

“Between Freedom Fighters and Terrorists:
The Politics of International Criminal Law in the 1970s”.

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Devin Pendas
Boston College

The 1970s witnessed a striking renewal in the development of international criminal law. Largely moribund for thirty years after World War II, the 1970s saw the passage of several major international conventions pertaining to international crimes. Unlike the international criminal law of the 1940s (or earlier), however, the international crimes of concern in the 1970s were those of “terrorism.” The United Nations conventions protecting diplomatic personnel (1973) and against the taking of hostages (1979), the multilateral conventions against the unlawful seizure of aircraft (1970) and against crimes against civil aviation (1971), as well as regional instruments, such as the European Convention on the Suppression of Terrorism (1977) or the Inter-American Convention to Prevent and Punish Acts of Terrorism (1971), together marked an expansion of international criminal law into new areas outside its traditional concern with the laws of war and mass atrocities such as genocide.

The 1970s had seen the rise of new forms of political violence, widely perceived at the time as a new kind of terrorism. The hijacking of civilian aircraft became particularly prominent over the course of the 1960s. According to data collected by the International Civil Aviation Organization, there were 206 successful hijackings in the 1960s (and a

further 74 unsuccessful attempts). In 1969 alone, 57 aircraft were seized. Between 1970 and 1972, over ninety people were killed as a result of hijackings.¹ The various conventions responding to crimes against civil aviation were a direct response to this phenomenon. Yet, while it proved relatively easy to get international agreement on conventions against hijacking, it proved far more difficult to reach any international consensus on how to respond to other forms of “terrorism” that emerged in the 1970s. Beginning with the Algerian war for independence in the early 1960s, the bombing of civilian targets (restaurants, nightclubs, department stores, train stations, etc.) became an increasingly common form of political violence as well. Yet unlike the conventions against hijacking, it proved impossible to craft a United Nations “terrorism convention” in the 1970s. (Nor has one been passed to this day). Regional conventions in the Americas and in Europe were passed, but the UN proved singularly incapable of crafting a convention, or indeed, any but the weakest of resolutions, dealing with the issue.

Why this discrepancy? Why could truly international conventions be passed regarding hijacking but not regarding “terrorism”? Why were regional bodies, like the Council of Europe or the Organization of American states, able to craft a terrorism convention when the United Nations failed? To answer these questions, I want to briefly examine the debate which took place in 1979 within the United Nation *Ad Hoc* Committee on International Terrorism. In 1972, the General Assembly passed Resolution 3034 (XXVII), forming an *Ad Hoc* Committee on Terrorism.² In 1977, in Resolution 32/147, the General Assembly renewed the *ad hoc* committee and charged it with two tasks: “first...studying the underlying causes of terrorism and then...recommending practical measures to

¹ Edmund Jan Osmańczyk, *Encyclopedia of the United Nations and International Agreements*, p. 55.

² GA Res 3034 (XXVII), December 18, 1972.

combat terrorism.”³ The *Ad Hoc* Committee was comprised of delegations from 35 nations; of these five were Warsaw Pact members, fourteen were either NATO members or were otherwise clearly within the US sphere of influence, and sixteen were non-aligned, either formally or informally. This latter group included significant numbers of Arab and African states, as well as India, the only Asian country besides Japan on the committee.

Meeting in March and April 1979, the committee quickly dissolved into competing factions. What is interesting about the ensuing debate is how it differs from earlier debates on international law within the UN.⁴ Whereas in earlier periods, the debates had typically centered on conflicts over the status of national sovereignty and had been waged between representatives of American and Soviet spheres of influence, the Socialist camp was clearly marginal to the 1979 debate over terrorism. Rather, by this point, the principal antagonists were the western powers, especially the Americans and the British, and the non-aligned representatives of the post-colonial Third World.⁵ In terms of formal substance, the debate centered on which part of the UN authorizing resolution to prioritize, that is whether to focus on the underlying causes of terrorism or on practical measures to combat it. The logic of positions can be seen most clearly in two working papers presented to the *ad hoc* committee, by a group of non-aligned states and by the US respectively.

In March, a group comprised of Algeria, Barbados, India, Iran, Nigeria, Panama, Syria, Tunisia, Venezuela, Yugoslavia, Zaire and Zambia presented a paper on the “underlying causes of international terrorism”.⁶ In this paper, the mainly Third World

³ GA Res 32/147, December 16, 1977, § 7.

