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2004

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## DEFINING TERRORISM AS THE PEACETIME EQUIVALENT OF WAR CRIMES: PROBLEMS AND PROSPECTS\*

Michael P. Scharf<sup>†</sup>

### I. Introduction

The problem of defining “terrorism” has vexed the international community for decades. 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.<sup>1</sup> Twelve years ago, representing the United States, I delivered a speech in the U.N. 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.”<sup>2</sup> I concluded that the history of the effort to deal with the problem of terrorism under the League of Nations and in the United Nations indicates that “the difficulty of an abstract definition is, as a practical matter, insurmountable.”<sup>3</sup>

A few months after I gave that speech at the United Nations, Alex Schmid, the Senior Crime Prevention and Criminal Justice Officer at the U.N.’s Terrorism Prevention Branch in Vienna, proposed a novel approach to the problem of defining terrorism which would draw on the existing consensus of what constitutes a war crime.<sup>4</sup> After circulating without much interest through the United Nations during the last decade, Schmid’s proposal suddenly gained world-wide attention in April 2004, when it was cited by the Supreme Court of India as a way around what the Court characterized as the Gordian definitional knot. In *Singh v. Bihar*, the Indian Supreme Court explained: “If the core of war crimes-deliberate attacks on

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\* Presented at the War Crimes Research Symposium: “Terrorism on Trial” at Case Western Reserve University School of Law, sponsored by the Frederick K. Cox International Law Center, on Friday, October 8, 2004.

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<sup>1</sup> See e.g., G.A. Res. 51, U.N. GAOR, 46<sup>th</sup> Sess., U.N. Doc. A/46/51 (1991).

<sup>2</sup> See Statement of Michael P. Scharf, United States Adviser to the forty-sixth General Assembly, in the Sixth Committee, on Item 125, Terrorism, Press Release USUN 63-(91) (Oct. 21, 1991), reprinted in MICHAEL P. SCHARF, THE LAW OF INTERNATIONAL ORGANIZATIONS: PROBLEMS AND MATERIALS 699(2001).

<sup>3</sup> *Id.*

<sup>4</sup> 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.

civilians, hostage-taking and the killing of prisoners is extended to peacetime, we could simply define acts of terrorism veritably as 'peacetime equivalents of war crimes.'<sup>5</sup>

This article examines the proposal to define terrorism as the peacetime equivalent of war crimes in the context of answering two questions: First, why might it be useful to define terrorism by reference to the existing laws of war? And second, what are the potential negative consequences which might counsel against such an approach? Before addressing these questions, however, it is useful to provide a brief history of the modern international effort to define terrorism.

## *II. The International Quest for a General Definition of Terrorism*

In 1987, the United Nations General Assembly adopted Resolution 42/159, recognizing that the effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism. The issue was initially assigned to the U.N. Sixth (Legal) Committee, which had over the years drafted a number of conventions addressing specific crimes committed by terrorists, although none of these conventions ever used the word "terrorism" let alone provided a definition of the term. When the Sixth Committee failed to make progress in reaching a consensus definition of terrorism, the General Assembly in 1996 established an ad hoc committee to develop a comprehensive framework for dealing with international terrorism.<sup>6</sup>

Foremost among its accomplishments, the ad hoc committee developed the International Convention for the Suppression of the Financing of Terrorism, which defined terrorism as (1) any activity covered by the twelve anti-terrorism treaties; and (2) "any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act."<sup>7</sup> 129 States have so far ratified this multilateral treaty. This was as close as the international community has ever come to adopting a widely accepted general definition of terrorism.

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<sup>5</sup> Singh v. Bihar, 2004 SOL Case No. 264, April 2, 2004, para. 16, available at <http://supremecourtonline.com> (upholding conviction under the Indian Terrorist and Disruptive Activities Act of 1987 of a number of heavily armed individuals who attacked a group of police officers).

