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LEGAL APPROACHES TO TERRORISM AS A FORM OF INTERNATIONAL POLITICS: THE REAGAN AND BUSH ADMINISTRATIONS

Masahiro Matsumura*

Abstract

"A rule of international law" does not and cannot exist under a decentralized power structure of international relations. Without "an international legal order", nations struggle for applying and interpreting legal rules according to their own national interests. This form of power struggle is most salient in legal approaches to terrorism as an instrument of developing nations in being engaged in political and military confrontation with Western Powers. This article analyzes the irreconcilable nature of the approaches since the 1980s onward, or the eras of the Reagan and Bush administrations, and identifies which legal approach to prevail in the post-Cold War transformatiou of international politics.

I. Introduction

With the Cold War over, the United States attempts to establish a New World Order. Terrorism is a primary instrument of developing nations to challenge such a U. S. approach. Developing nations have formed a legal approach to endorse terrorism. In response, the United States took two legal approaches over the last decade. The Reagan administration justified unilateral use of armed force against terrorism, and the Bush administration followed a prudent, multilateral approach in the use of force. The Clinton administration has not yet articulated its legal approach to terrorism but without dramatically changing the Bush approach. Analyzing the Reagan and Bush approaches is essential for understanding the emerging Clinton approach and for obtaining an important vantage point from which to anticipate fundamental features of a New World Order.

The United States is now compelled to divert resources from military to civil sectors and to significantly reduce a size of defense budget and armed forces. Under this condition, the United States has pursued reduction of economic cost involved in the use of armed force and comprehensive national security policy combining military and non-military instruments. This change means that the use of force remains integral as deterrence and the last resort but not central in such a policy mix.

Regional conflict and destability in the developing world have become a major security threat to the United States. She needs to secure compliance of the developing nations with her hegemony without

*Faculty of Sociology, St. Andrew's University

resorting to the use of force. This approach has a major focus on rule application and interpretation of international law in an attempt to justify the *status quo* under the hegemony and to compel the developing nations to accept that stable situation as "peace" under "a rule of international law".

Central to the above approach lies the Middle East which has occupied a critical importance to the U.S. hegemonic system because of the world's largest oil reserve, the Soviet Union's challenge against U.S. control over the region, and Arab-Israeli conflict complicated by U.S.-Soviet rivalry ; Middle Eastern stability is a vital U.S. interest. With the Cold War over, Arab nations have lost room for maneuvering between the two superpowers in pursuing an alternative source of military, political and economic support. In the consequence of the Persian Gulf War, the so-called "Islamic fundamentalists" have a strong sense of frustration and even alienation about their status in world politics and then have developed a radical and militant ideology and political programs in rejecting, resisting and obstructing the U.S. (more broadly, Western) hegemony[1].

II. Power Politics and International Law

Under the existing system of nation states, the international arena is subjected to power politics. The arena is devoid of any repeated and continuing pattern of interaction among states systematically enforced by the single political authority in accordance with legal rules. In anarchy where neither the international police nor the court with universal jurisdiction exists, states by themselves have to interpret rules of international law in identifying what constitutes infringement and breaches, while undertaking self-help or remedial measures in alliance with other states. Because of this inherent power structure of international relations, enforcement is decentralized and horizontal.

International law is an unorganized collection of partial legal arrangements to regulate specific regional and/or functional areas of international relations. Fundamental rules, in either a cordified or an unwritten form of customary international law, do not yet constitute a hierarchical structure essential for consistent legal reasoning. Contrarily, an opportunity for different interpretations which may end in contradiction abounds.

A hegemonic state will attempt to dominate the international arena by means of its overwheliming resources, power, and influence based on a global political order that it has created. Such a hegemonic order itself is a temporary global arrangement of partial political orders to regulate specific regional and/or functional areas of international relations, while the question how long such an global arrangement survives relies on actual conditions, particularly an international distribution of power and ideological viability of extant, partial political and legal arrangements.

1) Salame, Ghanssan, "Islam and The West", *Foreign Policy*, Number 90, Spring 1993, and, Miller, Judith, "The Challenge of Radical Islam", *Foreign Affairs*, Vol. 72, No. 2. As to the rapidly declining Paletitine Liberation Organization and the rise of Islamic fundamentalist groups, see, Williams, Daniel, "PLO R. I. P.?", *Foreign Policy, Ibid.*

III. Power Struggle

1) Terrorism and Regulation

Developing nations have resorted to terrorism in defiance of systematic domination and exploitation of Western Powers, particularly the United States; terrorism is "the deliberate and systematic murder, maiming and menancing of the innocent to inspire fear for political ends"[2] Terrorist activities include violent seizure of airliners and oceanliners, attacks on civilians on city streets, bombing in airport and urban centers. Terrorism is the only feasible instrument of defiance to counteract with overwhelming Western power, particularly armed force and economic resources, in an attempt to emancipate themselves from the West.

