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POLITICALLY MOTIVATED VIOLENCE AND ACTS OF TERROR: CONCEPTUAL AND LEGAL ISSUES

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INTRODUCTION

1. Within the overall framework of the Council meeting theme of political violence this paper will strive at answering the question whether distinctions, relevant for a human rights assessment of acts of political violence by non-state actors, can be made based on

    - the identity of the perpetrator of the violent act,
    - the victim of the violence, or
    - the motivation of the violent act.

2. The discussion in this paper is only related to acts of extreme or at least serious violence by non-state actors. The degree of violence is therefore not systematically discussed as a criterion for assessment, although some comments in this respect will be made. The identity of the perpetrator and the motivation of the violent act are addressed mainly as a part of the discussion on certain conceptual issues in Section 2. Thereafter Section 3 will address the relevance of human rights law, humanitarian law and international criminal law in the assessment of acts of political violence by non-state actors. Throughout the paper references are made to the importance of the victim of the violence in the assessment, and this is also the focus of the overall conclusions (Section 4).

CONCEPTUAL ISSUES RELATED TO LEGITIMATE AND ILLEGITIMATE RESORT TO VIOLENCE

3. In order to make a human rights assessment of acts of political violence by non-state actors, one needs conceptual clarity in relation to at least three notions or arguments that are used for the purpose of stigmatising or legitimising certain acts of violence committed by non-state actors. These three notions are

- the right to resistance,
- a political offence, and
- terrorism

The Right to Resistance

4. History is full of examples of successful, even unsuccessful, revolutions that today are treated as justified reactions to tyranny or oppression, even when violence was used against the oppressor. Armed resistance against the occupying power in countries occupied during World War II by Nazi Germany, or the targeted use of violence in the struggle of national liberation movements against oppressive colonial rule are two instances where such a right to resistance has been met with approval also by the international community.

5. In a longer historical perspective one can refer to examples such as the revolts by slaves in ancient Rome, the best-known of them led by Spartacus in 73-71 BC, or to the American Declaration of Independence of 1776 which in its preamble affirms the right of the people to "alter or to abolish" any form of destructive government. In his famous essay on Civil Disobedience Henry David Thoreau (1817-1862) did not dissociate himself from the ultimate resort to resistance: "All men recognize the right of revolution; that is, the right to refuse allegiance to, and to resist, the government, when its tyranny or its inefficiency are great and unendurable."

6. One of the main themes of the United Nations Charter (1945) is the outlawing of the use of force in international relations. The idea was to reserve the use of military force to the UN itself and to restrict any resort to military force by individual states to situations of genuine self-defence (Article 51). A clause was included in the preamble to the Charter that armed force "shall not be used, save in the common interest", and this was further operationalised by the clauses on state sovereignty (Article 2) and on collective action by the Security Council (Article 42). As the Charter deals with international (inter-state) use of force, it is silent on the right of resistance in the context of internal revolt against oppressive government. In this respect it is important that the Universal Declaration of Human Rights (1948) does, in the third recital of its preamble refer to the right of resistance with a formulation that presumes its legitimacy: "… Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,…"

7. However, it needs to be emphasised that the Universal Declaration cannot be invoked as general justification for the use of violence under the guise of a right to resistance. On the contrary, article 30 of the Declaration makes it clear that there would be other parameters that define whether a particular instance of resorting to violence as a part of resistance is compatible with the Declaration: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

8. The right of resistance figures also in the current ongoing discussions on UN reform. In his March 2005 report responding to and reflecting upon the high-level panel report "Threats, Challenges and Change" the Secretary-General included in his discussion on terrorism a clear dismissal of any efforts to justify acts of terrorism with reference to the inherent right of resistance. According to the Secretary-General the right of resistance "should be understood in its true meaning and not including any right to deliberately kill or maim civilians".[1]

[1] *In larger freedom: towards development, security and human rights for all.* Report of the Secretary-General, Follow-up to the outcome of the Millennium Summit, A/59/2005, paragraph 91.