<sup>6</sup> See G.A. Res. 210, U.N. GAOR Ad Hoc Comm., 52<sup>nd</sup> Sess., Supp. No. 37, U.N. Doc. A/52/37 (1996).

<sup>7</sup> G.A. Res. 109, U.N. GAOR, 54<sup>th</sup> Sess., at 3, U.N. Doc. A/RES/54/109 (2000).

Immediately after the events of September 11, 2001, the General Assembly established a working group to develop a comprehensive convention on international terrorism. In the spirit of cooperation that marked the early days after the September 11 attacks, the members of the working group nearly reached consensus on the following definition of terrorism:

[Terrorism is an act] intended to cause death or serious bodily injury to any person; or serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility . . . when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing an act.<sup>8</sup>

The effort hit a snag, however, when Malaysia, on behalf of the 56-member Organization of the Islamic Conference (OIC), proposed the addition of the following language:

Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime.<sup>9</sup>

According to Nicholas Rostow, General Counsel to the U.S. Mission to the United Nations, the OIC's proposal intended to exempt acts against Israel over the occupied territories and acts against India over Kashmir from the definition of terrorism, and to brand violations of the laws of war by State military forces such as the Israel Defense Forces as terrorist acts.<sup>10</sup> When neither side was willing to compromise on this issue, the project was shelved indefinitely.

With work on a general definition of terrorism once again stalled in the General Assembly, the U.N. Security Council stepped in to the fray. Acting under Chapter VII of the U.N. Charter, the Council adopted Resolution 1373, which in essence transformed the Terrorism Financing Convention into an obligation of all U.N. member States, requiring them to prohibit

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<sup>8</sup> Measures to Eliminate International Terrorism: Report of the Working Group, U.N. GAOR 6th Comm., 55<sup>th</sup> Sess., Agenda Item 164, at 39, U.N. Doc. A/C.6/55/L.2 (2000), quoted in Surya P. Subedi, *The U.N. Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law*, 4 INT'L LAW F. DU DROIT INT'L 159, 162 (2002).

<sup>9</sup> Subedi, *supra* note 8, at 163.

<sup>10</sup> Nicholas Rostow, *Before and After: The Changed UN Response to Terrorism since September 11th*, 35 CORNELL INT'L L. J.475, 488 (2004).

financial support for persons and organizations engaged in terrorism.<sup>11</sup> The Council missed an opportunity, however, to adopt a universal definition of terrorism when it decided not to include the Terrorism Financing Convention's definition of terrorism in Resolution 1373, but rather to leave the term undefined and to allow each State to ascertain its own definition of terrorism. Further, the Council created a committee (The Counter-Terrorism Committee) to oversee the implementation of the resolution, but it did not give the Committee the mandate to promulgate a list of terrorists or terrorist organizations to whom financial assistance would be prohibited under the resolution.<sup>12</sup>

The Security Council's most recent statement on terrorism came in response to a bloody terrorist attack at an elementary school in Russia in October 2004. Upon Russia's insistence, the Security Council adopted Resolution 1566, which provides:

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, *which constitute offenses within the scope of and as defined in the international conventions and protocols relating to terrorism*, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious, or other similar nature, and calls upon all States to prevent such acts and, if not

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<sup>11</sup> S.C. Res. 1373, U.N. SCOR, 56<sup>th</sup> Sess., 4385<sup>th</sup> mtg., U.N. Doc. S/RES/1373 (2001).

<sup>12</sup> See generally, Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. OF INT'L L. 333, 334 (2003) (explaining that Resolution 1373 fails to define terrorism or identify specific terrorists).

