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DEFINING TERRORISM AS THE PEACE TIME EQUIVALENT OF WAR CRIMES: A CASE OF TOO MUCH CONVERGENCE BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL CRIMINAL LAW?

*Michael P. Scharf**

I.	INTRODUCTION	391
II.	THE CASE FOR DEFINING TERRORISM AS THE PEACETIME EQUIVALENT OF WAR CRIMES	392
	A. <i>The Juan Carlos Abella Human Rights Case</i>	393
	B. <i>The Fawaz Yunis Prosecution</i>	394
	C. <i>The Ahmed Extradition Case</i>	395
III.	NEGATIVE IMPLICATIONS OF APPLYING THE LAWS OF WAR TO PEACETIME ACTS OF TERRORISM	396
IV.	CONCLUSION	397

I. INTRODUCTION

The problem of defining “terrorism” has vexed the international community for years. The United Nations General Assembly has repeatedly called for the convening of an international conference to define terrorism and distinguish it from legitimate acts in furtherance of national liberation struggles.¹ A decade ago, representing the United States, I gave a speech in the United Nations Sixth (Legal) Committee, in which I pointed out that general definitions of terrorism “are notoriously difficult to achieve and dangerous in what all but the most perfect of definitions excludes by chance.”² Today, we hear calls for a renewed effort to reach international agreement on a definition of terrorism, drawing from existing definitions of war crimes as a way around

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1. See e.g., G.A. Res. 46/51, U.N. GAOR, 67th plen. mtg., U.N. Doc. A/46/654 (1991).

2. See Press Release, Michael P. Scharf, United States Advisor to the Forty-Sixth General Assembly, in the Sixth Committee, on Item 125, Terrorism (Oct. 21, 1991) (on file with author) (USUN 63-(91)).

the definitional quagmire.³ This presents a case study for the topic of today's panel and raises the question: Is the convergence of the laws of war and international criminal law always a good thing?

II. THE CASE FOR DEFINING TERRORISM AS THE PEACETIME EQUIVALENT OF WAR CRIMES

Terrorism can occur during armed conflict or during peacetime (defined as the non-existence of armed conflict). When terrorism is committed in an international or internal armed conflict (including a guerrilla war), it is covered by the detailed provisions of the four 1949 Geneva Conventions and their Additional Protocols of 1977.⁴ These conventions provide very specific definitions of a wide range of prohibited conduct, they apply to both soldiers and civilian perpetrators, they trigger command responsibility, and they create universal jurisdiction to prosecute those who engage in prohibited acts. The Conventions specifically prohibit use of violence against non-combatants, hostage taking, and most of the other atrocities usually committed by terrorists.

The key is the "armed conflict" threshold. By their terms, these conventions do not apply to "situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence."⁵ In those situations, terrorism is not covered by the laws of war, but rather by a dozen anti-terrorism conventions, which outlaw hostage-taking,⁶ hijacking,⁷ aircraft⁸ and maritime

3. See Alex P. Schmid, *The Definition of Terrorism, A Study in Compliance With CTL/9/91/2207 for the U.N. Crime Prevention and Criminal Justice Branch* (Dec. 1992) (on file with the author).

4. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

5. Waldemar Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 33 AM. U.L. REV. 53, 62-63 (1983) (quoting Article 1(2) of Protocol II).

6. International Convention Against the Taking of Hostages, G.A. Res. 34/145 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/146 (1979).

7. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, I.I.A.S. No. 7192, 860 U.N.T.S. 105.

8. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, 974 U.N.T.S. 177.

sabotage,⁹ attacks at airports,¹⁰ attacks against diplomats and government officials,¹¹ attacks against United Nations peacekeepers,¹² use of bombs¹³ or biological, chemical or nuclear materials. These peacetime anti-terrorism Conventions establish universal jurisdiction to prosecute perpetrators, require states where perpetrators are found to either prosecute them or extradite them, and establish a duty to provide judicial cooperation for other states.

There are significant gaps in the regime of the peacetime anti-terrorism conventions. For example, assassinations of businessmen, engineers, journalists and educators are not covered, while similar attacks against diplomats and public officials are prohibited. Attacks or acts of sabotage by means other than explosives against a passenger train or bus, or a water supply or electric power plant, are not covered; while similar attacks against an airplane or an ocean liner would be. Most forms of cyber-terrorism are not covered by the anti-terrorism conventions.

Defining terrorism as the peacetime equivalent of war crimes would fill most of these gaps. As described below, domestic and international judicial bodies are beginning to apply the laws of war to peacetime acts of terrorism, thereby setting a precedent for this approach.

A. *The Juan Carlos Abella Human Rights Case*

The most recent example is the *Juan Carlos Abella v. Argentina case*, decided by the Inter-American Commission on Human Rights in 1997.¹⁴ The case concerned the January 23, 1989 attack by 42 civilians, armed with civilian weapons, on the La Tablada military barracks in Argentina during peacetime. The Argentine government sent 1,500 troops to subdue this terrorist attack. Allegedly, after four hours of fighting, the civilian attackers tried to surrender by waving white flags, but the Argentine troops refused to accept their surrender and the fighting raged on for another thirty hours until most of the attackers were killed or badly wounded by incendiary weapons.

