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## METHODOLOGICAL OPTIONS FOR INTERNATIONAL LEGAL CONTROL OF TERRORISM

M. CHERIF BASSIOUNI\*

THE TITLE OF MY PRESENTATION differs from the general title of this Conference which misleadingly links terrorism and the Middle East. Unintended inferences will inevitably be drawn from that title. This can only be deplored in light of the serious efforts of those concerned scholars who are seeking rational solutions to the complex problem of "terror-violence."

Social and behavioral scientists will in time tell us more about the conditions, reasons, causes and motivations leading to "terror-violence." With such knowledge jurists will be better equipped to develop the type of legal controls most likely to reduce the impact of violent strategies. However, any scheme for the legal regulation and control of types of behavior cannot be framed without a value-oriented goal. I shall not elaborate on this point, but it is nonetheless my position that no regulatory scheme can rest on a repressive basis because of the conflicting values reflected in the very activity sought to be regulated and controlled. Indeed, what is terrorism to some is heroism to others.<sup>1</sup> An international regulatory scheme must therefore be in a position to mediate between conflicting values and claims, and therefore, it must, as much as possible, remain neutral in respect to competing values and claims. To whatever degree a regulatory scheme embodies certain values, they must be clearly identified to avoid any ambiguity. This is significant at the level of interpretation and implementation. The value-oriented goal which serves as the premise of my discussion is the attempt to minimize violence, to prevent its spill-over effects to uninvolved participants and to limit its arenas. In other words, our goal is (1) to reduce the impact of violence; (2) restrict its extension to potential victims, and (3) prevent its exportation to arenas beyond those wherein a given conflict exists.

With this in mind, the threshold questions are: whether to define certain manifestations of "terror-violence," and how to regulate them (*i.e.*, from a substantive or complementary legal aspect). Put another way, we may frame the issue as whether to define terrorism as an international crime establishing an international enforcement machinery, or to not define it but to require states to increase their collaboration in the fields of extradition and other forms of judicial cooperation in respect

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<sup>1</sup> See Symposium on *International Control of Terrorism*, *The Globe*, Vol. II-1 (1973).

to certain activities. Assuming the choice is substantive control, the question then becomes how to define "terrorism." The problems in defining aggression are analogous to those of defining "terrorism."<sup>2</sup> Transcending the significant ideological implications in the elaboration of any definition, the methodology by which it is arrived at deserves consideration.

In this context there are three methodological options: First, the elaboration of a general (generic) definition. Second, the selection of certain specific acts which are phrased in a manner stating the specific content of the behavior sought to be proscribed; and finally, a mixed formula which combines a general (generic) statement and some illustrative applications phrased with specificity of content as to the proscribed conduct.

Considering that all legal systems of the world require that certain drafting principles be met, it is important then to ascertain these principles which are often referred to as principles of legality.<sup>3</sup> Furthermore, to insure the proper application of these principles, the doctrine of analogy in interpreting penal statutes is prohibited, and penal proscriptions must be construed narrowly and in accordance with the plain and common meaning of the language used. This is indispensable in order to provide notice of the prohibited conduct and thereby afford opportunity for compliance with the legal mandate. Thus, in view of these principles, it appears that the first and third options would not satisfy all these requirements and that only the second option, namely, description of specific acts with a well-defined content, could meet such standards.

A casual survey of acts deemed terroristic, according to the literature on the subject, would tend to indicate that these acts fall within the categories of common crimes which are prohibited in every penal legislation of the world. Indeed, there is so much agreement on such crimes as homicide, kidnaping, theft, robbery and extortion, that one can raise the issue of whether it is at all necessary to elaborate a new international crime which would encompass such conduct. The answer, however, lies in the questions of enforcement and jurisdiction rather than in regard to the substantive content of those specific crimes enumerated above.

The very fact that murder or kidnaping is deemed criminal in all legal systems is not sufficient to make it an international crime. To become so, at least one of the following five elements must be present in addition to those of the common crime: (1) The act or series of acts takes place in more than one state; (2) The act or series of acts takes place wherein no state has exclusive national jurisdiction; (3) The acts affect citizens of more than one state; (4) The acts affect internationally protected persons (*i.e.*, diplomats, personnel of international organization), and (5) The

<sup>2</sup> Bassiouni, *A Definition of Aggression in International Law* in M. C. BASSIOUNI & V. NANDA, *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 159 (1973); *see also*, Hazard, *Why Try Again To Define Aggression?* 62 AM. J. INT'L L. 702 (1968).