9. The right of resistance is a notion that provides moral, political or juridical legitimacy to oppressed people resorting to violent means against an oppressive regime in their own country. It cannot be invoked as justification for international use of force. While the notion is relevant in the discussion on possible justifications related to the perpetrator of the violent act and the motivation of the act, its use does it escape scrutiny over what type of violence is used, and against whom.

Political Offence

10. Similarly to the notion of a right to resistance, the reference to an act of violence as a political offence usually represents an effort to legitimise the act in question, in legal, moral or political terms. Such usage of the notion of a political offence has certain basis in international law.

11. Firstly, reference can be made to the refugee definition in article 1 (A) of the 1951 Convention on the Status of Refugees, according to which a refugee is, inter alia, a person who is persecuted for reasons of "political opinion". Against this definition is logical that other countries may treat as a refugee a person who is regarded as a criminal by his or her country, at least when the crime in question is of political nature and the effort to prosecute and punish the person may constitute persecution for reasons of his or her political opinion. In line with this link between the refugee definition and the notion of a political crime, the exclusionary clause in article 1 (F) of the Refugee Convention explicitly takes into account the possibility that a country of origin may treat a political offence as a serious crime, this not affecting the possibility that other countries still treat the person as a refugee:

> "F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> he has been guilty of acts contrary to the purposes and principles of the United Nations."

12. For the discussion in this paper it is of relevance that item (b) makes a distinction between "a serious political crime" and "a serious non-political crime", of which the latter but not the former leads to the exclusion of refugee status. However, it is equally important to read item (b) in the context of items (a) and (c) which demonstrate that the reference to an act as a political crime cannot be invoked as justification for any act that would constitute a war crime or a crime against humanity, or be contrary to the purposes and principles of the United Nations.

13. Extradition treaties, which in most cases are bilateral treaties between two states, usually make an exemption in respect of political crimes, so that a state is not under an obligation to extradite a crime suspect if the crime in question would be a political offence. While such exclusion of political offences from the scope of crimes that entail an obligation to extradite supports the legitimising function of the political offence notion, the treaties in question also demonstrate that such a justificatory exercise has its limits. As an example, reference is made to a regional extradition treaty regime, the 1957 European Convention on Extradition.

14. According to article 3 of this convention, extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested state as a political offence or as an offence connected with a political offence. The same rule shall apply if the requested state has

substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.

15. These rules appear as fairly straightforward, defining political offences as an exception to a possible duty to extradite. However, the European extradition regime includes several modifications to the main rule. Firstly, article 3 of the convention itself continues by excluding a specific form of political violence, namely the taking or attempted taking of the life of a Head of State or a member of his family, from the scope of political offences. Further, the convention has been supplemented by a 1975 Additional Protocol to the European Convention on Extradition which excludes a range of crimes from the scope of political offences:

- crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide;
- violations specified as grave breaches in specific provisions of the 1949 Geneva Conventions on humanitarian law; and
- "any comparable violations of the laws of war having effect at the time when this Protocol enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions".

16. A subsequent treaty between by and large the same states, the European Convention on the Suppression of Terrorism (1977), has further narrowed the range of political crimes in the context of extradition, Article 1 of this convention automatically excludes certain crimes from the scope of the political offences notion,[2] albeit subject to a possibility of reservations allowed by article 13. Article 2, in turn, makes it discretionary for a state to determine, case by case, whether a particular crime would be treated by it as a political offence leading to the denial of extradition.[3] There is a 2003 Protocol amending the European Convention on the Suppression of Terrorism, inter alia its articles 1 and 2. As this Protocol has not yet entered into force, its effect is not explained here.

17. In a more general form the exclusion of certain crimes from the scope of political offences is often made by distinguishing between "pure" (or absolute) and "relative" political offences, so that only the former ones constitute a genuine cause for denying extradition. The use of extreme

[2] "For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:
an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;
a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence."

