

1981

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Robert A. Friedlander

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Recommended Citation

Robert A. Friedlander, *Terrorism and National Liberation Movements: Can Rights Derive from Wrongs*, 13 Case W. Res. J. Int'l L. 281 (1981)

Available at: <https://scholarlycommons.law.case.edu/jil/vol13/iss2/12>

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DIALOGUE

Terrorism and National Liberation Movements: Can Rights Derive from Wrongs?

by Robert A. Friedlander*

"One man's terrorist is another man's freedom fighter." This much used and far too greatly abused aphorism well illustrates the dilemma produced by militant self-determination proponents. Their credo is that the end justifies the means. Their methodology postulates not only insurgency disguised as guerrilla warfare, but also the use of bomb and bullet directed against civilian populations and innocent third parties through acts of political violence often described as national and international terrorism. On numerous occasions during recent decades the end result has been the downfall of existing regimes and the establishment of new national entities. Small wonder that one senior American official directly concerned with the subject has bluntly observed: "terrorism works."¹

According to Frantz Fanon, the bitter political philosopher of the Algerian independence movement "[n]ational liberation, national renaissance, the restoration of nationhood to the people . . . is always a violent phenomenon."² The issue, simply put, is whether terror-violence utilized as a political weapon, wherever or whenever a dissident group is unable to achieve its separatist objectives by any legitimized means, is permissible within the framework of international law. Does a recognized normative right of rebellion or revolution allow the use of either random or calculated violence directed against innocent third parties as a generally sanctioned method of internal conflict? What exactly are the bounds of irregular warfare and to whom do they apply? Should terrorist actors, when

* Professor of Law, Ohio Northern University; Program Director (Law and Terrorism), International Analysis Center, Inc.; B.A. Northwestern University, 1955; Ph.D. Northwestern University, 1963; J.D. DePaul University, 1973.

¹ Remarks of Ambassador Anthony C.E. Quainton, Director, Office for Combatting Terrorism, U.S. Department of State; Program on International Terrorism, University of Akron, Center for Peace Studies, Oct. 18, 1979.

² F. FANON, *THE WRETCHED OF THE EARTH* 35 (C. Farrington trans. 1963). Marxist philosopher Jean Paul Sartre adds: "Once begun, it is a war that gives no quarter." *Id.* at 22. For a penetrating critique of Sartre's views and those of Fanon, see R. ARON, *HISTORY AND THE DIALECTIC OF VIOLENCE* 185-93 (B. Cooper trans. 1975).

claiming involvement with the self-determinative process, be immune from criminal liability? Must self-determination always be considered a license to kill?

Despite the claims of radical ideologues, revisionist historians, and leftist legalists, violence is not automatically a form of public protest when directed against particular political systems and established governments. When victims comprise civilian populations, murder is murder, regardless of what slogans are piously shouted or what justifications are ingenuously conceived. Who determines those who are to suffer and those who are to survive? Do victimizers have a better claim of right over their helpless victims? What of the majority of the human race who, to borrow a phrase from Nobel Laureate Albert Camus, "want to be neither victims nor executioners?"³

The need to draw a distinction between the use of violence as a first resort and the use of violence as a last resort has itself become so obfuscated by the world community that national liberation struggles have often provided moral or legal justification for terrorist acts. Despite the fact that they have co-opted the terminology of "guerrilla", not all terrorists are guerrillas. Even more true is the obverse. As journalist Lesley Hazleton has recently written, confusion between the words *guerrilla* and *terrorist* represents an "abrogation of the responsibility to distinguish between what is justifiable warfare and what is abhorrent under any circumstances . . ."⁴ Terrorism is distinguished from guerrillaism by its attacks upon the innocent and the separation of its victims from the ultimate target. General Geroge Grivas, founder and head of the Cypriot EOKA, which the British termed a terrorist organization, proudly asserted in his memoirs: "We did not strike, like the bomber, at random. We shot only British servicemen who would have killed us if they could have fired first, and civilians who were traitors or intelligence agents."⁵ The French Resistance, the Polish Underground, and the Greek Guerrillas were called terrorists by the Nazi Occupation, but they attacked only military personnel, government officials, and local collaborators. Yet, the present day terrorist-liberationist appears to follow the credo that those who are not with us are against us. Violence not only provides the means to a greater end, but it has become an end in itself.

A distinguished British legal scholar, Daniel Patrick O'Connell, maintained nearly a decade ago that "'wars of national liberation' are unknown to the law, and the concept is political."⁶ He was referring, of

³ A. CAMUS, *NEITHER VICTIMS NOR EXECUTIONERS* 27 (D. MacDonald trans. 1972).