9. Convention and Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, adopted by the International Maritime Organization, at Rome, Mar. 10, 1988, I.M.O. Doc. SVA/CON/15.

10. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention of September 23, 1971, Feb. 24, 1988, S. Treaty Doc. No. 100-19 (1988).

11. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. 8532.

12. Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 34 I.L.M. 482 (entered into force on Jan. 15, 1999).

13. International Convention for the Suppression of Terrorist Bombings, (Mar. 1998) 37 I.L.M. 249.

14. *Juan Carlos Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. 271 (1997).

The Inter-American Commission first held that international humanitarian law (the laws of war) was part of its subject matter jurisdiction by implied reference in Article 27(1) of the Inter-American Convention on Human Rights.¹⁵ Next, the Commission held that the confrontation at the La Tablada barracks was not merely an internal disturbance or tension (in which case it would not qualify as an armed conflict subject to the laws of war). The Commission stated that international humanitarian law “does not require the existence of large scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory.” The Commission found the confrontation at the La Tablada barracks to qualify as an armed conflict because it involved a carefully planned, coordinated and executed armed attack against a quintessential military objective—a military base—notwithstanding the small number of attackers involved and the short time frame of the fighting.¹⁶ The Commission thus stated that had the Argentinean troops in fact refused to accept the surrender of the civilian attackers, or had they in fact used weapons of a nature to cause superfluous injury or unnecessary suffering, this would have constituted a war crime.¹⁷ However, “because of the incomplete nature of the evidence,” the Commission was unable to find against Argentina concerning these allegations.¹⁸

The *Juan Carlos Abella* case is an important precedent because it lowers the armed conflict threshold so that many terrorist situations could now qualify for application of the laws of war. But it also highlights several potential problems with applying the laws of war to terrorist attacks. First, by confining their attack to a military barracks, the terrorists themselves acted lawfully under the laws of war. Conversely, the laws of war would constrain the methods the government could use to quell the attack.

B. *The Fawaz Yunis Prosecution*

A second case in which a court applied the laws of war to a peacetime terrorist act was *United States v. Yunis*.¹⁹ Fawaz Yunis was a member of the Amal militia which opposed the presence of the PLO in Lebanon. On June 11, 1985, Fawaz Yunis hijacked a Jordanian airliner from Beirut and attempted to fly it to the PLO Conference in Tunis to make a political statement. At his trial in the United States for committing acts of terrorism (hijacking and hostage taking), Yunis sought to use the obedience to orders defense.²⁰ This is the

15. *Id.* ¶¶ 157-164.

16. *Id.* ¶ 155.

17. *Id.* ¶ 180.

18. *Id.* ¶ 185.

19. *United States v. Fawaz Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

20. *Id.* at 1095.

defense made famous in the case of Lieutenant William L. Calley who was tried for the My Lai massacre in Vietnam.²¹ According to U.S. law, "acts of a subordinate done in compliance with an unlawful order by his superior are excused unless the order was one which a man of ordinary sense and understanding would know to be unlawful."²²

The Yunis Court instructed the jury that Yunis could prevail on the obedience to orders defense if it found that the Amal Militia was a "military organization." To make that finding, however, the judge indicated that the jury had to determine that: (1) the Amal Militia had a hierarchical command structure; (2) it generally conducted itself in accordance with the laws of war; and (3) its members had a distinctive symbol and carried their arms openly.²³ Although the jury did not find that the Amal Militia met this test, at least some terrorist organizations would qualify as a "military organization" under it, and thus have the right to rely on the obedience to orders defense.

C. *The Ahmed Extradition Case*

In the *Mahmoud El-Abed Ahmed* Extradition case, a United States district court used the rules of armed conflict by analogy to determine whether a peacetime terrorist act could qualify for the political offense exception to extradition.²⁴ In 1986, Ahmed attacked an Israeli passenger bus near Tel Aviv, and then fled to the United States. At his extradition hearing, his lawyer, former United States Attorney-General Ramsey Clark, argued that this was a non-extraditable political offense.

The Court held that a person relying on the political offense exception must prove the acceptability of his offense under the laws of war, even when there did not exist an armed conflict as such at the time of the offense.²⁵ The Court found that Ahmed's acts did not qualify for the political offense exception because they violated Additional Protocol II's prohibition on targeting civilians.²⁶ While this result ensured that Ahmed would be prosecuted in Israel, the implication of the holding is that if a terrorist targets military personnel or a government installation, the terrorist would be protected by the political offense exception.

21. *United States v. Calley*, 48 C.M.R. 19, 22 C.M.A. 534 (1973).

22. *Fawaz Yunis*, 924 F.2d at 1097.

23. *Id.*

24. *Ahmed v. United States*, 726 F. Supp. 389 (E.D. N.Y. 1989), *aff'd*, 910 F.2d 1063 (2nd Cir. 1990).

25. *Id.* at 404.

26. *Id.* at 406.