⁴ See Devin O. Pendas, “Toward World Law? Human Rights and the Failure of the Legalist Paradigm of War,” in Stefan Ludwig Hoffmann, *Human Rights in the Twentieth Century* (Cambridge: Cambridge University Press, 2011), pp. 215-36.

⁵ Unfortunately, the report of the ad hoc committee does not name the delegates on the committee, or attribute positions directly to individual delegations. Reading between the lines, however, as well as a perusal of the working papers presented makes it possible to identify the major protagonists.

⁶ “Working Paper on Underlying Causes of International Terrorism,” UN Doc A/AC.160/WG/R.1, March 1979.

delegates made several core claims. First, they asserted that the work of the committee “should not affect the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and the legitimacy of their struggle, in particular, the struggle of national liberation movements....”. They then divided the “causes” of terrorism into two broad categories, those of a political character and those of an economic and social character. Among the political causes were colonialism, racism and apartheid, aggression and foreign occupation, interference in the domestic affairs of other states and, in the only obvious contribution from a socialist perspective, “fascism and neo-fascism.” The social and economic causes included the “persistence of an unjust and inequitable international economic order,” the exploitation of natural resources by foreign powers, and “poverty, hunger, misery, frustrations, etc.”

Unsurprisingly, the working paper provoked heated responses within the ad hoc committee. A few delegations found it insufficiently radical, and wanted to include foreign “connivance with fascist, neo-fascist, and Zionist” groups and organizations. The Western powers, on the other hand, found the working paper frustrating. They pointed out, first, that the list was simply an “*a priori* judgment” about the causes, rather than the “study” mandated by the General Assembly. As such, it seriously underestimated the “complexities of the problem.” “A partial and subjective inventory of the causes of the phenomenon was likely to create more problems than it would solve.”⁷ The critics of the working paper further pointed out that there were numerous examples of colonialism or exploitation that did not produce terrorism, and other instances (as in the wave of left-wing attacks then unfolding within Europe) where such conditions were lacking, yet terrorism nonetheless occurred. Nonetheless the authors of the working paper insisted that “colonial, racial or apartheid policies or economic exploitation of the less developed

⁷ “Report of the *Ad Hoc* Committee on International Terrorism,” *Official Records of the Thirty-Fourth Session of the General Assembly*, Supplement No. 37 (A/34/37), § 71.

peoples of the world necessarily result in the emergence of organized resistance movements determined to counter such policies; thus...one act of terrorism begat another act of terrorism and organized resistance movements could not be expected to disappear as long as Governments did not desist from pursuing oppressive political and economic policies.”⁸

The alternative response within the ad hoc committee was articulated in working papers presented by the British and the Americans. Both favored diplomatic and legal responses, and largely ignored the question of “underlying causes” of whatever sort. The British were more cautious than the Americans, urging mainly that states do a better job of information sharing, that states sign and then meet their obligations under existing international treaties pertaining to crimes against aviation and protected persons, and that states generally cooperate more extensively to combat terrorism.⁹ The Americans, on the other hand, offered a somewhat vague but wide-reaching proposal to draft “an additional international convention, based on the principle of prosecution or extradition, to prohibit acts of international terrorism” against life, liberty, or property.

While the American proposal garnered some support, many delegations were deeply skeptical. There were two main lines of critique. First, many of the authors of the Third World working paper felt the American proposal neglected the essential issue of state terrorism. They felt that “the practical measures worked out by the *Ad Hoc* Committee should cover state as well as individual terrorism.”¹⁰ They further objected to its failure to include “a provision concerning the peoples fighting against colonial domination and alien occupation and against racist regimes.” The second major line of critique, which was not confined to Third World delegates, was that the American proposal was excessively vague. Delegates urged a refinement that would restrict its

⁸ Ibid, § 74.

⁹ “Working Paper on Elements of Possible Recommendations for Co-Operation to Combat International Terrorism,” UN Doc A/AC.160/WG/R.2, March 1979.

¹⁰ “Report of the *Ad Hoc* Committee,” § 90.

application to “particularly serious and heinous acts.” There was similar concern that such a convention would overlap with existing conventions, for instance against crimes against civil aviation, and would thus simply lead to confusion and redundancy.