⁴ Hazleton, *Respectable Terrorism*, HARPER'S, Oct. 1980, at 29.

⁵ Quoted by R. TABER, *THE WAR OF THE FLEA: A STUDY OF GUERRILLA WARFARE THEORY AND PRACTICE* 106 (1977).

⁶ O'Connell, *Observations*, 55 *ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL* 589

course, to traditional international norms. Nevertheless, during the 1970's, the world community attempted to legitimate liberationist movements in almost any context. On December 14, 1974, the United Nations adopted by consensus a Definition of Aggression which specifically exculpates terrorist activity when terrorism is waged on behalf of self-determination movements or directed against colonial and racist regimes.⁷ Protocol II of the 1977 Protocols Additional to the Geneva Conventions of 1949 while it exempts from application such categories as riots, internal disturbances, and isolated or sporadic "acts of violence," it particularly prohibits torture, the taking of hostages, and acts of terrorism (undefined), plus any threats to perpetuate the aforesaid activities.⁸ Yet, Protocol I, Article 1, Section 4, removes from coverage "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination"⁹

The obvious contradiction between the two Protocols has not been resolved, nor has there been any attempt at further clarification. The net effect of legitimizing terror by the Definition of Aggression and the Protocols Additional has been to encourage third-party intervention on behalf of national liberation movements and effectively to condone terror-violence whenever committed on their behalf. Small wonder that the famed legalist Georg Schwarzenberger predicted almost ten years ago that these "reforms" would constitute new milestones "on the high road to violence unlimited."¹⁰

The Final Act of the much maligned Helsinki Declaration of August 1, 1975, labeled as a "constitutive/organic" source of international law by a recently published American casebook, pledges the 35 signatory states to "refrain from direct or indirect assistance to terrorist activities

(1973).

⁷ See Definition of Aggression, G.A. Res. 3314, 28 U.N. GAOR Supp. (No.30a) 142, U.N. Doc. A/9030/Add. 1 (1974). For contrasting views of the significance of the Definition, cf. B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE*, (1975); J. STONE, *CONFLICT THROUGH CONSENSUS: UNITED NATIONS APPROACHES TO AGGRESSION* (1977); J. STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION* (1958); A.V. THOMAS & A.J. THOMAS, JR., *THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW* (1972).

⁸ 16 INT'L LEGAL MATERIALS 1442 (1977).

⁹ *Id.* at 1397. Cf. also Bassiouni, *Repression of Breaches of the Geneva Convention under the Draft Additional Protocol to the Geneva Convention of August 12, 1949*, 8 RUT.-CAM. L.J. 185 (1977); Dinstein, *The New Geneva Protocols: A Step Forward or Backward?*, [1979] Y. B. WORLD AFF. 265; Bierzanek, *Towards More Respect for Human Rights in Armed Conflicts*, 1 STUD. INT'L RELS. 75 (Polish Institute of International Affairs 1973). The latter puts forward the Communist bloc view favoring softening of restrictions upon national liberation movements.

¹⁰ G. SCHWARZENBERGER, *INTERNATIONAL LAW AND ORDER* 236 (1971).

...¹¹ Nonetheless, the U.S.S.R. and several members of the Soviet Bloc have consistently supported and supplied several terrorist organizations, such as the P.L.O., with training, weapons, material, and financing, despite the obligations imposed upon them by the Helsinki Convention. Not only are these proscribed activities directly contra to the established precept of *pacta sunt servanda*, incorporated into Article 26 of the Vienna Convention on the Law of Treaties (1969),¹² and into Article 43 of that same document (obligations imposed by international law independently of a treaty),¹³ but the continued violation of their pledged agreements by the non-performing states parties does not absolve them from the norms of state responsibility. It does, however, cast serious doubt upon the efficacy of the controlling document, particularly for those proponents who would grant to the agreement a "constitutive/organic" status. The *de facto* recognition of the P.L.O. by the member nations of the European Community, makes anomalous at best, their own claims of right as related to their joint and several counter-terrorist activities.¹⁴

Undoubtedly, the most extreme statement of support by the world community for national liberation movements can be found in Resolution 3103 passed by the United Nations General Assembly in December 1973. Entitled "Basic Principles of the Legal Status of Combatants Struggling Against Colonial and Alien Domination and Racist Regimes,"¹⁵ Resolution 3103 provides to these insurrections and rebellions the color of legitimacy under international law. It assertively proclaims that "armed conflicts involving the struggle of peoples against colonial and racist regimes are to be regarded as international armed conflicts . . .," but that "[t]he use of mercenaries by colonial and racist regimes against the national liberation movements struggling for freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals."¹⁶ According to the formula posited by this hyperbolic rhetoric, the Mauritians who aided the Moroccans against the Polisario Front were

¹¹ Conference on Security and Cooperation in Europe (CSCE), Final Act, Aug. 1, 1975. 14 INT'L LEGAL MATERIALS 1293, 1295 (1975).

