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# *Rebel with a Cause? Terrorists and Humanitarian Law*

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## **Abstract**

*This article suggests that international law has great difficulty in deciding whether terrorists should be treated as ordinary criminals or as political actors. This ambivalence is visible in treaties on the law of war, as well as in instruments dealing more straightforwardly with terrorism, and is traceable (at least in part) to an ambivalence about politics in general. Still, even if the law does not give clear-cut answers, there are sound reasons for treating terrorists in a humane manner.*

## **1 Introduction**

Almost four centuries ago in Holland, in August of the year 1618, a young man, then in his mid-thirties, was captured by the Dutch authorities. In May the following year he was convicted and sent to prison for life,<sup>1</sup> or perhaps even for eternity.<sup>2</sup> While he never, as far as I am aware, employed violent means, the Dutch authorities would most likely have labelled him a 'terrorist' if the word had been coined by then, for he disagreed with the authorities on a fundamental issue of religion.

Our young man was, of course, Hugo de Groot, better known abroad as Grotius. Having escaped from prison in an adventure that all Dutch schoolchildren know about, Grotius would later acquire fame as the father of international law. Indeed, for a long time, his name was a byword for sensible idealism:<sup>3</sup> he served as a 'well-spring of faith in the law as it ought to be',<sup>4</sup> as Hersch Lauterpacht once put it, for 'the teaching of Grotius has become identified with the progression of international law to

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<sup>1</sup> Thus the introduction by A. Eyffinger and B. Vermeulen to their edition of H. de Groot, *Denken over oorlog en vrede* (1991), at 12.

<sup>2</sup> See W. J. M. van Eysinga, *Huigh de Groot: een schets* (1945), at 71.

<sup>3</sup> In colourful language, the sentiment is voiced at the close of the First World War by van Vollenhoven: 'The international law of Grotius has reached the door, and it is knocking. For 300 years they have let it knock. Now it overwhelms us. The key has not yet been turned, but the bolts have already been removed.' See C. van Vollenhoven, *De drie treden van het volkenrecht* (1918), at 89 (author's translation).

<sup>4</sup> Lauterpacht, 'The Grotian Tradition in International Law', 23 *BYbIL* (1946) 1, at 51.

a true system of law both in its legal and in its ethical content'.<sup>5</sup> And less than a decade ago, Boutros Boutros-Ghali hypothesized that international law had reached a 'Grotian moment', a moment for building a new international system.<sup>6</sup>

Those days are gone. Today, we no longer speak of Grotian moments, but instead of 'constitutional' moments.<sup>7</sup> The Grotian tradition, in turn, has become a byword for conservatism,<sup>8</sup> shorthand for sensible idealism; as a guide to the way in which international law is developing, it has been replaced by a 'Kantian theory',<sup>9</sup> which, ironically perhaps, may not have all that much to do with Kant.<sup>10</sup>

The stories of Grotius and of the *Werdegang* of Grotianism are instructive in that they symbolize the troubled nature of the relationship between international law and terrorism. Grotius' own fate may well be seen as one more example, along with, say, Spartacus or the Bostonians of the tea party, of the old adage that today's terrorist is tomorrow's freedom fighter.

The *Werdegang* of Grotianism, in turn, suggests that our judgments are bound to be contextual: what seemed a good idea in a world characterized by division, characterized by more or less rigid sovereignties and a budding Cold War, may have lost some of its appeal now that we all secretly believe that Fukuyama had a point after all,<sup>11</sup> and now that most of our political debates are internecine debates between adherents of the same faith of human rights, the rule of law, the market economy and democracy.

Part of the reason for international law's troubled relationship with terrorism resides, no doubt, in the state-centric nature of international law: the system has problems incorporating even such relatively unproblematic entities as international organizations<sup>12</sup> and individuals.<sup>13</sup> Part of the reason for our difficulties with terrorism resides also, no doubt, in the adage just referred to: today's terrorist is tomorrow's

<sup>5</sup> *Ibid.*, at 19.

<sup>6</sup> See Boutros-Ghali, 'A Grotian Moment', 18 *Fordham International Law Journal* (1995) 1609.

<sup>7</sup> See Slaughter and Burke-White, 'An International Constitutional Moment', 43 *Harvard International Law Journal* (2002) 1.

<sup>8</sup> This is arguably a position that political scientists occupied before lawyers did. Compare H. Bull, *The Anarchical Society* (1977), at 244–245, outlining the differences between a Grotian order and an order which presumes the victory of a single ideology, such as the Kantian order.

<sup>9</sup> See Mégret, 'Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law', 12 *EJIL* (2001) 247.

<sup>10</sup> One of its more extreme proponents seems to concede as much when he notes that his reading of Kant involves some reconstruction so as 'to achieve the philosophically favored result': see F. R. Tesón, *A Philosophy of International Law* (1998), at 27, n. 9.

<sup>11</sup> See F. Fukuyama, *The End of History and the Last Man* (1992). See also T. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (1999).