At the Club of Madrid International Summit on Democracy, Terrorism and Security, 8-11 March 2005, the Working Group on Legal Responses to Terrorism (which included the author of this article) made the following proposal in paragraph 2.6 of its report: "In order to help States identify terrorist organizations to whom financial support is prohibited by the Convention on the Suppression of Terrorist Financing and Security Council Resolution 1373 (2001), the Counter Terrorism Committee (CTC) established by the Security Council should develop a core list of organizations that the CTC determines to be involved, directly or indirectly, with acts of financing of terrorism. In developing this list, the CTC should employ procedural safeguards to ensure that organizations and individuals associated with them which are not so involved are not erroneously included. States would thereafter be bound to subject organizations included in the list to the sanctions enumerated in resolution 1373 (2001). States would also remain free to impose sanctions on non-listed organizations that the State determines to be involved in terrorism." (On file with the author).

prevented, to ensure that such acts are punished by penalties consistent with their grave nature (emphasis added).<sup>13</sup>

At first blush this clause seems to be a general definition of terrorism, similar to that contained in the Terrorist Financing Convention. But due to the inclusion of the italicized language (which was required to gain consensus), this clause actually does no more than reaffirm that there can be no justification for committing any of the acts prohibited in the twelve counter-terrorism conventions; a sentiment that was expressed in numerous past General Assembly and Security Council resolutions.

### *III. 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 guerilla war or insurgency), it is covered by the detailed provisions of the four 1949 Geneva Conventions and their Additional Protocols of 1977.<sup>14</sup> These International Humanitarian law (“IHL”) 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 prohibit use of violence against non-combatants, hostage taking, and most of the other atrocities usually committed by terrorists. In addition, the Conventions and Additional

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<sup>13</sup> S.C. Res. 1566, U.N. SCOR, 59<sup>th</sup> Sess., 5053<sup>rd</sup> mtg., at 2, U.N. Doc. S/RES/1566 (2004).

<sup>14</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (First Geneva Convention); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 31 (Second Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Third Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Fourth Geneva Convention); Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (Protocol I); and Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, December 12, 1977, 1125 U.N.T.S. 609 (Protocol II). 190 States have ratified the four Geneva Conventions, 150 States have ratified Protocol I, and 125 States have ratified Protocol II. See <http://untreaty.un.org/English>.

Protocols contain several provisions aimed specifically at acts of terrorism committed during armed conflict.<sup>15</sup>

The key to whether the IHL conventions apply to acts of terrorism is the "armed conflict threshold." By their terms, these IHL conventions do not apply to "situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence."<sup>16</sup> In those situations, terrorism is not covered by the laws of war, but rather by a dozen anti-terrorism conventions, which outlaw hostage-taking,<sup>17</sup> hijacking,<sup>18</sup> aircraft<sup>19</sup> and maritime sabotage,<sup>20</sup> attacks at airports,<sup>21</sup> attacks against diplomats and government officials,<sup>22</sup> attacks against U.N. peacekeepers,<sup>23</sup> use of bombs<sup>24</sup>

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<sup>15</sup> See IV Geneva Convention, Oct. 21 1950, 6 U.S.T. 3516, 75 U.N.T.S.287 (stating that collective penalties and likewise all measures of intimidation or of terrorism are prohibited). (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 4, 16 I.L.M. 1391. Article 51(2) of Protocol I (applicable to international armed conflicts) provides: "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." Protocol Additional to the Geneva Convention of August 1949, and Relating to the Protection of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609. Article 4(d) of Additional Protocol II (16 I.L.M 1442) (applicable to internal armed conflicts) provides: "the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever . . ." Article 13 of Additional Protocol II states: The Civilian population as such, as well as individual civilians shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."

<sup>16</sup> 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.

<sup>17</sup> See International Convention Against the Taking of Hostages, Dec. 17, 1979, TIAS 11081, 1316 U.N.T.S. 205 (138 State parties).

<sup>18</sup> See Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 (177 State parties).

<sup>19</sup> See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 (180 State parties).

<sup>20</sup> See Convention and Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, I.M.O. Doc. SVA/CON/15, *reprinted in* 27 I.L.M. 668 (52 State parties).

<sup>21</sup> See Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation,, Feb. 24, 1988, 1589 U.N.T.S. 474 (148 State parties).