¹² Vienna Convention on the Law of Treaties, entered into force Jan. 7, 1980, art. 26, U.N. Doc. A/CONF. 39/27 (1969), reprinted in 8 INT'L LEGAL MATERIALS 679 (1969).

¹³ *Id.* at art. 43.

¹⁴ The 21 nation Council of Europe urged recognition of Palestinian "legitimate rights" in April 1980, and this was followed by a unanimous declaration of the nine EEC Heads of State in June of the same year. See *The Miami Herald*, April 23, 1980, at 16-A, col. 1; *N.Y. Times*, June 14, 1980, at cols. 1-2.

¹⁵ G.A. Res. 3103 U.N. GAOR Supp. (No. 30) 142, U.N. Doc. A/9030 (1973), reprinted in 1 R. FRIEDLANDER, *TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL* 495 (1979).

¹⁶ *Id.* at 496.

mercenaries, but the Cubans who fought for (and against) the Angolans were legitimate combatants engaged in permissible military intervention. In this type of situation, as a result of misunderstanding, misapplication, and misdirection, the self-determinative principle has been less conflict resolving than it has been conflict promoting.

Several years ago Professor Nicholas N. Kittrie conceded that, "[t]aking notice of rising new angry minorities (ethnic, religious, linguistic and cultural), and considering evidence of re-tribalisation in the modern nation-State, dire predictions might be advanced of yet new waves of violence."¹⁷ Economist Carl Landauer has called self-determination "an historical necessity,"¹⁸ but challenges those who maintain that it is an unconditional right. This mini-analysis is based on firm legal and historical grounds, although one certainly cannot deny that self-determination has been a potent political force throughout most of the 20th century. In the words of Professor Louis Sohn, self-determination is "an idea that revolutionized the world."¹⁹ But it was distorted in the post-Charter era to the point where it now appears to be applied exclusively as an anti-colonial weapon. What has been lacking with respect to international law, and with reference to modern state practice, is a precise, definite, definable standard which can be fairly and rationally implemented under identifiable and equitable procedures.

In the context of world public order, during the past seven decades, self-determination claims have been put forward as both a legal and moral rationale for: (1) a right to internal revolution; (2) ground for seceding from a dominant political entity; (3) a foundation for the unification of peoples; (4) a basis for the choice of state affiliation; (5) establishing minority rights; (6) a means for the acquisition of territory; and (7) recognition per se as a human right. In our own era, self-determination has become a code word for independence. The fundamental issue centers on the nature of secession and revolution, and whether a means of legitimizing the revolutionary process within the broader parameters of national aspirations and international law can be ascertained without resorting to violence. The historical record is not encouraging.

Professor Kittrie asserts that "[a]n examination of international terrorist movements indicates a common striving towards legitimacy."²⁰ But, it is a legitimation based upon the ancient adage of might makes right.

¹⁷ Kittrie, *Reconciling the Irreconcilable: The Quest for International Agreement over Political Crime and Terrorism*, [1978] Y.B. WORLD AFF. 208, 231-32.

¹⁸ C. LANDAUER, *GERMANY: ILLUSIONS AND DILEMMAS* 14 (1969).

¹⁹ Sohn, *Comment*, Panel entitled: *Radical Perceptions of International Law and Practice*, 66 PROC. AMER. SOC. INT'L L. 162, 173 (1972). See also R. EMERSON, *FROM EMPIRE TO NATION: THE RISE TO SELF-ASSERTION OF ASIAN AND AFRICAN PEOPLES* 307-08 (1969).

²⁰ Kittrie, *supra* note 17, at 236.

Conversely, historian Hans Kohn, a lifelong student of nationalism, believed that the U.N. Charter merely emphasized self-government and not national independence.²¹ Legalist Jordan Paust, a much published contemporary scholar, recently equated self-determination with "equality of opportunity for full and free participation by all persons within a given society."²² How does one, then, explain the startling disparity in these opposing views? Why did the nexus between self-determination and popular sovereignty—so clearly discernible in the 18th century Age of Democratic Revolution—become twisted into the 20th century syndrome of terrorist-liberation?

