view that Americans, by being Americans, are responsible for the acts of the US, or for sustaining its power. Such a view is politically punitive, not to mention arguably genocidal; it threatens a whole people, regardless of the individual harmfulness of its members.<sup>11</sup> Likewise, the targeting of UN or humanitarian personnel, for supposed complicity in nourishing the US occupation of Iraq, embodies a world-view which ultimately exposes every

### REFERENCES

1. Michael Ignatieff, 'Human Rights, the Laws of War, and Terrorism' (2002) 69 *Social Research* 1137, 1147.
2. Franz Fanon, *The Wretched of the Earth* (trans C Farrington, Grove Press, NY, 1963), 93.
3. Michael Walzer, *Just and Unjust Wars* (3rd ed, Basic Books, NY, 2000), 199; Tony Honoré, 'The Right to Rebel' (1988) 8 *Oxford Journal of Legal Studies* 34; 37; see, eg, Agence France Press, 'Hitler's would-be assassin receives belated honours', *Sydney Morning Herald*, 16 May 2003.
4. Walzer, above n 3, 198–199.
5. See, eg, *Watin v Ministère Public Federal*, Swiss Federal Tribunal (1964), 72 ILR 614, 617.
6. Walzer, above n 3, 199–200.
7. *Ibid.*, 145–146.
8. Hersch Lauterpacht (ed), *Oppenheim's International Law: vol II* (8th ed, Longmans, Green and Co, London, 1955), 338.
9. Ted Honderch, *After the Terror* (Edinburgh University Press, Edinburgh, 2003) 159; David Rodin, *War and Self-Defense* (Clarendon, Oxford, 2002), 84.
10. Walzer, above n 3, 200, 203.
11. Richard Falk, *The Great Terror War* (Arms Books, Gloucestershire, 2003), 43; Walzer, above n 3, 193, 200.

individual to terrorist harm — whether on account of their occupation, political beliefs, religious affiliation, nationality, or otherwise.

Another extreme challenge to IHL comes from those like Sheik Ahmed Yassin, who stated: 'The Jews attack and kill our civilians — we will kill theirs'.<sup>12</sup> Similar claims have been made by extreme Chechen groups. Arguments for retributive killings draw no moral distinction between intended and unintended killings of non-combatants, and embody a simplistic rejection of the doctrine of double effect. Incidental civilian casualties from proportionate military operations are a tolerated cost of war, but deliberately killing non-combatants — even in reprisal — is unlawful.<sup>13</sup>

### Terror of necessity: suicide bombing

A related but distinct justification for terrorism is expounded by the British philosopher Ted Honderich, who defends Palestinian terrorism against Israel as a moral right — 'terrorism for humanity' — and as the only effective means for freeing Palestinians from Israeli domination.<sup>14</sup> On his view, the right of Palestinian self-determination is meaningless without a remedy, and terrorism is thought justifiable where it has a decent probability of achieving its ends at a cost that makes it worth it. Honderich relies on analogies with the

deliberate killing of innocents by Western states in the naval blockade of Germany in the First World War, and by terror and atomic bombing in the Second World War.

The argument for Palestinian terrorism fails for at least five reasons. First, Palestinians do not face a 'grave and imminent peril' of the kind envisaged as 'necessity' under international law (as it applies to state conduct).<sup>15</sup> It is beyond doubt that Palestinians suffer from an oppressive Israeli military occupation, unlawful Israeli settlements, economic privations, and serious rights violations. The denial of self-determination is the denial of a peremptory norm. But Palestinians are not experiencing genocide, extermination, or a threat to their survival as grave as that anticipated by the law of necessity. Foreign occupation is an insufficient threat, and is, moreover, dealt with by the primary rules of IHL.

Second, permitting the deliberate targeting of Israeli civilians would impair a countervailing essential interest (a further requirement of the law of necessity) of both Israel and the international community as a whole — the right to life of innocent civilians. Deliberately killing Israelis is a means disproportionate to the peril it seeks to alleviate. Third, killing civilians is too remote from the political end sought, since terrorist acts have steered Israel's will and increased, not reduced, Israeli domination of Palestinian lives.<sup>16</sup> The zealousness of Israel's religious claim to Palestine ensures that it responds to terrorism with greater savagery of its own.

Fourth, unlike states, which monopolise national political decision-making, it is not clear that terrorists express the will of the Palestinian people. Fragmentation and factionalism make it difficult to identify clear lines of Palestinian political authority. Some terrorist attacks are launched by secret militant groups outside political or civilian control. Other attacks derive from extreme religious justifications of self-sacrifice and martyrdom, rather than from the political goal of self-determination. Finally, it is not obvious that alternatives to suicide bombing — including the faltering but not extinct peace process — have been exhausted. Suicide bombing to improve one's bargaining position may be strategic, but it is not of necessity.