<sup>12</sup> See, e.g., Brölmann, 'A Flat Earth? International Organizations in the System of International Law', 70 *Nordic Journal of International Law* (2001) 319. See more generally J. Klabbers, *An Introduction to International Institutional Law* (2002).

<sup>13</sup> See Klabbers, 'The Spectre of International Criminal Justice: Third States and the ICC', in A. Zimmermann (ed.), *International Criminal Law and the Current Development of Public International Law* (2003).

freedom fighter. Contexts of judgment, after all, can and do change. This is, however, not the entire story.

Humanitarian law is often thought to be silent when the weapons speak: *inter arma silent leges*. This cannot simply be attributed, as standard realism would probably have it, to the sheer supremacy of politics over law. Instead, the silence (or, more accurately, inconclusiveness) of the law, at least on the question whether humanitarian law applies to terrorism, is caused by our fundamental ambivalence about terrorism; and this ambivalence about terrorism, in turn, owes much to an underlying ambivalence about the nature of politics.

In the following, I will first look at how humanitarian law generally deals with non-state actors (which will include what we might refer to as terrorists).<sup>14</sup> Subsequently, I will briefly address some legal instruments that are more or less directly related to terrorism, and trace the ambivalence which characterizes at least the post-Second World War instruments by discussing our concept of politics. I will conclude by sketching some possible implications for our treatment of terrorists.

## 2 Terrorism in Humanitarian Law

When designing instruments of humanitarian law, drafters are invariably faced with a dilemma: How to treat those who are not members of the regular armed forces, but are, for instance, resistance troops, guerrillas or terrorists? How to treat, in other words, the 'unprivileged belligerent'?<sup>15</sup> One option is to assimilate such persons in some way with those who fight in the name of the state. This, however, does not appear to be totally desirable, for it rules out the possibility of brandishing terrorists or guerrilla fighters as criminal. Moreover, it rules out the possibility of applying domestic law to them, and instead would trigger the application of international rules which would, in all probability, offer more protection to the suspects than would domestic criminal law. Indeed, it would elevate each and every conflict to the level of international conflict, making it ever so much easier for foreign states to intervene and for the state concerned to be subjected to the scrutiny of international public opinion.

Not surprisingly then, there is a certain attraction to the second means of dealing with non-state fighters, and that is to label them simply as common criminals. This too, however, is not without its pitfalls, many of which are the opposite to those brought about by defining non-state fighters as recognized fighters. But, in addition, there remains a nagging concern that guerrilla fighters, resistance fighters, and even terrorists are not simply common criminals.

Our regular categories of criminal law have trouble containing terrorism and armed conflict. For one thing, our criminal categories are better suited to dealing with individual acts than with the group elements that usually characterize armed conflict

<sup>14</sup> A question I will not address is whether terrorism is outlawed in humanitarian law. On this, see, e.g., Guillaume, 'Terrorisme et Droit International', 215 *RdC* (1989-II) 287, esp. at 377–380.

<sup>15</sup> The term is used by, e.g., J. Stone, *Legal Controls of International Conflict* (1954), esp. at 562–570.

as well as terrorism.<sup>16</sup> Additionally, there is in the end something rather unsavoury about subjecting political adversaries to criminal law: that may be what dictators and tyrants do,<sup>17</sup> but it is far from commendable.

Moreover, in complex social events, as Judith Shklar has pointed out,<sup>18</sup> there is often quite simply no such thing as *mens rea*.<sup>19</sup> And such *mens rea* as there is, is not inspired by profit motives, or private revenge, but usually by some form of public ideal, however perverted. This is precisely why today's terrorist can become tomorrow's freedom fighter, and this is precisely why Antonio Gramsci and Che Guevara have become romantic icons: there was a political dimension to their acts.<sup>20</sup> Teenagers would have a hard time justifying posters of Ted Bundy on their wall; but the portrait of Che Guevara has graced many an adolescent's room.

We are caught, then, between two urges: either to treat irregular fighters as if they were regular fighters, or to treat them as common criminals. The Lieber Instructions of 1863 relentlessly opted for the second possibility: men or squads of men fighting 'without commission' were not to be considered as 'public enemies' but, instead, were to be 'treated summarily as highway robbers or pirates'.<sup>21</sup> This came at a price though: even those rising against the occupying forces were not to be considered as prisoners of war. Instead, resistance forces were to be regarded as 'war-rebels' who 'may suffer death'.<sup>22</sup> Thus, while Lieber's injunctions were clear and simple to apply, they were over-inclusive: Lieber simply refused to distinguish between just and unjust causes.

The 1874 Brussels Project of an International Declaration Concerning the Laws and Customs of War, on the other hand, took the opposite position. It was perfectly willing to include resistance troops among recognized belligerents as long as they respected the laws and customs of war.<sup>23</sup> Indeed, even non-combatants could, so it was acknowledged, form part of the armed forces, and ought to be treated as prisoners of war.<sup>24</sup> These provisions then were also over-inclusive, but from the other extreme. They were so broadly worded that common criminals were also to be covered by them. Again, then, the drafters refused to distinguish between just and unjust causes. Other instruments adopted in the late nineteenth and early twentieth centuries would

<sup>16</sup> See, e.g., Brants, 'Dealing with the Holocaust and Collaboration: The Dutch Experience of Criminal Justice and Accountability after World War II', 34 *Crime, Law & Social Change* (2000) 211.