<sup>3</sup> *E.g.*, *ex post facto, nulla poena sine legge, nullo crimine sine lege*, BASSIOUNI, *CRIMINAL LAW AND ITS PROCESSES* 37 (1969).

acts affect internationally protected objects such as international civil aviation and international means of communications.<sup>4</sup> Thus, whenever any one of these five elements exists in conjunction with a common crime, it can become an international crime in addition to being a municipal crime wherever it occurred. Such a theory must nonetheless be codified or be the subject of a multilateral treaty. In such a case a definition of the specific acts sought to be internationally proscribed must be clearly set forth showing the elements of the common crime as well as the international elements which render it internationally cognizable.

Assuming all these requirements for international codification are met, one cannot underestimate the difficulties involved in any attempt to achieve that very codification of international crimes. The history of such efforts as the Draft Code of Offenses Against the Peace and Security of Mankind,<sup>5</sup> attest thereto. However, if one is encouraged by the somewhat successful treaty-making efforts in the prohibition of slavery,<sup>6</sup> international traffic in narcotics<sup>7</sup> and hijacking,<sup>8</sup> it is nonetheless clear that no agreement can be reached regarding penalties. Such efforts in the 1971 Montreal Convention on Hijacking<sup>9</sup> have not proven successful, and the 1972 Amending Protocol to the 1961 Single Convention on Narcotic Drugs,<sup>10</sup> took the approach of merely requiring signatory states to impose appropriate penalties.

Finally, the problems of enforcement and implementation which have generally plagued the progress of international law are particularly visible in this area. That is why the 1937 Convention on Terrorism saw fit to prescribe the establishment of a criminal court.<sup>11</sup> Since then the idea has been recommended from time to time, and the United Nations elaborated two drafts in 1951 and 1953 for the creation of an international criminal court.<sup>12</sup> There are, however, no additional signs of acceptance of

<sup>4</sup> This is generally the position taken by the III International Symposium on *Terrorism and Political Crimes* of the International Institute for Advanced Criminal Sciences, June 1973, and the proceedings will be part of a forthcoming book edited by this writer under the title, *INTERNATIONAL TERRORISM AND POLITICAL CRIMES* (1974).

<sup>5</sup> 9 U.N. GAOR, Supp. 9 at 11-12, U.N. Doc. A/2693 (1954).

<sup>6</sup> See Nanda and Bassiouni, *Slavery and the Slave Trade: Steps Toward Eradication*, 12 SANTA CLARA L. REV. 424 (1972).

<sup>7</sup> Bassiouni, *The International Narcotics Control System, A Proposal*, 46 ST. JOHNS L. REV. 713 (1972).

<sup>8</sup> See Convention on Offenses and Certain Other Acts Committed on board Aircraft, signed at Tokyo Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. 6768; Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. 7192; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal Sept. 23, 1971, T.I.A.S. 7570.

<sup>9</sup> *Id.*

<sup>10</sup> Draft Convention for Prevention and Punishment of Certain Acts of International Terrorism, U.N. Doc. A/C.6/L. 850 (1972).

<sup>11</sup> Convention for the Prevention and Punishment of Terrorism, opened for signatures at Geneva, Nov. 16, 1937, 19 LEAGUE OF NATIONS OFF. J. 23 (1938).

<sup>12</sup> 5 U.N. GAOR Supp. 12 at 18, U.N. Doc. A/1316 (1950); 9 U.N. GAOR Supp. 12

the idea save for the writings of scholars defending it.<sup>13</sup>

The contemporary approach seems to avoid the issue of an international enforcement mechanism, and consequently the trend is moving away from the elaboration of a general treaty defining an international crime of terrorism.<sup>14</sup> The direction seems to be the one adopted in the 1970 Hague Convention on Hijacking and 1972 Amending Protocol on Narcotics, which is designed to impose upon states the duty to prosecute under municipal law or to extradite. Thus, the methodological choice appears to steer away from substantive international criminal law to adjective (complementary) international criminal law. This trend is highlighted by the 1972 United States Proposed Draft Convention on Terrorism which embodies the value-oriented goals stated earlier in this presentation, namely the minimization of violence, its restriction to participants in a given conflict, and its limitation to the arenas of these conflicts.<sup>15</sup> The 1972 Draft Convention was the product of Professor Moore's efforts<sup>16</sup> whose position seems to be that an international regulatory scheme is more likely to be accepted and succeed if it avoids the ideological implications of the conflicting values which are usually at the very base of terror-violence strategies. The United States proposal illustrates the fact that no international superstructure is contemplated, but instead that increased judicial cooperation is the desirable option to effectively control the problem.