Under such an imbalance of power, developing nations cannot help arguing against Western Powers. Developing nati ons, however, possess no effective control or influence over Western mass media through which to propagate their political views in the formulation process of Western public opinion and to alter Western approach to developing nations. Resorting to terrorism, they will attempt to generate the sense of terror among Western general public with the aim of changing the public opinion and the governments' policies inimical to their interests.

Thus, developing nations have their political interest to apply and interpret rules of international law in a way to justify terrorism, while Western Powers need to restrict a legal format of belligerency which prohibits terrorism. In other words, the pros and cons on terrorism is an expression of the Western position of strength and the developing nations' position of weakness in the context of international power politics.

Western Powers and developing nations have conflicting views on terrorism and mutually exclusive interpretations on the rules on warfare concerning terrorism. Western Powers consider terrorism crime under customary international law. In particular, the neo-realist legal school advocates unilateral use of force against terrorists. On the other hand, developing nations regard a terrorist as a freedom fighter pursuing self-determination against Western Powers; the radical legal school demands to apply humanitarian protection under the rules on warfare to terrorists. Facing the two irreconcilable views, the internationalist legal school neither agrees with the neo-realist willingness for the use of force nor with the radical justification of terrorism. Internationalists support "a general foreign policy orientation characterized by international cooperation, international law and institutions, economic interdependence, international development, diligence in seeking arms control, and restraint in the use of force."[3]

In the West, both neo-realists and internationalists see criminal elements in terrorism, and have taken initiatives leading to the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, and the Hague

2) This definition was adopted at the Jonathan Institute's 1978 Jerusalem Conference on International Terrorism. See, B. Netayahu, ed., *Terrorism: How the West Can Win*, No. 9. 1986.

3) Farer, Tom J., "International Law: The Critics Are Wrong", *Foreign Policy*, Number 71, Summer 1988, p. 22.

Convention on Hijacking. But, these two legal schools disagree about the nature of terrorism. Considering it crime against humanity, neo-realists argue for universal jurisdiction of all the states in suppressing terrorism, as customary international law treats piracy, slave trade and genocide. Internationalists, however, regard terrorism as relative political offense——ordinary crime committed in a political context or with political motivation. Internationalists consider universal jurisdiction inappropriate on the ground that it is one of the well-established rules of international law since the 1891 classical case (*In re Castioni*) not to extradite such an offender to the country of his nationality where punishment is certain.

2) Actors

(1) Radicals

Before the Reagan era, radicals articulated a legal approach to endorse terrorism as combat pursuing freedom, political independence, and self-determination. The U.N. Charter 1—(2) and the U.N. General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples guarantee the right of self-determination. In response, the U. N. General Assembly Resolution (2621) even acknowledges the "inherent right of colonial peoples to struggle by all necessary means at their disposal against colonial Powers". Radicals interpret that "all necessary means" includes terrorism. Although Western Powers opposed the above resolution, it was adopted by the Assembly with an overwhelming majority of the developing nations.

Radicals, therefore, insist on legitimacy and privileges that a soldier has in wartime according to the rules on warfare, or the combatant status (if captured, the prisoner-of-war status). Radicals manipulated to adopt the 1977 Protocol I to the 1949 Geneva Convention on Prisoners of War which significantly departed from the traditional understanding on duties and rights of the combatant. Traditionally, according to the 1949 Convention, irregular forces achieve the combatant status, when soldiers (1) are commanded by a person responsible for subordinates, (2) bear a fixed distinctive insignia recognizable from a distance, (3) carry weapons openly, and (4) conduct their operations in accordance with the laws and customs of war. Both neo-realists and internationalists entertain an armed force of the Second War World resistance type as "irregular force". Radicals desire a similar protection to any armed force of the postwar national liberation movements. Supported by an overwhelming majority of the developing nations, the Protocol I states in Article 44—(3) that "there are situations where, owing to the nature of the hostilities, an armed combatant cannot so distinguish himself"; In such situations, "he shall retain his status as a combatant, provided [that] ... he carries his arms openly (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate".

This radical position rejects the traditional rules on warfare that clearly distinguish a non-combatant from a combatant, while securing humanitarian pro-

tection for a combatant. Under the 1949 Convention, a terrorist could not hide himself among civilians until just before an attack. Under the Protocol I, however, he may do so only by carrying arms openly as long as he is visibly engaged in a deployment or as long as he is in an actual engagement.