<sup>17</sup> Van den Wijngaert makes the telling observation that totalitarian regimes 'usually consider political offenders as the most dangerous among all criminals'. See C. van den Wijngaert, *The Political Offence Exception to Extradition* (1980), at 101.

<sup>18</sup> See J. Shklar, *Legalism: Law, Morals, and Political Trials* (rev. ed., 1986), at 172.

<sup>19</sup> As much is recognized by the so-called 'incidence theory' of political crimes that is applied in extradition proceedings: to establish whether or not a crime can be labelled political, courts do not look at *mens rea* but at whether or not the crime was incidental to a more general political disturbance. For a sustained and critical discussion, see Van den Wijngaert, *supra* note 17, at 111–120.

<sup>20</sup> On the political dimension, see more generally Koskenniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of United Nations Law* (2002).

<sup>21</sup> Lieber Instructions, Article 82. For the text, see D. Schindler and J. Toman (eds), *The Laws of Armed Conflict* (2nd ed., 1981), no. 1.

<sup>22</sup> *Ibid.*, Article 85.

<sup>23</sup> Brussels Project, Article 10. Reproduced in Schindler and Toman, *supra* note 21, no. 2.

<sup>24</sup> *Ibid.*, Article 11.

follow the pattern set by the Brussels Conference, and provide a generous grant of applicability of their provisions.<sup>25</sup>

This was to change after the Second World War, perhaps in a belated recognition of fundamental ideological differences. The 1949 Geneva Conventions and its Additional Protocols do not aspire to either legitimacy or rigidity, but instead aim to combine the two: they waver between classifying non-state fighters as lawful combatants on the one hand, and as common criminals on the other hand. This became clearest with the drafting of Common Article 3,<sup>26</sup> which, after all, aims to offer some protection in the face of domestic law.<sup>27</sup> Here, while governments saw the need to provide protection for unprivileged belligerents, they nonetheless were naturally inclined to regard them as '*vulgaires criminels*'.<sup>28</sup>

There is a second, and related, way in which Common Article 3 of the Geneva Conventions has an impact on unprivileged belligerents. The final sentence provides that the application of Common Article 3 'shall not affect the legal status of the Parties to the conflict'. This was, according to the *Commentaire*, '*essentielle*': without this final sentence, no Common Article 3 would have come into existence.<sup>29</sup>

Yet, the point of the final sentence of Common Article 3 is the opposite of that which Common Article 3 itself stands for. While Article 3 is intended to ensure that insurgents shall have some special status, the final sentence unequivocally rejects this special status. Indeed, the *Commentaire*, slightly naively perhaps, underlines that the final sentence makes clear that Article 3 does not touch on the internal affairs of states, and does not in any way limit a state's right to repress a rebellion by all possible means, including the use of force. Indeed, so the *Commentaire* concludes, it does not in any way affect the right of the state to prosecute, adjudge and condemn its adversaries for their crimes, in accordance with its own law.<sup>30</sup>

Thus, the law has a hard time making up its mind as to how to deal with insurgents, and vacillates between treating them as combatants and as common criminals.<sup>31</sup> Small wonder then that scholars too are divided on the topic, with some advocating the position that an unrecognized insurgency would at least remain an internal affair and thus leave the police free to act, and others upholding the more liberal position that particularly if the insurgency has attained serious proportions, the insurgents

<sup>25</sup> So, e.g., the 1880 Oxford Manual and the 1899 and 1907 Hague Conventions on Land Warfare, reproduced in Schindler and Toman, *supra* note 21, nos. 3, 4 and 5.

<sup>26</sup> The Geneva Conventions are reproduced in Schindler and Toman, *supra* note 21, nos. 41–44.

<sup>27</sup> For an insightful discussion of the drafting of Common Article 3, see G. Best, *War and Law since 1945* (1994), at 168–179.

<sup>28</sup> See J. Pictet (ed.), *Commentaire sur la Première Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne* (1952), at 42.

<sup>29</sup> *Ibid.*, at 64.

<sup>30</sup> *Ibid.*, at 65: '*... il ne limite en aucune manière son droit de réprimer une rébellion par tous les moyens — usage des armes compris — que sa propre loi lui fournit; il n'affecte en rien son droit de poursuivre, de juger et de condamner ses adversaires, conformément à sa propre loi, pour leurs crimes.*'

<sup>31</sup> As Ed Morgan succinctly puts it, terrorism 'is both crime and politics, and is culpable on both accounts'. See Morgan, 'International Law's Literature of Terror', 15 *Canadian Journal of Law & Jurisprudence* (2002) 317, at 324.

should not be treated as mere common criminals.<sup>32</sup> And at any rate, there is consensus among academic writers that Common Article 3 is, so to speak, under-applied.<sup>33</sup>

The same pattern of vacillation between a conception of insurgents as lawful combatants and insurgents as common criminals is displayed by the drafting history of the two Additional Protocols of 1977. Protocol I expands the protection offered by international humanitarian law to situations ‘in which peoples are fighting against colonial domination or alien occupation and against racist régimes’,<sup>34</sup> while Protocol II deals entirely with armed conflicts not involving two states.