Political philosopher Michael Walzer has described the notion that one can simply proclaim a litany of rights through the use of armed force.²³ This does not mean, however, that the overthrow of a government previously established by law is in itself illegitimate. Nor does it mean that states, recognized as legitimate in the international arena, may in fact be illegitimate in their use, abuse, and perpetuation of power over their helpless and hapless citizenry. Rebellion and revolution are recognized remedies in international law, provided that the modalities of revolt are not violative of established norms. What has confused and confounded contemporary international practice is the refusal of those who claim the human right of self-determination to respect the human rights of innocent parties in the ensuing struggle for national liberation. As we have all too often witnessed in our own generation, those who profess to fight tyranny have themselves assumed the role of tyrants.

Bernard Lewis, a widely-respected historian and Islamicist, cogently observed a few years ago that the reason why the United Nations has been more or less impotent to develop measures to combat international terrorism is that many of the governments represented in the United Nations originally established their authority through the use of terror-violence.²⁴ It is for this reason that wars of national liberation have been granted the juridical status of just wars by the majority of the world community. A 1962 conference of Afro-Asian jurist held in Conakry, Guinea, provided the most concise expression of the Third World, Fourth World, and Soviet Bloc liberation thesis: "All struggles undertaken by the peo-

²¹ H. KOHN, REFLECTIONS ON MODERN HISTORY 336 (1963). See also G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 67 (4th ed. 1960).

²² Paust, *The Concept of Norm: Toward a Better Understanding of Content, Authority, and Constitutional Choice*, 53 TEMPLE L.Q. 226, 285 (1980).

²³ Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 PHIL. & PUB. AFFS. 209, 224-28 (1980).

²⁴ Lewis, *The Palestinians and the PLO: A Historical Approach*, COMMENTARY, Jan. 1975, at 48. The ineffectiveness and immobilization of the U.N. is described in detail by E. Mickolus, *Combatting International Terrorism: A Quantitative Analysis* (1980) (unpublished doctoral dissertation in Yale University Library).

ples for their full national independence or for the restitution of their territories or occupied parts thereof, including armed struggle, are entirely legal."²⁵

Senator Daniel Patrick Moynihan has entitled the memoirs of his U.N. ambassadorship "A Dangerous Place." A major theme of his biting recollections is the diminution and deterioration of the rule of law in the world community, along with the oppressive domination of that body by an anti-democratic majority.²⁶ His admonition to the U.N. Security Council on January 10, 1976, remains as relevant today as when it was originally delivered: "self-determination is a democratic idea. It is an idea based on law, on procedure, on consent"²⁷

Perversion of the self-determination concept is not a new historical phenomenon. Self-determinative claims of right were utilized by Adolf Hitler as a legal justification for his expansionist and annexationist policies in the 1930's. As noted by historian Alfred Cobban, "[t]he appeal to this principle was particularly effective for propaganda directed towards the Western democracies, who could not forget it was supposed to be their own principle in international affairs."²⁸ A similar guilt complex was developed by the Western democracies over the so-called settler regimes (a Third World term of art) in Rhodesia (now Zimbabwe), South Africa and Israel. Nevertheless, in the latter two countries, to paraphrase former French President Giscard d'Estaing, it is not a question of right and wrong, but rather a more complicated issue of two conflicting sets of rights.²⁹ The Boers were in some regions of South Africa *before* any African tribes had settled there, and the decade-long furor over Palestinian rights in the United Nations has tended to undermine if not extinguish Israel's right to exist—an existence which was brought into being by the United Nations invocation of the self-determination process.

No one can deny the challenge so clearly stated by political scientist Rupert Emerson: "Self-determination when self-exercised involves revolution."³⁰ It is likewise impossible to ignore the constraints and controls that international law places upon internal events when they involve external relationships. Historic, traditional international law was not extinguished by the U.N. Charter, nor does the rejection by the Third

²⁵ Quoted in W. OFUATEY-KODJOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* 142 (1977); U. UMUZURIKE, *SELF-DETERMINATION IN INTERNATIONAL LAW* 80-81 (1972). The conference date is cited incorrectly in the latter text.

²⁶ D. MOYNIHAN, *A DANGEROUS PLACE* (1980).

²⁷ *Id.* at 303.

²⁸ A. COBBAN, *THE NATION STATE AND NATIONAL SELF-DETERMINATION* 93 (rev. ed. 1970).

²⁹ The N.Y. Times, Mar. 13, 1980, at 5, col. 1. These sentiments have also been echoed by the new President of the European Community Commission, Gaston Thorn, *See EUROPE*, Nov.-Dec., 1980, at 7.