The duty to prosecute or extradite is well established in international criminal law and has its origin in a maxim by Hugo Grotius, namely, *aut dedere aut punire*. This speaker suggests that a more appropriate maxim is *maseim is aut dedere aut iudicare*. It appears to me that the future may well see two stages of development. The first one will be in the field of adjective international criminal law,<sup>17</sup> and the second state of substantive international control may only come into being after the

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at 23, U.N. Doc. A/2645 (1954). See also, United Nations Secretariat, Historical Survey of the Question of International Criminal Jurisdiction, U.N. Doc. A/CN.4/7 at 18 (1949).

<sup>13</sup> See Doutricourt, *The International Criminal Court* in M. C. BASSIOUNI & V. NANDA, I A TREATISE ON INTERNATIONAL LAW 636 (1973) and L. Kos-Rabcewicz-Zubkowski, *The Creation of an International Criminal Court for the Suppression of International Terrorism* in BASSIOUNI, INTERNATIONAL TERRORISM AND POLITICAL CRIMES (1974).

<sup>14</sup> See Study prepared by the United Nations Secretariat entitled, Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes, U.N. Doc. A/C.6/418 (1972).

<sup>15</sup> See Draft Convention on International Terrorism, *supra*, note 10.

<sup>16</sup> John Norton Moore, Professor of Law, University of Virginia, was counselor in International Law in the Department of State, 1972, and prepared this draft in that capacity.

<sup>17</sup> On the topic of judicial cooperation in extradition, see e.g., M. C. BASSIOUNI & V. NANDA, II A TREATISE ON INTERNATIONAL CRIMINAL LAW (1973).

first one has been successful in the course of the customary practice of states. That second stage would be the elaboration of an international criminal code with an international supporting structure for its enforcement and implementation. That stage may prove unnecessary if the first one produces satisfactory outcomes. However, since this is not likely, the second stage may prove necessary if a sufficient number of states deem it in their best interest and in the interest of preserving minimum world order to abate jealously guarded concepts of sovereignty. The exigencies of the problems may accelerate international cooperation, particularly if its dimensions continue to grow beyond the ability of existing or contemplated schemes to control it.

From this speaker's perspective, the strategies of "terror-violence" throughout the world are not likely to abate but on the contrary are certain to increase. The reason for this prediction is based on three factors. (1) Conventional wars appear to have outlived their historical usefulness. (2) Nuclear strategy has not developed to a point where it can be a useful instrument in attaining power outcomes. (3) There are no conflict resolution devices available for the settlement of disputes arising out of ideological claims and human rights violations. Nevertheless, we must not be as indiscriminate as we have been with respect to considering all forms of "terror-violence" as terroristic strategies requiring international controls. There are three distinctions which must be made and which arise out of common experience with the various manifestations of "terror-violence." These distinctions must be based on the motivations of the perpetrators of such acts. Namely, are we dealing with psychopathological cases which so far have produced the majority of hijackings; common criminals or persons acting for personal or private profit-motive as in some hijacking cases and kidnapping, or ideologically motivated persons who are part of national liberation movements or internal political opposition movements? Certainly as to participants in national liberation movements, the regulation of armed conflicts and the four 1949 Geneva Conventions regulate such conduct,<sup>18</sup> and the only weakness is the lack of enforcement machinery. As to other forms of ideologically motivated "terror-violence," the ability to control that violence will be only as successful as alternative conflict resolution devices are found to channel such conflicts into a peaceful arena. The present situation leaves no alternative but a resort to "terror-violence" to accomplish what is sometimes a legitimate end based on legitimate rights, but which find no legal or peaceful remedy for their redress.