[3] "For the purpose of extradition between Contracting States, a Contracting State may decide not to regard as a political offence or as an offence connected with a political offence or as an offence inspired by political motives a serious offence involving an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person.
The same shall apply to a serious offence involving an act against property, other than one covered by Article 1, if the act created a collective danger for persons.
The same shall apply to an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence."

or at least serious violence against one or more persons would normally constitute an ordinary crime, meaning that a possible political motive makes it, at most, a relative political offence. This is reflected in article 2 of the European Convention on the Suppression of Terrorism which relativises the application of the political offence notion in respect of any serious offence involving an act of violence against the life, physical integrity or liberty of a person.

18. Similarly to the conclusion arrived at in the earlier discussion on the right of resistance, the notion of a political offence does provide some moral, political or juridical legitimacy to certain criminal acts, at least hypothetically also some acts that involve the use of violence. However, as illustrated by the example of European multilateral treaties related to extradition the effect of the political offence notion is fairly limited in respect of crimes that entail the use of extreme or serious violence against a human person. The political offence notion is relevant in the discussion on possible justifications related to the perpetrator of the crime and the motivation of the act, but its use does it escape scrutiny over what type of violence is used, and against whom.

Terrorism

19. While the notions of the right of resistance and political offence are used for the purpose of shedding a light of moral, juridical or political justification over some acts of violence, the notion of terrorism is used with the opposite effect, namely as a stigma through which any justification for a particular act of violence is denied. Already in the previous discussions the notion of terrorism appeared as one of the criteria through which the legitimising effect of the right of resistance or of the categorisation of a crime as a political offence is reduced or excluded.

20. Despite the major role the notion of terrorism plays in the world of today, there still is no agreed definition of terrorism. This can be largely explained by the high stigmatising effect of the term, making it highly attractive as a rhetorical tool for any state or other actor that wishes to deny the possible legitimacy of a particular act of violence.

21. It would not make sense to try to analyse here the various existing national and international definitions of terrorism.[4] Rather, the reader is taken directly to a recent effort to formulate a consensus definition of terrorism. In its report, "A more secure world: our shared responsibility", the UN High-level Panel on Threats, Challenges and Change proposes the elaboration of a comprehensive international convention against terrorism where the definition of terrorism should be based on the following elements:

> "(a) Recognition, in the preamble, that State use of force against civilians is regulated by the Geneva Conventions and other instruments, and, if of sufficient scale, constitutes a war crime by the persons concerned or a crime against humanity;
>
> (b) Restatement that acts under the 12 preceding anti –terrorism conventions are terrorism, and a declaration that they are a crime under international law; and restatement that terrorism in time of armed conflict is prohibited by the Geneva Conventions and Protocols;
>
> Reference to the definitions contained in the 1999 International Convention for the Suppression of the Financing of Terrorism and Security Council resolution 1566 (2004);
>
> Description of terrorism as "any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566

[4] For various classifications of terrorism, see Mikaela Heikkilä, *Holding Non-State Actors Directly Responsible for Acts of International Terror Violence - The Role of International Criminal Law and International Criminal Tribunals in the Fight against Terrorism*, Institute for Human Rights, Åbo Akademi University (2002), available at http://www.abo.fi/instut/imr/norfa/mikaela.pdf

(2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an 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".[5]

22. As underlined by the high-level panel itself, this proposal for a consensus definition is based on the exclusion of so-called state terrorism from it and on non-inclusion of a qualification that would legitimise the right of resistance by excluding its exercise from the notion of terrorism.[6] In his March 2005 report, responding to and reflecting upon the high-level panel report the Secretary-General strongly endorsed the move towards a consensus definition through setting aside these two stumbling blocks.[7]

23. For the conceptual issue relevant here, namely what forms of violence by non-state actors are covered by the notion of terrorism, the most important part of the formulation by the high-level panel is its last item where terrorism is identified through the simultaneous existence of three qualifying conditions, namely those related to:

- the degree of violence applied: "intended to cause death or serious bodily harm";
- the victim of the act of violence: "civilians or non-combatants"; and
- the motivation of the violent act: "to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act".