³⁰ R. EMERSON, *supra* note 19, at 398. *See also Id.* at 298-99.

World, Fourth World, and Soviet World, of customary international norms, as well as Western culture and tradition, mean that prior civilized values and former legal standards no longer exist. States which establish their own rules, and then apply them in an arbitrary and capricious fashion, not only change the nature of the game, but also threaten the very survival of the participants. To say that our law is not my law, but that majority vote—however fundamentally unfair and violative of due process—will determine any outcome, invariably substitutes the rule of the jungle for the rule of law. Violence in whatever form is still violence, no matter what rhetorical explications are propounded in world parliamentary bodies, especially when those very organs are primarily dedicated to the promotion and preservation of peace.

Self-determination is one thing; terror-violence is another. Refusal by the United Nations to condemn such undeniable criminal acts, even when allegedly committed in the name of a higher purpose, means that the world community is either unwilling or unable to conform to the basic human rights standards which have become a normative part of the international legal system during the past generation. The 1979-80 Committee on Armed Conflict of the International Law Association, American Branch, has clearly disavowed any doctrine or document which places "purity of motives" above "humanitarian concerns."³¹ Moreover, the position of governments devoted to the rules of law and reason, and to those fundamental values underlying any civilized society, must be addressed in terms similar to ones enunciated by former Secretary of State William Rogers when he appeared before the 1972 opening session of the U.N. General Assembly: "[T]errorist acts are totally unacceptable attacks against the very fabric of international order. They must be universally condemned, whether we consider the cause the terrorists invoke noble or ignoble, legitimate or illegitimate."³² In other words, to cite the venerable legal maxim, *jus ex injuria non oritur*, or rights do not arise from wrongs.

The principle of self-determination first impacted upon the global arena in this century through the medium of Woodrow Wilson's Fourteen Points.³³ Wilson's striking eloquence promised more than he could deliver, and the ensuing bitterness over the peace settlements of the First World War helped prepare the groundwork for a second world conflict. Yet, self-determinative remedies were applied at Paris in 1919, and were

³¹ *Report of the Committee on Armed Conflict*, PROC. AND COMM. REPORTS OF THE AMER. BRANCH OF THE INT'L L. ASSOC. 1979-1980, at 43.

³² 67 DEP'T STATE BULL. 425, 429 (1972). See also declaration by the President of Venezuela to the U.N. General Assembly on Nov. 16, 1976: "Violence which takes the form of criminal action can never be a political act." Quoted by Venezuelan representative to *Ad Hoc* Committee on Terrorism, U.N. Doc. A/AC. 160/3/Add. 2 (July 20, 1977), at 5.

³³ See generally, SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS (ed. Y. Alexander & R. Friedlander 1980).

again invoked by Wilson's disciple, Franklin Roosevelt, even before the formal American entry into World War II. Both in 1919 and in 1945 self-determination was a remedy to be implemented by state practice. Not until the sovereignty explosion of the 1960's following the General Assembly Declaration On the Granting of Independence to Colonial Countries and Peoples (Resolution 1514, December 1960),³⁴ did self-determination shift to a self-help process to be implemented by dissident minorities against either Western colonial or European settler regimes. Recognition of an asserted right by the United Nations became highly politicized and exceedingly selective, causing several eminent Continental legal scholars, such as Professor Charles de Visscher, to label self-determination as an inherently suspect concept: "In its present total lack of precision it in no way represents a principle of law. Applied without discernment, self-determination would lead to anarchy."³⁵

Public international law has now reached a critical juncture. One way points toward a civilized, normative system based upon equity, justice, and the rule of reason. The other direction leads to a Spencerian environment of crises, conflict, and survival of the fittest. Which of the two will ultimately prevail depends in part upon the sanctity of international agreements and the humanity of organized society. As Judge Manley Hudson wrote more than thirty years ago, at the end of his distinguished career:

If Governments cannot have confidence that the instruments by which they bind themselves will not be made to serve unintended purposes, if respect is not paid to the terms and tenor of the obligations imposed by such instruments, the result may be a reluctance to assume further commitments and the progressive development of international law may be seriously retarded.³⁶

To ignore this warning is to invite disastrous consequences for ourselves and for the future of humankind.

³⁴ G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) 66, U.N. Doc. A/4686 (1960).

³⁵ C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* (P. Corbett trans., rev. ed. 1968).

³⁶ Hudson, *Integrity of International Instruments*, 42 AM. J. INT'L L. 105, 108 (1948).