III. NEGATIVE IMPLICATIONS OF APPLYING THE LAWS OF WAR TO PEACETIME ACTS OF TERRORISM

The *Abella*, *Yunis*, and *Ahmed* cases show that domestic and international judicial bodies are beginning to apply the laws of war to terrorist acts outside the traditional concept of armed conflict. These cases thus provide a precedent for treating terrorism as the peacetime equivalent of war crimes. But these cases also indicate some of the problems inherent to this approach, which stem from the fact that the laws of war establish rights as well as obligations for those over whom they apply.

The first problem is that, under this approach, terrorists can rely on the "combatant's privilege," under which combatants are immune from prosecution for common crimes.²⁷ For example, killing a combatant is justified homicide, not murder. This means that terrorist attacks on military, police, or other government personnel would not be prosecutable or extraditable offenses. Similarly, kidnapping a combatant constitutes a lawful taking of prisoners. Consequently, taking military or government personnel hostage would generally not constitute a crime. Finally, government installations are a lawful target of war. Thus, terrorist attacks on military, police, or government buildings would not be regarded as criminal. And the collateral damage doctrine would apply, such that injury or deaths to civilians would not be regarded as criminal so long as the target was a government installation, and reasonable steps were taken to minimize the risk to innocent civilians.

The second problem is that the approach would permit assassination of political leaders while they are within their own borders. The Internationally Protected Person Convention only protects heads of state, high level officials, and diplomats when they are on a mission outside of their home state.²⁸ The laws of war, which would apply to such persons while within their country, make it a war crime to kill "treacherously,"²⁹—understood as prohibiting assassination.³⁰ But this prohibition has been narrowly interpreted to, for example, permit targeting military or civilian commanders during a conflict.³¹

27. See *Netherlands Law Concerning Trials of War Criminals*, in 11 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 86 (1949); Baxter, *The Municipal and International Law Basis of Jurisdiction Over War Crimes*, 28 BRIT. Y.B. INT'L L. 382, 384-85 (1951); Waldemar Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 33 AM. U.L. REV. 53 (1983).

28. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1037 U.N.T.S. 167.

29. Convention (No. IV) Respecting the Laws and Customs of War on Land, With Annex of Regulations, Oct. 18, 1907, art. 23 (b), 36 Stat. 2277, T.S. No. 539.

30. Department of the Army, the Law of Land Warfare art. 31 (1956) (Army Field Manual No. 27-10, Washington, D.C.).

31. W. HAYS PARKS, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW

Executive Order 12,333, which prohibits United States government personnel from engaging in assassination,³² has been subject to a similarly narrow interpretation. Shortly after the 1986 bombing of Libyan leader Colonel Muammar Qaddafi's personal quarters in Tripoli, Senior Army lawyers made public a memorandum that concluded that Executive Order 12,333 was not intended to prevent the United States from acting in self-defense against "legitimate threats to national security" even during peacetime.³³ If the laws of war apply to terrorists it would logically follow that they have the same right as governments to target military or civilian commanders and others who pose a threat to the security of their self-determination movement.

The third problem is that the approach would entitle terrorists to prisoner of war (hereinafter POW) status, which requires that they be given special rights beyond those afforded to common prisoners. In *United States v. Noriega*,³⁴ General Noriega argued that Article 22 of the Third Geneva Convention required that he not be interned in a penitentiary.³⁵ Although the District Court held that Article 22 did not apply to POWs convicted of common crimes, it agreed that General Noriega was entitled to POW status and therefore entitled to the protections of Article 13 ("humane treatment"); Article 14 ("respect for their persons and their honour"); and Article 16 ("equal treatment"). General Noriega's jail cell has been described as having all the amenities of a hotel suite, including a television, phone and fax machine, and a private bathroom.

Finally, as the *Fawas Yunis Case* demonstrated, the approach would enable terrorists to rely on the obedience to orders defense. This may be a fair tradeoff for providing the prosecution with the use of the doctrine of command responsibility, but at least in some cases it will render it more difficult to obtain a conviction of accused terrorists.

IV. CONCLUSION

The proposal to define terrorism as the peacetime equivalent of war crimes necessitates application of the laws of war to terrorists. The approach would fill some of the gaps of the current anti-terrorism treaty regime. It would give the prosecution the ability to argue the doctrine of command responsibility, which was not previously applicable to peacetime acts. And it will encourage terrorist

5 (Dec. 1989) (Dept. of the Army Pamphlet 27-50-204).

32. Executive Order 12333 of Dec. 4, 1981, 46 Fed. Reg. 59, 941 (Dec. 8, 1981).

33. PARKS, *supra* note 31, at 8.

34. *United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992).

35. Article 22 provides: "Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, Art. 22.

groups to play by the rules of international humanitarian law. On the other hand, the approach virtually declares open season on attacks on government personnel and facilities. It would encourage insurrection by reducing the personal risks of rebels. And it would enhance the perceived standing of insurgents by treating them as combatants rather than common criminals.

It is important that those advocating this new approach to the definition of terrorism be fully aware of all the legal consequences that stem from the approach. It is no panacea, and in the final analysis the negative consequences may render it another dead end in the age-old struggle to define terrorism. Thus, this may be a case of too much convergence.