24. The proposed definition is not perfect – inter alia, because it refers to "civilians or non-combatants", notions that do not really apply beyond situations of armed conflict. As not every instance of terrorism amounts to or occurs in the context of an armed conflict, a broader notion such as "innocent bystander" might be appropriate. Nevertheless, it is more important that the formulation by the high-level panel avoids the shortcomings of many overly broad national definitions of terrorism and hence avoids or at least reduces the risk of stigmatizing as "terrorism" acts or actors that would not deserve that stigma. Among problematic elements that do *not* occur in the high-level panel formulation are the following:

- referring to destruction of public or private property as terrorism;
- referring to violence against state institutions and leaders as terrorism;
- including in the notion of terrorism shorter or longer chains of association with persons who use violence (membership, cooperation etc); and tautologous definitions that "define" terrorism by reference to the word "terror" or its derivatives.

25. In the light of the conclusions arrived at above when discussing the notions of the right of resistance and political offences it appears that if terrorism is defined by requiring the simultaneous existence of these three factors, there is indeed no need to include in it any reservation related to the right of resistance or political offences. The legitimising function of those notions would in any case not extend to acts of violence that meet all three conditions.

[5] *A more secure world: our shared responsibility*, High-level Panel on Threats, Challenges and Change, UN Doc A/59/565, paragraph 164.

[6] *Idem*, paragraph 160.

[7] *In larger freedom: towards development, security and human rights for all.* Report of the Secretary-General, Follow-up to the outcome of the Millennium Summit, A/59/2005, paragraph 91.

HUMAN RIGHTS ASSESSMENT OF ACTS OF POLITICAL VIOLENCE BY NON-STATE ACTORS

Human Rights Treaties and Violence by Non-State Actors

26. Textually human rights treaties do not provide much basis for making any distinctions between violent crimes, as to whether their perpetrators can invoke some legitimising notion such as right of resistance or political offence. Nevertheless, general human rights treaties are relevant and useful as a normative point of reference in any public debate on crime, as they include a number of principles that a worth mentioning irrespective of the crime in question:

- the universality of human rights, including the idea of every human being, including the criminal or terrorist, being the beneficiary of human rights;
- the absolute (non-derogable) nature of certain human rights, including rights that are extremely relevant in the fight against terrorism (prohibition against torture and any form of inhuman treatment, prohibition against retroactive criminal laws and principle of legality in the field of criminal law, prohibition against arbitrary deprivation of life, etc.);
- various limitations on the application of capital punishment even for the most serious crimes, including the requirement of strict observance of all procedural guarantees including effective legal assistance and the right of appeal; alternatively for states that have ratified a relevant additional/optional protocol or otherwise abolished capital punishment, the exclusion of capital punishment even in cases of terrorism;
- the prohibition against *refoulement*, i.e. the handing of a suspect through extradition or any other procedure to another state that would not respect the above principles;
- the right to a fair trial, including the numerous detailed provisions of the rights of the defendant in a criminal trial; and
- the prohibition against arbitrary deprivation of liberty and the requirement of effective judicial review over any form of arrest or detention.

27. In the public discussion on politically motivated acts of extreme or serious violence human rights advocates may also refer to the above principles as being a part of the accepted framework of human rights, applicable in respect of all crimes and their perpetrators. Hence, calling respect for these principles should not be seen as siding with the person or group that has resorted to violent crime.