The drafters of Protocol I also grappled with the problem of classification: When is a liberation fighter truly a liberation fighter, and when a mere ordinary criminal? While this question gave rise to heated debates at the Geneva Conference, the Conference, understandably, failed to provide a reliable line of demarcation.<sup>35</sup> In the end, as the *Commentary* has it, whether or not the Protocol applies to a given situation is ‘merely a question of common sense’<sup>36</sup> or, as more cynically inclined observers might put it, open to manipulation.

At any rate, the states responsible for the final text made sure they left themselves a lot of leeway. In a move that was destined to echo the inclusion of the final sentence of Common Article 3 of the four Geneva Conventions of 1949, Article 4 of Protocol I specifies that the application of international humanitarian law ‘shall not affect the legal status of the Parties to the conflict’.

Protocol II aims to deal in particular with non-international conflicts.<sup>37</sup> Obviously, the demarcation issue arose again during the negotiations, and while again no entirely reliable demarcation line was drawn, Article 1(1) establishes a high threshold. For Protocol II to apply, non-state entities must exercise control over part of the territory in such a way that they can engage in military operations and, not unimportantly, implement the Protocol.<sup>38</sup>

Additionally, Article 1(2) provides the necessary room for manoeuvre for states by providing that the Protocol ‘shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts’. The question then is twofold: How to draw the line? And, who gets to draw it? The most immediate answer will have to be that the

<sup>32</sup> See E. Castrén, *Civil War* (1966), at 97–98 (with references).

<sup>33</sup> See, e.g., T. Meron, *Human Rights in Internal Strife: Their International Protection* (1987), at 43; Aldrich, ‘The Laws of War on Land’, 94 *AJIL* (2000) 42, at 59.

<sup>34</sup> Article 1, para. 4, Protocol I. For the text, see Schindler and Toman, *supra* note 21, no. 48.

<sup>35</sup> For a particularly critical analysis, see Aldrich, *supra* note 33, at 45.

<sup>36</sup> See Y. Sandoz et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at 56.

<sup>37</sup> For a general analysis, see Cassese, ‘The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts’, 30 *ICLQ* (1981) 416.

<sup>38</sup> For critical comments see Meron, *supra* note 33, at 47.

state concerned shall make this determination in accordance with its own insights.<sup>39</sup> While the *Commentary* to Protocol II speaks, perhaps somewhat despairingly, of objective criteria, noting that ‘application should not depend on the discretionary judgment of the parties’,<sup>40</sup> it would nonetheless seem that the ball is still in the state’s court: it is the state which can decide whether it is engaged in a domestic armed conflict or whether it is simply dealing with random criminals. Indeed, extremely telling is the fact that during the Conference leading to Protocol II, the initial draft text to emerge from the various committees appeared unacceptable, and needed a clean-up operation. As it turned out, the main obstacles to adoption were removed: ‘all the elements considered to contain any possibility at all of being interpreted in the sense of a recognition of insurgent parties were deleted’.<sup>41</sup>

And to dispel any remaining doubts, Article 3(1) states that the Protocol shall not affect the government’s responsibility to maintain or re-establish law and order, or to defend national unity and territorial integrity. In other words, this provision goes a long way towards retaining the government’s right to classify freedom fighters as criminals. While there is a limit (in that the provision allows the use of only legitimate means to uphold law and order), that limit is eminently flexible.

### 3 Anti-terrorism Instruments

Instruments dealing specifically with terrorism display much the same characteristics as humanitarian instruments, and the normative guidance they offer is equally limited. The same political difficulty of distinguishing good from bad dominates anti-terrorism instruments.

This was not yet the case with the 1937 Convention for the Prevention and Punishment of Terrorism.<sup>42</sup> This instrument, however, limited terrorism to acts done against a state, and while in one sense probably all terrorism is directed against a state, in another sense few terrorist attacks are actually directed against a state. At the very least, the criterion of being directed against a state offers avenues for creative argument: one could have lengthy discussions on whether the Lockerbie attack, the Achille Lauro affair, or even the attack on the World Trade Center would come within the scope of the Convention. This would mean that the application of the Convention could never be a foregone conclusion: one would always first have to settle whether a certain act was indeed directed against a state.

With more recent instruments, however, the dilemma shows itself in full force. One

<sup>39</sup> See also the critical comments of Sahovic, ‘Rapport Provisoire sur l’application de droit international, notamment humanitaire, dans les conflits armés auxquels prennent part des entités non-étatiques’, in 68 *Annuaire de l’Institut de Droit International* (1999/I) 288, at 296.

<sup>40</sup> Sandoz, *supra* note 36, at 1351. During the preparatory discussions, some experts felt that it should be left to the government to decide when the protocol would be applicable. While this sentiment did not pass into the Protocol, it is nonetheless telling. See *ibid.*, at 1331.