The second line of critique was clearly technical in nature and could have been more or less easily resolved. The first line of critique was fundamental and, ultimately, the two approaches—a legalist response to terrorist acts, and a political critique of the social origins of terrorism—proved to be irreconcilable. In the end, the *Ad Hoc* Committee produced a set of recommendations that sought to placate all sides and, as a result, achieved almost nothing. The Committee’s formal recommendations included elements of the British working paper urging states to apply existing international law more diligently, asking the General Assembly to “take note of the study of the underlying causes of international terrorism” contained in the Third World working paper, and asking the General Assembly to consider the desirability and feasibility of a convention against international terrorism.¹¹ Upon the recommendation of the umbrella Sixth (Legal) Committee, the General Assembly resolved on December 17, 1979 to reconsider the issue in 1981, establishing a trend which has persisted to the present.¹²

So what does this small conflict over the development of international criminal law tell us? The first point I want to make here is that international criminal law does not operate like domestic law. As numerous international lawyers have pointed out, the defining difference between international and domestic criminal law is that the former lacks an executive capable of enforcement.¹³ Lacking the coercive authority of the state, international law operates more by forging consensus and articulating shared values rather than by enforcing norms of behavior. In such a context, the ability to forge normative consensus despite different interest positions becomes crucial. This capacity

¹¹ *Ibid.*, § 118.

¹² GA Res 34/145, December 17, 1979.

¹³ Lauterpacht, more recently, Goldsmith and Posner.

often hinges upon a shared ideological underpinning. This is why, in the first twenty-five years or so after World War II, the fault lines in the development of international law tended to fall along the East/West divide of the Cold War. As decolonization led to the emergence of increasing numbers of what were then called “new states,” the potential axes of dissensus expanded. Now, alongside the continued ideological conflict between socialism/capitalism, a new fault line emerged, one which sat uneasily within the Cold War frame. This was framed in terms of national liberation struggles and anti-racism and it pitted the former colonial world against its erstwhile masters, with the socialist block trying with mixed results to mobilize this dispute to its benefit.

For the Third World block that came to increasing prominence in the General Assembly in this period, talk of terrorism was largely an attempt by the developed world to reassert its hegemony over the former colonies. This point was made explicit by the authors of the Third World Working paper in their defense of their list of causes. “In their opinion any Government that engaged in acts of violence or threats of violence in order to achieve its colonial, racial or apartheid policies was committing acts of terrorism, particularly if the act was carried out in such a way to subjugate the will of a people against those policies.” They stressed that their draft “emanated from countries which had all, at one point or another and in varying degrees, been the victims of exploitation and it would be irresponsible not to take duly into consideration the experience on which it was based.”¹⁴

In this context, one must recall the role of violence against non-combatants in the wars of national liberation that became commonplace in the 1960s and 1970s. The FLN’s use of such bombings in Algeria was widely perceived as a successful military/political strategy and strong efforts had been made at the time to treat such violence as a legitimate instrument of political/military struggle.¹⁵ Moreover, this was an approach that could be

¹⁴ “Report of the *Ad Hoc* Committee,” § 79.

¹⁵ Connolly.

deployed by radical or nationalist movements with limited mass support and/or weak strategic resources. As a consequence, many of the newly liberated countries flocking into the UN in the 1970s vehemently opposed the international criminalization of what they perceived to be an invaluable tool of Third World liberation, certainly as long as it did not explicitly criminalize all bombings of civilian targets (i.e. those carried out by conventional air power, as well as by individual guerrilla fighters). Hijacking was at least tacitly supported by many of these same powers for similar reasons, yet here their opposition was less successful because hijacking was perceived as being both less successful and less obviously linked to the liberation struggles of the Third World.

Given that there were thus now three potential ideological positions within which to frame the values of international criminal law, the likelihood of consensus emerging were that much less. As a consequence, the 1970s saw a further stagnation of international criminal law, one independent of the Cold War freeze that had set in already in the 1950s. At least as far as the 1970s is concerned, the Cold War framework needs to be expanded to include a post-colonial perspective when seeking to explain the failure of international law to move forward in the ways that its advocates hoped it would. The continued failure to attain an international terrorism convention in the 1990s indicates that this parallel dynamic extended well past the collapse of the Soviet Union and into what the first President Bush dubbed the New World Order. This, as well as the dynamics of this dissensus in the post-September 11 world of the Second President Bush is something I've only just started to explore, but ought to make for an interesting examination of lines of continuity and rupture in the post-colonial world.