28. A second dimension of relevance is related to the "statist" nature of human rights law, at least in its current stage of development codified into legally binding international human rights treaties. So far, only states can be parties to human rights treaties. And even to the extent substantive human rights norms can be referred to as expressions of commonly shared interpersonal moral obligations that should be respected by all actors, all monitoring mechanisms that exist under human rights treaties are geared towards state responsibility. Only states submit periodic reports on the implementation of the seven principal UN human rights treaties, and only states can be subject to treaty-based complaints by individuals or groups. While it is gradually becoming common that in the public debate also private actors – such as transnational corporations or terrorist groups – are identified as responsible for "human rights violations", there still are no mechanisms of accountability under existing human rights treaties through which such claims could be considered.

29. Human rights courts and treaty bodies have developed a range of doctrinary approaches through which *states* are held internationally responsible for human rights violations that directly are caused by the conduct of non-state actors. The Inter-American Court of Human Rights applies a standard of "due diligence", the UN Human Rights Committee refers to the state's obligation to respect and ensure an individual's "right to the security of the person", and the European Court of Human Rights attributes to the state "positive obligations" under the right to life. All three

doctrinary approaches have the same effect, namely that of holding the state accountable under human rights treaties when it fails in protecting an individual against violent acts by third parties, such as politically motivated acts of extreme or serious violence.

30. One may ask how helpful it is in the public debate if human rights activists blame the state for violent acts perpetrated by others, by referring to the above or other doctrinary constructions that allow imputing violence by private actors to the state as a human rights violation. If such arguments are made use of, it is usually appropriate to emphasise that this is not done in order to exonerate the direct perpetrators but to emphasise the overall responsibility of the state to uphold such social order that affords adequate protection against human rights violations by third parties. In most such cases it is also advisable to make it clear that human rights advocates are prepared to blame also private actors for "human rights violations", although they are aware of the absence of adequate international mechanisms that would enable the direct accountability of the actual perpetrators.

Relevance of International Criminal Law

31. As explained in the preceding section, the traditional system of international law is weak in addressing directly on the level of international law acts by individuals or other private parties. For the most part international law focuses on state responsibility and leaves it for each sovereign state to find the most appropriate means for seeing to it that acts by individuals do not give rise to the state being held on the international level responsible for a wrongful act. However, already within this "weak" tradition there have been two forms of international criminal law applicable in respect of individuals, namely (1) *ad hoc* international tribunals for the prosecution and punishment of perpetrators of international crimes, and (2) international conventions that in substance relate to criminal law and impose on states an obligation to enact within their own legal system criminal law provisions that meet the substantive requirements prescribed in these treaties. The first-mentioned form is known from the Nuremberg and Tokyo War Crimes Tribunals instituted after World War II but also from the more recent and continuing experiences of the Criminal Tribunals for the former Yugoslavia and Rwanda. The second form, indirect international criminal law is represented, for instance in treaties on humanitarian law (so-called grave breaches), certain human rights treaties (the Genocide Convention, the Convention against Torture and the Convention for the Elimination of Racial Discrimination) and treaties related to the combat against terrorism and other international crimes.

32. In 1998 a major step towards genuine and direct international criminal law was taken through the adoption of the Rome Statute of the International Criminal Court (ICC). For the first time in history, there now is a beforehand-established criminal court and a criminal procedure for the purpose of trying individual perpetrators before an international tribunal for crimes that are with precision predefined in an international instrument. As this event can be seen as a breakthrough of a new, "strong" form of international criminal law it is of particular importance here to pose the question to what extent the Rome Statute and the ICC can address extreme forms of violence by private individuals as a matter of international criminal law.

33. Article 5 of the Rome Statute establishes the jurisdiction of the ICC in respect of four categories of international crimes:

- genocide (as defined in Article 6),
- crimes against humanity (as defined in Article 7),
- war crimes (as defined in Article 8), and
- aggression (as defined later on through a separate standard-setting process).

34. It follows from the way the definition of the crime of aggression was left open that the ICC currently cannot exercise its jurisdiction over this crime. As the crime of aggression is also the least relevant of the four categories of crime in respect of conduct by private individuals, it can be omitted from the discussion that follows below. Instead, all three other categories of crime do entail the international criminalisation of some forms of extreme violence by non-state actors.