It must also be stated that not all forms of ideologically declared "terror-violence" are to benefit from the mitigation, if not justification, advanced earlier. Some criteria must be set forth to distinguish between

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<sup>18</sup> For the regulation of armed conflict see M. C. BASSIOUNI & V. NANDA, *I A TREATISE ON INTERNATIONAL LAW*, Part 3, 295-454 (1973); Yingling & Ginnane, *The Geneva Convention of 1949*, 46 *AM. J. INT'L L.* 393 (1952).

legitimate resort to violence and its permissible limits as a last resort and "terror-violence" whose only connection to a legitimizing reason is the self-proclaimed rhetoric of its perpetrators. This will be of great importance to determine whether extradition is to be granted or whether the accused can benefit from the political offense exceptions.<sup>19</sup>

We must also be mindful that efforts to regulate and control "terror-violence" cannot merely be only one-sided. All too often the same behavior, or behavior similar in nature or outcome is proscribed for some, and accepted when committed by others. The "terror-violence" of colonization cannot be condoned while the "terror-violence" of liberation is condemned. Similarly, kidnaping<sup>20</sup> and hijacking<sup>21</sup> cannot be deemed a crime when committed by individuals and permissible when committed by agents of a state.

In conclusion, allow me to state that however abhorrent all forms of violence are, the "terrorism" we know today is probably the beginning of a new historical cycle. If such acts of violence are to replace wars, whether conventional or in any other form, then "terrorism" is welcome because its harmful consequences are minimal in comparison to the well known consequences of war. A single bombing raid in World War II or Viet Nam caused more damage, harm, and destruction than all the consequences of "terrorism" during the last quarter of the century. This is true even if the random and haphazard nature of contemporary "terror-violence" can be distinguished from the better aspects of regulated conventional warfare. This is not a glorification of "terror-violence," nor for that matter even an apology for it, but a mere observation which reflects on the nature of our civilization. Indeed, terrorism is nothing more than a manifestation of the quality of our civilization and its elimination is a function of the thickening of its thin veneer.<sup>22</sup>

## DISCUSSION

*The question put to Professor Bassiouni concerned itself with whether there should be a regional, domestic, or universal basis for international law on settling the problem of terrorism.*

I must say I had grave reservations in my earlier discussions with the

<sup>19</sup> Bassiouni, *Ideologically Motivated Offenses and the Political Offense Exception in Extradition*, 7 VAND. J. TRANS. L. 25 (1973), discussing various forms of unlawful seizures by states of persons outside their jurisdiction. E.g., cases of Eichmann, Tsombe, Soblen, Argoud, Ahlers, and 11 Arabs seized by Israel in Lebanon in 1973 and brought to trial. *Id.* at 28-33.

<sup>20</sup> Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANS. L. 25 (1973), discussing various forms of unlawful seizures by states of persons outside their jurisdiction. E.g., cases of Eichmann, Tsombe, Soblen, Argoud, Ahlers, and 11 Arabs seized by Israel in Lebanon in 1973 and brought to trial. *Id.* at 28-33.

<sup>21</sup> As an example, the unlawful seizure in Lebanese air space of an Iraqi Airways plane by Israeli military aircraft, forcing it to land in Israel. See *Time*, August 20, 1973, at 28.

<sup>22</sup> Bassiouni, *The Human Rights Program—The Veneer of Civilization Thickens*, 21 DEPAUL L. REV. 271 (1971).

organizers about this topic. I would like to call your attention to the fact that the Palestinian Liberation Organization is an organization dedicated to liberate its national homeland which had been seized by force against the will of the local population which had been evicted. In the process of that eviction of the Palestinians from their homeland, many terroristic actions have taken place to prevent such ouster. If we are to indeed look at international law as neutral, we cannot under any stretch of the imagination accept that Israeli terror is legitimate and Palestinian terror is criminal. Otherwise we run into what Mr. Dayan once called "the making of facts" whereby one party creates a fact, and the acceptance of the status quo is condoned by international law without any means of redress for the claimant who then finds himself in the position of having to engage in acts which the world community subsequently labels as terroristic.

There is no question in my mind that if we are going to try to find a solution for acts of violence, and there are indeed acts of violence which legitimately fall into any definition of "terrorism," we must single out those common crimes which have an international character. We have no difficulty in finding that an individual who hijacked an aircraft for purposes of ransom, engages in such a crime. Clearly, individuals who engage in the kidnaping of industrial persons or diplomats, for purposes of economic extortion or other personal gains, commit a crime. However, when we enter into the field of self-determination and wars of national liberation, the question becomes more difficult. This is because we are dealing with the state, with all the powers appurtenant to states, and the recognition that a state has in international law, whereas an individual or group does not have that recognition nor the right to resort to violence as has a state. The limitations imposed upon individuals by the very nature of the situation compels them to engage in some action which is bound to be at times outside the scope of the law, unless the law devises certain structures for redress of wrongs. There is at this point in time no international system by which wrongs can be redressed. There is no means through which the international community can indeed restore the rights of those individuals whose human rights have been violated. Consequently, what is the outcome? Now the simplistic solution is to condemn any form of coercion that such individuals may engage in, and through repression evade the real issues. Shouldn't we instead try to devise means of preventing the need to resort to such action?