<sup>22</sup> See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 (146 State parties).

or biological, chemical or nuclear materials,<sup>25</sup> and providing financial support to terrorist organizations.<sup>26</sup> 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.

While some of the anti-terrorism Conventions are widely ratified, only fifty countries have ratified all twelve treaties. Moreover, 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 included. Placing anthrax into an envelope would not be covered; nor would most forms of cyber-terrorism. Additionally, acts of psychological terror that do not involve physical injury are not covered, even though placing a fake bomb in a public place or sending fake anthrax through the mails can be every bit as traumatizing to a population as an actual attack.

Defining terrorism as the peacetime equivalent of war crimes would fill most of these gaps. Moreover, it would make it clearer that States have a right to use military force in self-defense against a terrorist group physically located within the boundaries of another state. As described below, some domestic and international judicial bodies have already applied the laws of war to peacetime acts of terrorism, thereby setting a precedent for an approach that lowers the armed conflict threshold to equate acts of terrorism with war crimes.

### A. The Juan Carlos Abella Human Rights Case

An international body first considered this question in the *Juan Carlos Abella v. Argentina case*, decided by the Inter-American Commission on Human Rights in 1997.<sup>27</sup> The case concerned the January 23, 1989 attack

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<sup>23</sup> See Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 34 I.L.M. 482 (entered into force on January 15, 1999)(29 State parties).

<sup>24</sup> See International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 284 (123 State parties).

<sup>25</sup> See Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 124 (95 State parties).

<sup>26</sup> International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270, 2178 U.N.T.S. 228 (117 State parties).

<sup>27</sup> See *Juan Carlos Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., 55/97,OEA/Ser.L/V/II.98, doc. 6 rev. (Apr. 13, 1998).

by forty-two 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 waiving 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.

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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> However, "because of the incomplete nature of the evidence," the Commission was unable to find against Argentina concerning these allegations.<sup>31</sup>

The *Juan Carlos Abella case* is an important precedent because it lowers the armed conflict threshold so that many terrorist situations could now trigger the standard 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 (who in this case carried their arms openly) acted lawfully under the laws of war. Conversely, the laws of war would constrain the methods the government could use to quell the attack.

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<sup>28</sup> See *id.* paras. 157-168.

<sup>29</sup> *Id.* at paras. 155-156.

<sup>30</sup> *Id.* at paras. 180,189.

<sup>31</sup> *Id.* at para. 185.

## B. The United States' Response to the 9/11 Attacks

In testimony before the Senate Judiciary Committee, Scott Silliman, the Executive Director of the Center on Law, Ethics and National Security at Duke University School of Law, explained that since the United States was not in a state of armed conflict with al Qaeda on the morning of September 11, 2001, the attacks by al Qaeda could not be considered violations of the laws of war.<sup>32</sup> Although al Qaeda had been responsible for a few prior sporadic attacks against the United States, including the bombings of the U.S. embassies in Kenya and Tanzania in 1998 and the attack on the U.S.S. Cole in 2000, and the United States had attacked al Qaeda's Afgan training bases with cruise missiles in 1998, these did not rise to the level of protracted armed violence between governmental authorities and organized armed groups as required to trigger the laws of war.<sup>33</sup>

Nevertheless, in promulgating the instruments governing the prosecution of al Qaeda members before U.S. military commissions, the United States made clear that in its view, ongoing mutual hostilities were not required to qualify the attacks of September 11 as an armed conflict. Rather, "[a] single hostile act or attempted act may provide sufficient basis for the nexus [between the conduct and armed hostilities] so long as its magnitude or severity rises to the level of an 'armed attack'...or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force."<sup>34</sup> Applying this novel definition which reduces the armed conflict threshold to require merely a single severe terrorist act, the Military Commissions have charged several members of al Qaeda with committing war crimes in relation to the attacks of September 11.<sup>35</sup>

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<sup>32</sup> See *On DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing on Review of Military Terrorism Tribunals Before Congress*, 107<sup>th</sup> Cong. (2001), available at 2001 WL 26187921.