35. Private individuals, including terrorists, may be prosecuted before the ICC for genocide, for instance if they commit violent acts against members of a particular national, ethnic, racial or religious group, provided this is done "with intent to destroy, in whole or in part," the group in question. The acts themselves may range from murders to the causing of mental harm, from the prevention of births to the removal of children from the group. Hence, the essential definitional elements of genocide are related to the *victim* and the *intention* of the perpetrator.

36. Private individuals, including terrorists, may also be held criminally liable before the ICC for acts of violence that constitute crimes against humanity. Again, the degree of violence may vary from murder to, for instance, forced displacement. The crucial definitional elements for the purposes of this paper are related to the *victim* which is defined as "any civilian population" and to the *context* of a criminal act which must be "a widespread or systematic attack" against the civilian population in question.

37. The *context* is crucial also for war crimes which may take place only during an international or non-international armed conflict, the Rome Statute specifically excluding its application in respect of "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature". Again, article 8 of the Rome Statute is broad enough in its wording to include varying forms and degrees of violence under the notion of war crimes. The *victim* of the crime is, once again, a crucial definitional element and here the Rome Statute gets its substantive content from humanitarian law and its various categories of "protected persons", including civilians, prisoners of war, the wounded and the sick, etc.

38. The ICC may exercise its jurisdiction only in respect of crimes that are committed after its international entry into force (1 July 2002) and (a) within the territory of a state that has ratified the Statute, or (b) by a national of such a state (article 12), or (c) if the Security Council has referred a situation to the ICC (article 13). Presuming that at least one of these alternative grounds for exercising jurisdiction is met, the following observations can be made in respect of the potential applicability of articles 6-8 of the ICC Statute in respect of violence by terrorists or other non-state actors.

39. Despite the nature of the Rome Statute as a breakthrough for direct international criminal responsibility of individual perpetrators of crime, it is in practice unlikely that individual acts of extreme or serious violence by non-state actors would be prosecuted before the ICC. This is mainly due to the intent requirement for the crime of genocide and the contextual requirements for crimes against humanity and war crimes (widespread or systematic attack and armed conflict, respectively). This is not to say that in legal terms it would be impossible or inappropriate to prosecute someone for terrorist acts before the ICC. It is merely a matter of assessing such indictments as unlikely that it is here concluded that the role of the Rome Statute probably is more in showing the way for further standard-setting work in the field of direct international criminal responsibility than in a prospect of actual application in cases of political violence by non-state actors. And human rights people should not object to proposals to extend the ICC Statute to cover separate terrorist crimes, provided that their definitions meet all the requirements of the principle of legality in criminal law.

Relevance of Humanitarian Law

40. Due to the integration of humanitarian law into the Rome Statute as defining grave breaches of humanitarian law as war crimes in article 8, the considerations presented above in respect of international criminal law and in particular article 8 of the Rome Statute apply also in relation to the potentials of humanitarian law in addressing extreme acts of violence by terrorists or other non-state actors. It is unlikely that acts of violence in this category could be considered as qualifying as an armed conflict and the group in question still being treated as a terrorist group or as private individuals. Hence, humanitarian law is unlikely to have direct application in respect of politically motivated acts of violence by non-state actors. As a caveat one nevertheless needs to mention that in theory organized violence between one or more states and a highly organized international terrorist organization with a clear military command structure could qualify as a "global non-international armed conflict" – global because it is not constrained by any state borders, but "non-international" because it is not an armed conflict between two or more states but between a non-state organization and one or more states.[8]

41. Even without exploring the last-mentioned scenario there are at least three reasons why humanitarian law nevertheless should be seen as having relevance for a human rights assessment of politically motivated violence.