Both neo-realists and internationalists criticize the above radical position, arguing that terrorists who do not intend to satisfy traditional requirements of an "irregular force" are not soldiers ; they do not wear uniform, hide among civilians, and, after striking, escape once again into civilian groups.[4]

According to the radical perspective, however, civilian population explicitly and implicitly protects terrorists, providing a *de facto* asylum, because they fight for the right of national self-determination ——or the most elementary human rights, dignity, freedom and independence. Radicals argue that terrorists "[cannot] be blamed for committing desperate acts which in themselves [are] reprehensible" ; rather, "the real culprits [are] those who [are] responsible for causing such desperation"[5]. Radicals contend that the traditional understanding is not responsive to a majority interest of the developing nations, only serving for a particular mirority interest of Western Powers.

(2) Neo-realists: The Reagan Administration

Neo-realists have resorted to unilateral use of force because terrorists do not comply with the rules on warfare. This vision is known as the Reagan Doctrine :

> Clearly, unilateral compliance with the [U. N.] Charter's rules of non-intervention and nonuse of force are of no consequence to some who have been engaged in pursuing "national liberation" in our times, in Africa and Asia, in the Middle East and in Central America. Certainly this is not what the Charter requires of us. If there is to be a rule of law——and we are as committed to that proposition today as ever in our history and as any other nation in the world—— that rule of law must be universally accepted, a day which we would welcome.
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> But we cannot permit, in defense not only of our country but of the domain of law ... in which democratic nations must rest ..., ourselves to feel bound to unilateral compliance with obligations which do in fact exist under the Charter, but are renounced by others. This is not what the rule of law is all about. As we confront the clear and present dangers in the contemporary world, we must recognize that the belief that the U. N. Charter's principles of individual and collective self-defense require less than reciprocity is simply not tenable[6].

4) See, for example, Roberts, Guy, B., "The New Rules for Waging War: The Case Against Ratification of Additional Protocol I,", *Virginia Journal Of International Law*, Vol. 26, 1985, pp. 109–170.

5) Sofaer, Abraham D., "Terrorism and the Law", *Foreign Affairs*, Vol. 64, Summer 1986, p. 904.

6) Address by Jean J. Kirkpatrick, U. S. ambassodor to the United Nations, *Proceedings of the 78 th Annual Meeting of the American Society of International Law*, Washington, D. C., April 12–14, 1984, The American Society of International Law, 1986, pp. 67–68. The Doctrine was invoked to justify, *inter alia*, U. S. intervention in Grenada in 1983, the interception of an Egyptian airliner carrying suspected attackers of the Achille Lauro in 1985, the bombing of Libya in 1986, and the mining of Nicaraguan harbors in 1984.

Neo-realists refuse an idea that law can eliminate terrorism, and that more law is needed. Given the Protocol I-44(3), the law virtually served to legitimatize terrorism, and to protect a terrorist from punishment as a criminal. In other words, international law created endless opportunities for avoiding the responsibility to deter lawlessness. From the neo-realist perspective, therefore, the United Nations itself subverted international norms more actively by morally undermining the use of force that in fact helped enforce them. Accordingly, neo-realists considered the absence of law enforcement authority or mechanism as the problem; the answer was unilateral use of force.

With terrorism escalating in kind and degree in the 1980s, neo-realists who viewed that the norm restraining the use of force burdened the defense of national interests prevailed among U.S. opinion leaders and policymakers[7]. In the name of self-defense, neo-realists justify unilateral use of force against terrorists. While outlawing aggression, the contemporary international law guarantees the right of self-defense under certain conditions. Indeed, the U.N. Charter states in Article 2-(4) that "all Members shall refrain in their international relations from threat or use of force against the territorial integrity or political independence of any State". But Article 51 of the Charter also acknowledges "the inherent right of individual or collective self-defense if an armed attack occurs".

7) See, for example, Henkins, Louis, Stanley Hoffman, Jeane J. Kirkpatrick & Allan Gerson, William D. Rogers and David J. Sheffer, *Right v. Might: International Law and the Use of Force*, Council on Foreign Relations, 1989.