<sup>33</sup> See *Prosecutor v. Dusko Tadic (Decision on the Defense Motion for Interlocutory Appeal Jurisdiction)*, No. IT-94-1-AR72, para. 70, (ICTY 1995), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.

<sup>34</sup> Department of Defense Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission, § 5(C) (April 30, 2003), available at [http://www.defenselink.mil/news/May2003/d20030430milcom\\_instno2.pdf](http://www.defenselink.mil/news/May2003/d20030430milcom_instno2.pdf) (last visited Feb. 9, 2005).

<sup>35</sup> See Press Releases, U.S. Department of Defense, Two Guantanamo Detainees Charged (Feb. 24, 2004), Additional Military Commission Charges Referred (Jul. 14, 2004) available at [www.defenselink.mil/releases/2004](http://www.defenselink.mil/releases/2004). The Defense has challenged the jurisdiction of the military commissions over acts committed outside of an armed conflict in the traditional meaning of the term, and this issue is likely to wind its way through the courts in the years ahead. See *Defense Motion to Modify Charges-Lack of Subject-Matter Jurisdiction-Offenses Must be Committed During International Armed Conflict*, *United States v. David*

### C. The Fawaz Yunis Prosecution

In other contexts, U.S. courts have applied the laws of war to even minor terrorist acts committed during peacetime. Consider the case of *United States v. Yunis*.<sup>36</sup> Fawaz Yunis was a member of the Amal militia which opposed the presence of the PLO in Lebanon. On June 11, 1985, 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.<sup>37</sup> This is the defense made famous in the case of Lieutenant William L. Calley who was tried for the My Lai massacre in Vietnam.<sup>38</sup> According to U.S. law, "acts of a subordinate done in compliance with an unlawful order given him by his superior are excused . . . unless [the order] is one which a man of ordinary sense and understanding would . . . know to be unlawful . . ."<sup>39</sup>

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.<sup>40</sup> 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.

### D. The Ahmed Extradition Case

In the *Mahmoud El-Abed Ahmed* Extradition case, the U.S. 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.<sup>41</sup> 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

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M. Hicks (U.S. Military Commission) (Oct. 4, 2004) available at [www.defenselink.mil/news/Aug2004/commissions\\_motions.html](http://www.defenselink.mil/news/Aug2004/commissions_motions.html).

<sup>36</sup> *United States v. Fawaz Yunis*, 924 F.2d 1086 (1991).

<sup>37</sup> *Id.* at 1095.

<sup>38</sup> *United States v. Calley*, 22 C.M.A. 534 (1973).

<sup>39</sup> *Fawaz Yunis*, 924 F.2d at 1097.

<sup>40</sup> *Id.*

<sup>41</sup> *Ahmed v. Wigen*, 726 F. Supp. 389, 408 (E.D. N.Y. 1989), *aff'd*, 910 F. 2d 1063 (2nd Cir. 1990).

U.S. 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 an armed conflict did not exist as such at the time of the offense.<sup>42</sup> 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.<sup>43</sup> 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.

#### *IV. Negative Implications of Applying the Laws of War to Peacetime Acts of Terrorism*

The *Abella*, *Yunis*, *Ahmed*, and al Qaeda 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.

##### **A. Unlawful Verses Lawful Combatants**

The terms "lawful" and "unlawful-combatants" are designed to draw a distinction between armed forces, which are a legitimate target of war, and the civilian population, which is not. To promote the distinction, only lawful combatants are entitled to the protection afforded by the laws of war, including the combatant's privilege and Prisoner of War status.