42. Firstly, not only the rhetoric but also the practice of the ongoing "war on terror" appear to suggest that at least some states are trying to combine the applicability of humanitarian law through the qualification of a situation as an armed conflict with the designation of the enemy as "terrorists". The post-September 11 situation is unprecedented in the sense that certain states are fighting against an international network of terrorist cells, at least as one of the options pursued, by defining them as an organised military force and by justifying their own action with reference to international humanitarian law. Although an isolated act of terror should still not be capable of triggering off the categorisation of a situation as an armed conflict, the real or perceived common international organisation of terrorist cells may give rise at least to a need to consider where to draw the line beyond which their concerted action could amount to participation in an armed conflict.

43. Secondly, and perhaps more importantly, humanitarian law is relevant in demonstrating an analogy. While the UN Charter in principle outlaws the use of force in international relations, humanitarian law nevertheless legitimises certain use of force, including the deliberate killing of human individuals, when such force is exercised against enemy combatants in the context of an armed conflict. On a higher level of abstraction, this is known as the principle of distinction in humanitarian law: force is to be used against a military objective, and in a way that affords maximum protection to civilians and civilian objects against destruction. The context and the victim are the crucial definitional elements that determine whether the use of even deadly violence is legal under humanitarian law and hence legitimate in a more general (legal, moral or political) meaning.

44. While no comparable combination of context and victim exists that would legalise the deprivation of human lives under human rights law in respect of situations other than armed conflict, one may ask whether humanitarian law retains some of its legitimising functions even beyond its own scope of application. Targeted violence against, say, a ruthless dictator and his immediate collaborators may enjoy a certain degree of legitimacy as a proper instance of resistance, partly because of an analogy with the humanitarian law notion of an enemy combatant.

[8] The author is indebted to Jelena Pejic for an elaboration of this scenario which, if proven factually applicable, would have important legal consequences for instance in relation to the lawfulness of detaining persons who are active combatants in the armed conflict in question.

45. Thirdly, humanitarian law emphasises the principle of proportionality, even when force is used against enemy combatants or other military objectives, due to its destructive consequences for civilians or civilian objects. Excessive use of destructive force is therefore not permissible. It is evident that the degree of violence applied is one of the decisive criteria in any human-rights-informed discussion on the possible legal, moral or political legitimacy of political violence. Therefore, the starting point of this paper has been to focus on extreme or at least serious forms of violence. The deliberate killing of a human person, or his or her incapacitation through injuring, would constitute such extreme or serious violence. In addition to this threshold requirement of a certain degree of violence applied as a starting-point for the discussion it is of course so that an issue of proportionality will always form a part of the legitimacy assessment. The lower the degree of violence, for instance through careful selection of the target and avoiding any harm to outsiders (distinction) and choosing the least destructive of effective methods (proportionality), the more likely it is that a violent politically motivated crime will be met with some understanding.

OVERALL CONCLUSION

46. The discussion presented above in this paper points to the conclusion that the various arguments derived from the notions of the right to resistance and political offence, as well as from the disciplines of international criminal law and international humanitarian law all point towards the crucial significance of the *victim* of an act of politically motivated violence for any human-rights-informed assessment of the possible moral, political or juridical legitimacy of the act in question.

47. Intentional or indiscriminate violence against third parties ("civilians"), instead of the actual political opponent ("enemy combatant" or "oppressor") is unlikely ever to be met with sympathy. Likewise, disproportionate or excessive use of violence easily leads to the same conclusion due to anticipated or unintended damage to third parties ("collateral damage"), resulting from a failure to apply through an analogy the humanitarian law principles of proportionality and distinction. Again, these considerations are related to the suffering of innocent by-standers ("civilians") as the *de facto* victims of the violence, irrespective of whether the actual target was elsewhere and carefully chosen.

48. Against these considerations it is no coincidence that the comprehensive definition of terrorism, as proposed by the High-level Panel and quoted above (in section 2.3), refers to "death or serious bodily harm to civilians or non-combatants" as a crucial element in the definition, even though there is no strictly legal basis for the general application of international humanitarian law in the context of terrorism which in most cases does not represent an armed conflict.