With respect to human rights, I think that we can devise regional and international structures to implement these rights at the national level. Similarly, we can control international crimes such as "terrorism" at the international, regional and national level. This will depend upon what is classified as terroristic actions. It seems rather easy to deal with the psychopathological and the common criminal who engages in an action that has international ramifications, but it is more difficult to deal with claims of self-determination and wars of national liberation. Now it is not



true, however, that there are no international laws that restrict forms of violence between combatants. Accordingly, I call the attention of Mr. Paust to the Four IGUG Geneva Conventions, particularly with respect to the treatment of prisoners of war, the sick, and the wounded. I find it difficult to answer the above question dispassionately. Nevertheless, I would suggest in the first place that we deal with the question of what are the common crimes of international character that should be controlled. Those it seems to me can be defined by international treaties, and universal jurisdiction can be established along with an obligation to extradite or prosecute, thus leaving every nation with the duty to either prosecute or extradite. This eliminates the need to create a cumbersome international structure, such as an international criminal court or an international criminal police.

With respect to wars of national liberation and the conflicts on self-determination, the problem is much more complex than that, and I don't think that we are going to be able by any stretch of the imagination to devise any means of controlling terror-violence arising in this context so long as the initial claims of the participants do not find a channel through which they can legitimately assert their claims in a peaceful way. There are, however, some imaginative alternatives. For example, if a given group would like to make known its claim, I see no reason why we cannot set up an international radio-television station where liberation movements could have access and broadcast their claims to the world community, avoiding the need to focus attention on them by engaging in particular acts which are dramatic in the eyes of the press. On the other hand, it seems to me we have enough international law at our disposal to be able to adjudicate certain claims and therefore a more expanded role for the International Court of Justice should be contemplated.

It is difficult to determine what is aggression and also what is self-determination, but certainly if we are going to try to apply both concepts to the Middle East conflict as it is generally called, I would rather call it the Arab-Israeli conflict, and more specifically the Palestinian conflict where we're dealing with their self-determination claims. The United Nations has recognized their claim, but their rights have not been enforced. Where do they go from there? You can certainly suppress their claims, and say that is the end of the route for them, that they should not engage in any further actions to make any such claims valid. Certainly, you have to realize that the strategy they employ is going to be limited by their money and resources. They have no nations from which to operate, they have no real basis of operation, and they have no army to declare a defensive war which would render their action legitimate. Therefore, they have to engage in actions which would seem otherwise abhorrent. These actions can be repressed as their rights or their actions can be prevented, by redressing these wrongs and granting them legitimate claims.

How do you classify the terrorists? Particularly if you wish to call

them that, and I think that's debatable to say the least. What is the point of view to be taken with respect to them? Is there toleration by the governments or are they considered a legitimate arm of a national movement?

I think we are going to have to distinguish between Arab governments, in terms of their position, as to this particular issue. Some governments, of course, recognize the Palestinian Liberation Organization as being the legitimate representative of the Palestinian people, and they recognize that the activities they engage in are valid activities by the Black September Group or activities which are conducted by other splinter groups. I do not know of any Arab government that has condoned or recognized the validity of the acts of the Japanese in Lod airport. I think these are easily distinguishable acts. On the other hand this is a very difficult situation because it involves internal political considerations on the part of the Arab states. Each Arab government is going to have to deal with its own constituency and with its position vis-à-vis the entire conflict. It is true that many of the actions engaged in by the Palestinians are intended to dramatize their plight, to cause the Arab governments to take a stronger position, and to force the issue into the open.

In Security Council resolution 242 of 1967, which is supposed to be the basis of a settlement in the Arab-Israeli conflict, the Palestinians are referred to therein as the "refugee problem." However, by 1969, the United Nations recognized the "legitimate rights of the people of Palestine to self-determination." Consequently you see a shift between 1967 and 1969 from "refugees" to "people." Now that does mean that the international community puts a premium on such action because without it, the international community did not recognize the Palestinians as a conflict for nationhood but saw it only as problems of refugees. This again shows the precarious nature of international law at this point in time where without coercion there is no recognition of legitimate claims. Now obviously, as jurists, I think we have to rely on the neutrality of law, and its equitable application to all world community participants regardless of whether they are states, groups or individuals.