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Juridical Control of Terrorism

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The present comment is written upon the basic assumption that the purpose of the juridical doctrines designed to control terror is to reduce, and if possible to eliminate, the destruction of human and material values involved in acts of terror. Professor Bassiouni approaches this problem through a threefold categorization of terror based upon motivation: first, terror designed to promote the private gain or profit of common criminals; second, terrorism by the mentally ill, and third, ideologically motivated terrorism. He deals primarily with the third one. This categorization is useful since it leads directly into a study of the causes of acts of terror which can in turn provide the basis for more effective control. It is difficult to see how a start toward effective control can be made without a fundamental understanding of the causes involved. Such an understanding does not condone either the causes of terrorism or its results.

Professor Bassiouni has also emphasized a fundamental consideration in pointing out that particular acts of terrorism must be condemned without regard to the identification of the perpetrator as an individual, a group or a government.1

There are also significant considerations in not excusing terroristic acts because of the governmental identity of terrorists. It is well known that reciprocity and mutuality in observance of the law, including the existing proscriptions against terrorism, involves one of the more effective sanctioning processes. It would be a surprising proposition if governments, which are the principal authors of the existing international law doctrines, were immunized from the restrictions against

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1 A conception of control of terror, consistent in fundamentals with Professor Bassiouni's, is developed in W. T. & S. V. MALLISON, The Concept of Public Purpose Terror in International Law: Doctrines and Sanctions to Reduce the Destruction of Human and Material Values, 18 Howard L.J. 12 (1973).
terrorism while individuals and small groups were to be punished for similar activities. It would certainly be desirable if politically motivated individuals and groups were to adhere to all of the criteria of existing international law without reciprocal observance on the part of governments. Experience has shown, however, that this is not a very likely outcome. One of the principal sanctions against terror is the same as that which has operated with some degree of effectiveness in the law of war; that is, non-discrimination in application and mutuality in observance.

The United States Draft Convention on Terrorism which was presented to the United Nations General Assembly on September 26, 1972, and not acted upon, is adequately illustrative of the fallacies of the contrary approach. The Draft Convention, in addition to other defects including ignoring the causes, dealt only with acts of terrorism which were committed by individuals or small groups and which were directed against governments. In addition to its moral myopia, it is clear that there would be no effective way of enforcing this draft. Government officials, in attempted justification, have of necessity down-graded the importance of an understanding of the causes of terrorism and stressed only its outward symptoms. If the same type of discriminatory approach in terms of the identity of the perpetrators and the immunization of government officials from law were attempted in a United States municipal statute, it would be an unconstitutional discrimination which violates the due process clause of the fifth amendment. Thereafter, on December 18, 1972, the U.S. Government voted against a General Assembly resolution which, by more than the two-thirds vote required for important questions, condemned all kinds of terrorism and emphasized the importance of studying the underlying causes. Assuming that the U.S. Government is in "good faith" attempting to control terrorism, its unthinking approach to this serious problem reminds one of the jingle which recommends: "When uncertain, when in doubt, run in circles, scream and shout." The government's objective of controlling only some kinds of terror, which it perceives as emanating from actual or potential enemies, is about as realistic as would be the attempt to prohibit only some kinds of murder.

Mr. Paust is to be commended for the systematic utilization of a series of claims categories which are designed to provide a framework for inquiry to appraise juridically a wide variety of fact situations in relevant context. The recommendations which he advances concerning even-handed application of existing law, including the doctrines of the laws of war, without regard to the allegedly desirable characteristics of the political objectives of particular governments or groups, are calculated to preserve the efficacy of existing legal doctrines. He rejects the notion that guerrilla

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4 The basic inquiry model has been developed by Professors Lasswell and McDougal of the Yale Law School.
Mr. Paust is aware that there is considerable overlap, or indeed identity, between the doctrines designed to inhibit terror and minimize unnecessary violence which appear under the label of "terror" and those which appear under the label of "laws of war." However, while his emphasis upon the understanding of particular facts in the total context is helpful in promoting the goals of human dignity and world public order, his misconceptions concerning the doctrinal content of the laws of war are not. For example, he finds no proscriptions "which prohibit terroristic attacks against combatants who are engaged in an armed conflict." This is an unnecessary and erroneous retreat from the holdings of the major Nuremberg Trial conducted by the International Military Tribunal where "war crimes," which could with equal accuracy be characterized as "acts of terror," were not excused because the victims were members of armed forces. His conclusion that terror may be practiced against combatants in armed conflict situations also involves ignoring the provisions of the first five subdivisions of article 23 of the venerable Hague Regulations of 1907 which state:

[I]t is especially forbidden—

a. To employ poison or poisoned weapons;

b. To kill or wound treacherously individuals belonging to the hostile nation or army.

c. To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;

d. To declare that no quarter will be given;

e. To employ arms, projectiles, or material calculated to cause unnecessary suffering....

Hague Convention Number IV and its Annexed Regulations⁵ comprise a currently effective multilateral agreement to which the United States is a party.

Having swallowed the camel of terror, or extreme violence unlimited by the laws of war, against combatant forces, Mr. Paust then strains at the gnat of a limited economic embargo to reach the astonishing conclusion that "Arab cuts of oil to the United States" may be considered as "a terroristic strategy." One must wonder as to the contextual factors or doctrinal formulations which lead to this conclusion. If the comprehensive economic blockade measures employed by the Allies in two World Wars are examined, they will be seen to have involved the starvation of

⁵ Convention—War on Land, 36 Stat. 2277 (1907), T.S. No. 539 (effective Oct. 18, 1907).
non-combatants along with combatants.\textsuperscript{6} If the post-World War II economic measures of the U.S. Government against its political adversaries may be deemed as supplying the criteria, there would appear to be authority for measures rather more severe than those involved in the oil embargo. A precise precedent for the use of oil as a weapon exists in President Eisenhower’s withholding of oil to Great Britain and France in 1956 and 1957 as a coercive measure to hasten the withdrawal of British and French armed forces from Egypt.\textsuperscript{7} The recent oil embargo was invoked, it should be recalled, in response to the United States Government’s massive direct support for Israeli military activities conducted inside Egypt and Syria. The United States precedents which have been mentioned provide ample authority to meet the traditional requirements of international law for responding to coercion which are preserved as “inherent right” in article 51 of the United Nations Charter. The conclusion must be that both the necessity for the Arab oil embargo and its reasonableness and proportionality as responding coercion, considerably short of what should be characterized as terror, are well established. There is no doubt but that the elimination of all coercion is a desirable long-range goal. It must, however, be accorded a lower priority than the elimination of terror involving extreme violence.

It is clear that further serious study must be given to the problem of the juridical control of terrorism. Professor Bassiouni and Mr. Paust are to be commended for advancing an understanding of the difficult problems which must be solved.

\textsuperscript{6} The authoritative study of the comprehensive blockade in the Second World War is MEDLICOT, \textit{THE ECONOMIC BLOCKADE} (2 vols., 1952 and 1959; United Kingdom, History of the Second World War, Civil Series).