<sup>41</sup> *Ibid.*, at 1335.

<sup>42</sup> Reproduced in M. O. Hudson (ed.), *International Legislation*, vol. VII (1972 (1941)) 862. It never entered into force.

example is the European Convention on the Suppression of Terrorism.<sup>43</sup> This Convention neatly illustrates the political problem of fighting terrorism: its opening article (and its main provision) provides that certain terrorist activities shall not be regarded as ‘political offences’ for extradition purposes. Clearly, the idea is to deactivate political considerations, and to treat terrorists as common criminals.<sup>44</sup>

However, this tactic of ‘depoliticization’ was not pursued with consistency, as Article 5 of the same Convention reintroduces political considerations: if the extradition request is politically motivated, then the requested state shall have no obligation to extradite. While Article 1 does away with politics, Article 5 reintroduces politics. While it is true that for Article 5 it is the politics of the requesting state that matters rather than those of the terrorist, it is nonetheless not too difficult to establish a connection between the two, at least on the basis of the ‘terrorist-as-political-actor theory’: a request for extradition of a terrorist is by definition politically motivated precisely because the terrorist is a political actor. While Article 1 aims to fit terrorism into the mould of common crime, Article 5 recognizes that persons may be persecuted on account of their political opinion.

Again, then, the familiar pattern recurs: a vacillation between a conception of terrorists as common criminals<sup>45</sup> and of terrorists as political actors. The current attempts to come to a ‘Comprehensive Convention’ on terrorism are no exception. Article 2 of the draft Convention, so far still in the guise of an ‘informal text’, veers toward simple criminalization: the Convention aims to encompass anyone who unlawfully and intentionally causes death or serious bodily injury, or contributes thereto.<sup>46</sup> Yet, draft Article 18, in various forms and guises, makes clear that, at least notionally, this should not apply to the behaviour of armed forces during an armed conflict or even otherwise in the exercise of official duties.<sup>47</sup> Indeed, it shall not affect rights, obligations and responsibilities under international law, particularly the UN Charter, and this raises the possibility of violence in the service of self-determination being excluded from allegations of terrorism.

The Draft Comprehensive Convention follows the pattern of the 1998 Terrorist Bombings Convention,<sup>48</sup> which also explicitly rules out, in Article 19, that the activities of armed forces during armed conflict or the public activities of military forces shall be construed as terrorism. The Convention at first sight looks very determined to treat terrorists as common criminals. There is a broad definition of

<sup>43</sup> Reproduced in R. Higgins and M. Flory (eds), *Terrorism and International Law* (1997) 306.

<sup>44</sup> For a critical discussion decrying the ‘depoliticization’ approach as illogical and without sound legal foundation, see Van den Wijngaert, *supra* note 17, at 134–135.

<sup>45</sup> The terrorist-as-criminal approach strongly underlies Sofaer, ‘Terrorism and the Law’, 64 *Foreign Affairs* (1986) 901. For critical discussion, see T. Franck, *The Power of Legitimacy among Nations* (1990), at 69–73.

<sup>46</sup> See the Report of the Ad Hoc Committee established by GA Res. 51/210 of 17 December 1996 (Sixth Session, 28 January–1 February 2002), UN Doc. A/57/37.

<sup>47</sup> *Ibid.*, annex 4, which lists a draft circulated by the Coordinator and one emerging from the Organization of the Islamic Conference, the latter of which more specifically excludes behaviour of non-state actors also during foreign occupation: a none-too-subtle reminder of the Intifada.

<sup>48</sup> Text in 37 *ILM* (1998) 249. The Convention entered into force in 2001.



terrorism laid down in Article 2; Article 5 underlines that no justifications are acceptable, and Article 11 defuses the political offence exception: activities prohibited in the Convention shall not be construed as political offences for the purposes of extradition law. However, the exclusion of armed forces from the scope of the Convention seriously softens the blow. In fact, it does so to such an extent that the US State Department thought it wise to add the understanding that it could still treat at least some acts done by armed forces as terrorism, should circumstances so demand.<sup>49</sup>

Perhaps it is only possible to overcome our ambivalence and come to a more uniform approach in the wake of concrete, large-scale terrorist attacks, such as the events of September 11, 2001. Most observers seem to agree that those attacks are quite simply criminal, and cannot be justified. This, at least, is the gist of the initial attitudes in the Security Council<sup>50</sup> as well as of academic commentary,<sup>51</sup> and also transpires from the strong and at times perhaps over-inclusive wording of Security Council Resolution 1373 (2001).<sup>52</sup> Yet even this resolution cannot help but incorporate a more political conception, however tiny perhaps: it recognizes the possibility that some suspected terrorists may perhaps legitimately apply for refugee status or legitimately apply not to be extradited.<sup>53</sup> The criminalization of terrorism has not been (and cannot be) complete; in the corners of the minds of the members of the Security Council, even at their most gung-ho, there is still a tiny voice whispering that not all violence is by definition criminal because, after all, violence can be used for the noblest of purposes.<sup>54</sup> It is perhaps for this reason that many have given up on defining terrorism in any comprehensive fashion: a senior member of the International Court of Justice wrote a few years ago, in a blend of relief and resignation, that terrorism was, ultimately, a term 'without legal significance'.<sup>55</sup>

Regardless of whether terrorism is a term without legal significance, most attempts at defining it have seized on one central element: the terrorist, typically, acts out of some form of political inspiration. This political element facilitates a curious symbiosis between the terrorist and the political authorities on the other side of the fence, in two ways: both the terrorist and the authorities have an interest both in playing down the

<sup>49</sup> See the testimony of State Department Legal Adviser William H. Taft IV to the Senate, reproduced in 96 *AJIL* (2002), at 256–257.