Arguments for suicide bombing rely on a fundamental objection to the asymmetry of power between states and non-state actors. Terrorism is considered the only effective weapon available to the weak and



12. Paul McGeough, 'Inside the mind of a suicide bomber', *Sydney Morning Herald*, 13 Apr 2002.

13. See, eg, 1949 Geneva Conventions, common art 3; 1949 Fourth Geneva Convention, articles 27, 147; 1977 Protocol I, articles 51, 75, 85; 1977 Protocol II, articles 4, 13.

14. Honderich, above n 9, 151, 162, 170, 184–185.

15. International Law Commission, Articles on State Responsibility (2000) article 25.

16. Paul Wilkinson, *Terrorism and the Liberal State* (Macmillan, London, 1977) 186.

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disempowered, who cannot hope to win by regular methods against modern, well-resourced, militarised states.<sup>17</sup> There is intuitive appeal to this view, which assumes that power disparity is unfair and that the law should redistribute power. There is also a policy argument that terrorism minimises violence, where liberation forces tactically choose not to escalate a dispute into an armed conflict, and instead employ low-intensity terrorist methods.

Yet it is difficult to see why the fact of unequal resources triggers entitlement to use irregular methods, to even up the odds. Nothing in IHL presupposes equality of power between adversaries (as opposed to procedural 'fair play'<sup>18</sup>). Conflict is intimately founded on achieving superiority of power, and to manipulate IHL to equalise power differences is simply unrealistic. There would no longer be any incentive for states to comply with IHL, and any exceptions accorded to liberation movements would be reciprocally resorted to by states.

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

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

Even if necessity-based arguments for terror and atomic bombing are considered, such arguments still fail. Where such methods were used later in the war — after the 'supreme emergency' had passed — it was not to ensure a Nazi or Japanese defeat, or even to prevent genocide, but merely to improve the speed and price (in Allied lives saved) of victory.<sup>19</sup> It is also

difficult to appreciate how killing German civilians, to undermine morale, was related to the end of a Nazi defeat, since it may have contrarily steeled the German will to resist (although exterminating a population inevitably defeats it).

At the same time, unless divine or natural law is accepted, an absolute prohibition on killing innocents is difficult to defend, since it embodies a poor sense of proportion if refusing to kill some innocents leads to the killing of many more.<sup>20</sup> Despite the danger of 'moral monstrosities threatened by unbounded consequentialism',<sup>21</sup> it is 'paradoxical to justify fighting a bloody war by saying Hitler must be defeated, and then to accept absolute restrictions which may mean the war is followed by Hitler's victory'.<sup>22</sup> Yet if terror bombing was not justified by necessity in the extreme case of Nazi aggression, the justification for Palestinian suicide bombing is even less convincing, given the lesser seriousness of the Israeli threat.

## Conclusion

One of the giants of international law, Hersch Lauterpacht, once said that

So long as international society did not effectively guarantee the rights of men against arbitrariness and oppression by governments, it could not oblige states to treat subversive activities... as a crime.<sup>23</sup>

Attempts to internationally define and criminalise terrorism must pay due regard to this warning, so that international law does not become complicit in oppression. Part of this duty involves taking justifications for non-state political violence seriously, and subjecting them to rigorous legal and moral scrutiny — to determine whether they are claims of substance, or merely claims that dress-up unprincipled impulses to violence. Arguments in favour of targeting 'non-innocent' settlers, and suicide bombing, do not withstand such legal and moral analysis. While the international community accepts that certain kinds of political violence are lawful and justifiable, it cannot accept claims such as these, which allow the instrumental destruction of civilian life for political gain. No political objective is that valuable — even self-determination, since whereas self-determination presupposes life, life does not presuppose self-determination.

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17. Yonah Alexander, 'Democracy and Terrorism: Threats and Responses' (1996) 26 *Israel Yearbook on Human Rights* 253, 264, 257.

18. Theodore Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239, 240.

19. Walzer, above n 3, 261, 263–268; Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* (Jonathan Cape, London, 1999), 83, 89–112.

20. Glover, *ibid.*, 109.

21. Jeremy Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' (1998) XI *Canadian Journal of Law and Jurisprudence* 143, 156.

22. Glover, above n 19, 85.

23. (1954-I) *International Law Commission Yearbook* 141.