Under the 1949 Geneva Conventions, to qualify as a lawful combatant members of a militia had to *inter alia* have a fixed distinctive sign recognizable at a distance, something most terrorists would not have.<sup>44</sup> In recognition of the realities of modern guerrilla warfare, however, the 1977 Protocol I to the Geneva Conventions provides that, while combatants should clearly distinguish themselves from civilians, it may be that "the nature of hostilities" will in some cases effectively preclude such distinction. In such case, members of a fighting force will nevertheless

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<sup>42</sup> *Id.* at 404.

<sup>43</sup> *Id.* at 407.

<sup>44</sup> Geneva Convention III, *supra* note 14, art. 4.

retain "combatant" status and be entitled to POW status upon capture, provided they "[carry] arms openly" during actual military engagements.<sup>45</sup>

It is for this reason that the United States has not ratified Additional Protocol I, which it felt gave too much protection to terrorist groups.<sup>46</sup> But the Protocol has been ratified by 155 countries, including seventeen of the nineteen members of NATO and three of the Permanent Members of the Security Council.<sup>47</sup> The Protocol has been invoked as reflecting customary international law in various conflicts by governments, U.N. investigative bodies, and the International Committee of the Red Cross.<sup>48</sup> The United States, itself, argued that the Protocol represented customary international law in advocating that the International Criminal Tribunal for the former Yugoslavia should have jurisdiction over breaches of the Protocol.<sup>49</sup> U.S. soldiers are subject to arrest and prosecution/extradition for breaches of the Protocol when they are present in the territory of any State Party. When the U.S. deploys troops on a U.N. peace-keeping mission, the United Nations requires that they be subject to Protocol I.<sup>50</sup> Finally, as a matter of policy on the conduct of hostilities during coalition actions, the United States has implemented the rules of the Protocol because of the need to coordinate rules of engagement with its coalition partners.<sup>51</sup>

Consequently, if the laws of war are extended to peacetime acts of terrorism, than many terrorists would be able to qualify for the rights of combatants under the less stringent standard of Additional Protocol I.

### **B. The Combatant's Privilege and Collateral Damage Doctrine**

If terrorism is defined as the peacetime equivalent of war crimes, terrorists could rely on the "combatant's privilege," under which

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<sup>45</sup> Additional Protocol I, *supra* note 14, art. 44(3).

<sup>46</sup> Though the United States signed the Protocol during the Carter Administration, the Regan Administration subsequently decided not to seek ratification because of fears that [it] would legitimize the claims of the Palestine Liberation Organization to prisoner of war privileges for its combatants and promote various liberation movements to state or quasi state status. See Michael P. Scharf, *The United States and the International Criminal Court: The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, citing THEODOR MERON, WAR CRIMES LAW COMES OF AGE 178-79 (1998).

<sup>47</sup> *Id.* at 93.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 95.

<sup>50</sup> *Id.* at 94.

<sup>51</sup> *Id.*

combatants are immune from prosecution for certain common crimes.<sup>52</sup> 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 combatants constitutes a lawful taking of prisoners. Consequently, taking military or government personnel hostage would generally not constitute a crime.

Moreover, under the combatant's privilege, government installations are a lawful target of war. Though citing Alex Schmid's definitional approach with approval, the recent judgment of the Indian Supreme Court cautioned that "[i]f terrorism is defined strictly in terms of attacks on non-military targets, a number of attacks on military installations and soldiers' residences could not be included."<sup>53</sup> Thus, terrorist attacks on military, police, or government buildings would not be regarded as criminal; nor would attacks on navy vessels or aircraft. 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. Thus, under the proposal to define terrorism as the peacetime equivalent of war crimes, if al Qaeda had attacked the Pentagon not with airliners full of innocent passengers, but with a truck bomb, that would have been a lawful act of war, not terrorism.

### C. Assassination

Another problem with the proposal is that it 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.<sup>54</sup> The laws of war, which would apply to such persons while within their country, make it a war crime to kill "treacherously,"<sup>55</sup>—understood as prohibiting assassination.<sup>56</sup> But this prohibition has been

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<sup>52</sup> Richard 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, 58 (1983).