<sup>50</sup> See UN Doc S/2001/864 of 13 September 2001. And even so, Cuba could not resist a little dig at the US, claiming that Cuba had been subjected to terrorist attacks from US territory. *Ibid.*, annex IV.

<sup>51</sup> For Cassese, e.g., the question is whether they qualify as international rather than domestic crimes. See Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', 12 *EJIL* (2001) 993. Others put terrorism on a par with piracy and slave trade: see Koh, 'The Spirit of the Laws', 43 *Harvard International Law Journal* (2002) 23, at 32.

<sup>52</sup> SC Res. 1373, 28 September 2001.

<sup>53</sup> Article 3(g). See more generally on terrorism and refugee law (and extradition), Kälén and Kunzli, 'Article 1F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes', 12 *International Journal of Refugee Law* (2000, Special Supplementary Issue) 46.

<sup>54</sup> As Lambert notes, the impossibility of defining terrorism 'reflects an ideological split on the permissible uses of violence'. See J. Lambert, *Terrorism and Hostages in International Law* (1990), at 30.

<sup>55</sup> Higgins, 'The General International Law of Terrorism', in Higgins and Flory, *supra* note 43, 13, at 28.

political element and in blowing it up; therewith, terrorists ultimately reinforce the state, and the state ends up reinforcing terrorists.<sup>56</sup>

The terrorist, we may presume, has an interest in playing down her terrorism in the sense that it is most likely that, if treated as an ordinary criminal, the search for her may be less intense, and if captured and tried, perhaps punishment may be somewhat less severe. On the other hand, the terrorist also has a clear interest in seeing herself recognized as a terrorist, because only recognition as a terrorist brings her political sympathies to the fore.

State authorities share this ambivalence, partly for mirroring reasons. Thus, for the state, it may be attractive to play down the political element because treating a would-be terrorist as a common criminal takes away her public platform: it denies a voice to precisely those political sentiments which inspired the act to begin with. Moreover, treating terrorism as a common crime means that the acts can remain an internal affair; the terrorist acts are not elevated to international status with all that that entails.

Yet, this comes at a price, for treating the terrorist as a common criminal means that the search can only be relatively low-key. Surely, one does not throw bombs on other nations to find a common criminal: the language of terrorism is necessary in order to justify a large-scale response. It is not just the case, as Rosalyn Higgins once suggested, that to label behaviour as terrorism is a useful method to indicate 'community condemnation';<sup>57</sup> it is, in fact, a useful way of mobilizing community resources. Ultimately, then, the terrorist and the state depend on each other in an uncomfortable way,<sup>58</sup> and this too renders it difficult to create effective legal instruments.

## 4 Politics of Terror/Terror of Politics

The ambivalence of our legal instruments when it comes to terrorists or others who fight for a cause but not in the name of an existing state does, of course, not come out of the blue. Instead, it reflects a deeply felt ambivalence in our thinking about politics more generally.

On the one hand, we loathe politics. To do something for political motives is to act, somehow, inauthentically.<sup>59</sup> To join a political movement is an activity that is sometimes frowned upon, and people who opt for a career in politics are, we tend to

<sup>56</sup> See also Hoffmann, 'Clash of Globalizations', 81 *Foreign Affairs* (2002) 104, at 113.

<sup>57</sup> Higgins, *supra* note 55, at 28.

<sup>58</sup> Porras makes a related point when noticing that Western democracies define themselves partly in response to terrorism. Porras, 'On Terrorism: Reflections on Violence and the Outlaw', *Utah Law Review* (1994) 119.

<sup>59</sup> Note also the way Sir Arthur Watts associates political behaviour with holding a party function; otherwise, heads of state are, to his mind, not engaged in politics. The attitude betrays a conviction of politics as a not quite respectable activity. See Watts, 'The Legal Position of Heads of State, Heads of Government and Foreign Ministers', 247 *RdC* (1994-III) 9, at 45.

think, not very trustworthy: they should get a real job instead.<sup>60</sup> In short, politics has, in part, a bad reputation.

Yet, there is also something admirable about political behaviour. We may not admire professional politicians, but we do admire our neighbour who sacrifices her free time in order to attend town council meetings, or who organizes postcard writing evenings for Amnesty International. Indeed, the mere fact that Amnesty International campaigns for decent treatment of political prisoners tells us something: being locked up for one's political beliefs somehow evokes different and greater sympathies than being locked up for having committed common crimes.

This ambivalence itself finds its cause in two related factors. On the one hand, it may be seen that almost all Western political thought since ancient Greece is geared towards thinking of politics in instrumental or teleological terms.<sup>61</sup> Politics, so we think, is a means to an end. The end can be justice, or peace, or fairness, or the rule of law, or even more subtly, in modern discourse politics, simply the reaching of agreement, but whichever the end, politics is the way to get there. It is no coincidence that all great ideologies carry a promise of the end of politics: politics is the way towards some ultimate destination. Politics is the means to whichever ends we may wish to pursue.<sup>62</sup>

On the other hand, and closely related, we vaguely realize that we cannot really be sure which ends we should prefer. Much of Western political philosophy suggests that we are in fundamental disagreement on what constitutes the good life,<sup>63</sup> on what constitutes justice or fairness, or what the rule of law should look like.<sup>64</sup> In those circumstances, we cannot find fault with people for their political beliefs, and when people are faulted for their political beliefs we immediately respond by saying that their freedom of thought and expression are being curtailed and, indeed, that politics is being made impossible.

Our alternative then is usually to blame people not for the ends they aspire to, but for the means they employ. This, however, does not get us very far, as condemnation of the means must bow to approval of the ends. True belief in the righteousness of a cause implies that the ends do indeed justify the means, and that this is in the end the only plausible attitude when confronted with idealism (however perverted): anything less implies giving up on ideals, and that implies, in turn, giving up on ourselves.

Hence, we need to leave an escape route whenever we are drafting instruments on terrorism or irregular armed conflict. We need to make sure that there is always a justification to fit ideas and ideals, and not just for our own sake but for the sake of idealism and its role in politics as such.

<sup>60</sup> And trustworthiness has become a serious issue: we tend to judge politicians on their character rather than their programmes and actions (Clinton may have been an exception). For a critical analysis, see R. Sennett, *The Fall of Public Man* (1992 (republ. 1977)).

<sup>61</sup> See generally G. Sabine and T. Thorson, *A History of Political Theory* (4th ed., 1973).

<sup>62</sup> A fine brief discussion in Dutch can be found in B. Tromp, *Het einde van de politiek?* (1990).

<sup>63</sup> For a classic statement, see A. MacIntyre, *After Virtue: A Study in Moral Theory* (2nd ed., 1985).

<sup>64</sup> For a recent appraisal of the political nature of the rule of law, see M. Loughlin, *Swords & Scales: An Examination of the Relationship between Law & Politics* (2000).

Probably the leading exception to the teleological tradition resides in the work of the German-born political theorist Hannah Arendt.<sup>65</sup> For Arendt, the only form of politics which would be devoid of totalitarian elements would be a highly formal politics which would be its own end: politics for the sake of politics.<sup>66</sup> To her, mankind would be at its best in a public realm which would be concerned first and foremost with its own organization, on the basis of an acceptance of the inevitable plurality of human existence. According to Arendt, then, there would be nothing specifically goal-oriented about politics: politics would not be a means to an end, but an end in itself.<sup>67</sup> Perhaps such a conception would enable us to come to terms with terrorism: it would allow us to judge people on the quality of their behaviour, divorced from the goals they aim to pursue and the possible legitimacy of those goals.<sup>68</sup>

## 5 Concluding Remarks

The chances of Arendt's conception of politics replacing our more current teleological conception appear slim. It is perhaps inevitable that we generally think teleologically and, so to speak, prefer substance over form, in particular (but not exclusively) when it concerns our own preferred substance.<sup>69</sup> While we realize that we cannot always impose our ideas on others, the temptation to do so is nonetheless difficult to resist. Yet, with this comes the realization that today's majority may be tomorrow's minority or, indeed, that today's terrorist may be tomorrow's freedom fighter. Our teleological orientation necessitates the very ambivalence of the law on this point, and means that the law does not have a clear-cut answer to the question whether international humanitarian law should protect terrorists.

Still, the silence of the law is not absolute, and there is always prudence and enlightened self-interest to fall back on. Both of these would seem to dictate that one might as well afford terrorists the protection of humanitarian law. The main thing distinguishing the terrorist from the lawful combatant is that the terrorist, as a rule, is not fighting in the name of any existing state; surely this is too flimsy a ground for non-application of humanitarian law, in particular if the humanitarian mission of

<sup>65</sup> My reading of Arendt on this point owes much to D. Villa, *Arendt and Heidegger: The Fate of the Political* (1996). Among present-day theorists, perhaps Taylor (on occasion) and Barber come closest to the Arendtian position. See, e.g., C. Taylor, *The Ethics of Authenticity* (1991), or B. Barber, *The Conquest of Politics: Liberal Philosophy in Democratic Times* (1988).

<sup>66</sup> For a sustained argument that also liberalism carries the seeds of totalitarianism in it, see M. Halberstam, *Totalitarianism & the Modern Conception of Politics* (1999).