<sup>53</sup> *Singh v. Bihar*, 2004 SOL Case No. 264, Apr. 2, 2004, para.16, available at <http://www.supremecourtonline.com/cases/9520.html>.

<sup>54</sup> See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, art. 2, 1037 U.N.T.S. 167.

<sup>55</sup> Convention (IV) Respecting the Laws and Customs of War on Land and its Annex, Oct. 18, 1907, art. 23 (b), 36 Stat. 2277, T.S. No. 539.

<sup>56</sup> U.S. DEP'T OF THE ARMY, *the Law of Land Warfare*, art. 31 (1956) (Army Field Manual No. 27-10, Wash., D.C.).

narrowly interpreted to, for example, permit targeting military or civilian commanders during a conflict.<sup>57</sup> Executive Order 12,333, which prohibits U.S. government personnel from engaging in assassination,<sup>58</sup> has been subject to a similarly narrowly 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.<sup>59</sup> More recently, the United States has begun to use unmanned Predator drone aircraft, equipped with Hellfire missiles, to hunt down members of the al Qaeda terrorist organization throughout the world, even outside the zone of conflict.<sup>60</sup> If the laws of war apply to terrorists in peacetime 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 insurgency or self-determination movement.

#### D. POW Status

Another problem is that defining terrorism as the peacetime equivalent of war crimes might entitle some terrorists to POW status, which requires that they be given special rights beyond those afforded to common prisoners. By way of analogy, one might examine the case of *United States v. Noriega*,<sup>61</sup> in which General Noriega argued that Article 22 of the Third Geneva Convention required that he not be interned in a penitentiary.<sup>62</sup> 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"). The members of al Qaeda being tried by the U.S. Military Commissions in Guantanamo Bay have made a similar

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<sup>57</sup> W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW, Dec. 1989 at 5.

<sup>58</sup> Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 8, 1981).

<sup>59</sup> Parks, *supra* note 57, at 8.

<sup>60</sup> See Michael P. Scharf, *In the Cross Hairs of a Scary Idea*, THE WASH. POST, Apr. 25, 2004, at B1.

<sup>61</sup> *United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992).

<sup>62</sup> 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, art.22, 75 U.N.T.S. 135.

argument in their habeas petitions, contending that as POWs under the Geneva Conventions they cannot lawfully be tried by military commission.<sup>63</sup>

Even if they are ultimately denied POW status, under the Geneva Conventions the al Qaeda detainees are still entitled to fundamental guarantees of humane treatment and may not be tortured or degraded. In contrast, if the members of al Qaeda were deemed common criminals not subject to the protections of the laws of war, the United States would actually have more leeway in how it treats al Qaeda members that are captured and detained outside of its borders.

### E. The Obedience to Orders Defense

Finally, as the *Fawas Yunis Case* demonstrated, defining terrorism as the peacetime equivalent of war crimes 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. While the defense is not available with respect to acts that our manifestly unlawful, such as intentionally targeting civilians or taking hostages, it would apply to those lower down in the chain of command who are ordered to perform specific tasks, such as procuring explosives or an airline schedule or a fake passport which are not in themselves manifestly war crimes.

### V. 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 might permit the exercise of more forceful measures that might not be permissible under the rubric of law enforcement. It would give the prosecution the ability to argue the doctrine of command responsibility, which was not previously applicable to peacetime acts. It will also encourage terrorist groups to play by the rules of international humanitarian law. Conversely, the approach virtually declares open season for 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.

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<sup>63</sup> At the time this article went to press, at least one federal court had agreed with this argument. See *Salim Ahmed Hamdan v. Donald H. Rumsfeld*, 344 F.Supp. 152 (D.C. 2004), at 13-35.

It is important that those advocating this new approach to the definition of terrorism be fully aware of all the legal consequences that arise from the approach. It is no panacea, and in the final analysis the negative consequences may render it another dead end in the enduring struggle to define terrorism.