<sup>67</sup> Echoes hereof can be heard in Koskenniemi's plea for a culture of formalism, although it is uncertain to what extent Koskenniemi would sign up to Arendt's non-teleological politics altogether. See M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002), at 494–509.

<sup>68</sup> If this sounds a bit *Weltfremd*, it may be useful to realize that, for many, human rights work on the similar premise of decontextualizing behaviour from the goals the behaviour is supposed to serve: no matter the goal, torture is torture. Ironically, however, human rights have themselves become a goal, indeed a 'second reformation', as Bauman puts it. See Z. Bauman, *In Search of Politics* (1999), at 157.

<sup>69</sup> Form, by contrast, is usually invoked against other people's designs. For an insightful discussion, see R. M. Unger, *Law in Modern Society* (1976), at 203–216.

humanitarian law is taken into account.<sup>70</sup> The International Court of Justice, in its *Nuclear Weapons* opinion, underlined this humanizing mission when it seemed to ground much of humanitarian law in ‘respect for the human person’ and, echoing its famous *Corfu Channel* dictum, in ‘elementary considerations of humanity’.<sup>71</sup> Hence, one should not go around mistreating people for the sole reason that they fight under the banner of an entity of a different form than the dominant one of the state, all other things remaining equal.

A similar imperative emerges from recent instruments on terrorism, such as the 1998 Terrorist Bombings Convention. While this does not instruct parties to apply humanitarian law, at least it specifies that terrorists or suspected terrorists be treated fairly and be treated on the basis of a national standard which includes international human rights law.<sup>72</sup> Again, then, decent treatment is what matters.<sup>73</sup>

Indeed, the very proclamation by a state that it is engaged in a war against terrorism or against certain specified terrorist networks,<sup>74</sup> invoking the right of self-defence and relying on the seeming acquiescence of the world community in this conceptualization, would seem to imply the applicability of humanitarian law.<sup>75</sup> One cannot, after all, claim to be engaged in warfare, yet also claim to be entitled to ignore the applicable rules;<sup>76</sup> one cannot, as the saying goes, blow hot and cold.<sup>77</sup>

And at any rate, it is difficult to think of a good reason to deny terrorists the protection offered by humanitarian law. The main argument would doubtless be something based on reciprocity:<sup>78</sup> terrorists disregard human life, so they have forfeited the right to be treated decently.<sup>79</sup> This argument, however, would be difficult to reconcile with, again, the humanizing mission of humanitarian law, and has

<sup>70</sup> See, e.g., J. Pictet, *Humanitarian Law and the Protection of War Victims* (1975), at 11, holding that humanitarian law consists of moral and humanitarian considerations transposed into legal provisions.

<sup>71</sup> *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996) 226, para. 79.

<sup>72</sup> *Supra* note 48, Article 14.

<sup>73</sup> The same spirit oozes from Special Rapporteur Kalliopi Koufa’s Second Progress Report on Terrorism and Human Rights, UN Doc. E/CN.4/Sub.2/2002/35, of 17 July 2002.

<sup>74</sup> Compare the characterization by Fitzpatrick, ‘Jurisdiction of Military Commissions and the Ambiguous War on Terrorism’, 96 *AJIL* (2002) 345, at 348, holding that the US administration seeks ‘to fight a “war” with essentially no rules’.

<sup>75</sup> It might have more structural implications as well. See Mégret, ‘“War”? Legal Semantics and the Move to Violence’, 13 *EJIL* (2002) 361.

<sup>76</sup> Mundis, ‘The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts’, 96 *AJIL* (2002) 320, at 325, reports that President Bush has decided that Geneva Convention No. 3 does not apply to members of Al Qaeda.

<sup>77</sup> The same idea seems to underlie Wedgwood, ‘Al Qaeda, Terrorism, and Military Commissions’, 96 *AJIL* (2002) 328.

<sup>78</sup> Perhaps it is useful to remember that reciprocity arguments were positively defeated already during the drafting of Common Article 3 of the 1949 Geneva Conventions. See Best, *supra* note 27, esp. at 170.

<sup>79</sup> Related is the idea that no one should benefit from their own unlawful act (*ex inuria ius non oritur*). For a discussion hereof in the context of humanitarian law, see Greenwood, ‘International Humanitarian Law (Laws of War): Revised Report for the Centennial Commemoration of the First Hague Peace Conference 1899’, in F. Kalshoven (ed.), *The Centennial of the First International Peace Conference: Reports and Conclusions* (2000) 161, at 176–178.

effectively been left outside humanitarian law since the *si omnes* clause died a well-deserved death.

In the end, then, this type of reasoning by default brings us back to Grotius,<sup>80</sup> whose point of view on the topic is admirably summarized by Geoffrey Best: ‘Rulers and commanders may respect the non-combatant because there are no practical military reasons why they should not do so and because there are good religious and ethical reasons why they should.’<sup>81</sup> And given what Grotius came to represent after his imprisonment, perhaps there is every reason not to take any overly drastic measures, not even against terrorists.

<sup>80</sup> See *supra* note 1, esp. Book III.

<sup>81</sup> Best, *supra* note 27, at 26.