As the Caroline case has established, customary international law permits unilateral use of force for self-defense when a state confronts "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation." Many cases of unilateral use of force against terrorists, if not all of them, satisfy these requirements; terrorist neither recognize any constraints of law nor act within the established rules and conventions of war. The Israeli rescue operation in Entebee which protected its citizens from terrorists is a classical example; there existed an imminent threat to civilians which was created by a violation of international law. The rescue operation aimed at solely securing the safety of victims but not at punishing the offending terrorists. In that sense, the principle of proportionality was satisfied because the Israeli use of force in response to the terrorists did not exceed in magnitude or effect, the harm caused by the terrorist offense. In a similar manner, the 1986 U.S. military operation against Libya can be evaluated as a defensive retaliation which satisfied these requirements for self-defense; it was evident that Libya supported terrorist groups attacking U.S. citizens, and the United States confronted a series of ongoing attacks. Besides, since the terrorists were engaged in suicide bombing and other types of surprise attacks, a preemptive and protective action was the only feasible recourse.

Nothwithstanding legitimacy according to customary international law standards, an overwhelming majority of the developing nations openly criticized the above unilateral uses of force in the U.N. General

Assembly, thereby refusing to accommodate U.S. and Western interests in suppressing terrorism. Developing nations feared that defense against terrorism would become an omnibus justification for intervention by Western Powers, especially the United States. Farer argues that such a fear is deeply rooted in a double standard highlightened by U.S. unilateral use of force against small-scale terrorist activities on one hand and its supportive approach toward Isreal and South Africa on the other hand, particularly in the 1980s, which "most openly and consistently violated existing norms limiting cross-border violence in the name of suppressing terrorism."[8] Israel justified its invasion in Lebanon by a terrorist attack on an Israeli diplomat in London. The fact that the United States did not condemn this invasion reinforced the appearance of American hostility to the Arab world. South Africa intervened "repeatedly in neighboring states, both directly and through support for insurgents, and without attempting to relate particular operations to specific terrorist attacks or to any particular patterns of attacks."[9] The South African government used force for defensive purposes as it arbitarily determined, including the "defense" of Namibia which it unlawfully occupied[10].

Radicals, therefore, saw that the United States implicitly supported these two "terrorist states"——the Israeli alien domination in Palestine and the South African racist regime——as a matter of foreign policy. Seen from this radical understanding, it is natural that developing nations consistently rejected to condemn, without qualification, state-sponsored terrorist activities against the United States and Western allies in the U.N. General Assembly.

(3) Internationalists: The Bush Administration

Internationalists presupposes a fiction, either utopian or self-deceptive, that an international legal order exists. Internationalists attempt to systematically defend the integrity of the existing "international legal order" as a precondition in justifying their approach according to which to refrain from the use of force and to achieve a "cheaper" management of global politics.

Internationalists disagree with radical and neo-realist arguments. Internationalists see both schools reject integral parts of the existing "international legal order". The just war tradition not only punishes war crime and crime against humanity but also denies random attacking against civilians/non-combatants by terrorists which possesses elements against humanity[11]. Defending terrorists at the sacrifice of non-combatants contradicts the humanitarian rules on warfare which emphasize the protection of non-combatants. If an act constituting war crimes during wartime is to be punished, then terrorists even with political motivation must be punished in peacetime.

On the other hand, internationalists do not accept the neo-realist willingness for the use of force. Farer argues that, "in

8) Farer, *op. cit.*, p. 40.
9) Farer, *op. cit.*, p. 40.
10) *Ibid.*
11) See, for example, Walzer, Michael, *Just and Unjust Wars*, New York: Basic Books, 1977.

the name of law and order", neo-realists virtually "challenge the central postulate of the postwar system of law and order"; the neo-realist challenges the internationalist position[12]. There exists a strong perception among an overwhelming majority of the states that war avoidance and restraints in the use of force are important interests. In response to U.S. invasion in Grenade, even Britian saw it a simple case of invasion legally indistinguishable from Soviet invasion in Afghanistan and Vietnamese involvement in Cambodia[13].

From the internationalist perspective, it is necessary to work within "the international legal order" rather than to reject and de-stabilize it; radicals should not encourage terrorism and neo-realists should not support norm-busting violence and unilateral use of force. Piper argues:

> [T]he international legal quality of unilateral actions is uncertain until the action are affirmed by other members of the international community as either customary or treaty rules of law. Moreover, the unilateral process is deliberate or inadvertent abuse by states which may assert particular rules in order to protect or promote immediate interests rather than seek accommodation with other states in conformity with widely accepted community values. Consequently, the unilateral law-making process is not regularized and systematic and may be dysfunctional to the international legal order if the unilaterally asserted legal rules are percieved by other national decisionmakers as destructive of well-established legal rights or unwarrented and unnecessary in the light of the relevant situation[14].
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> Rejection of the international legal order will always have some appeal for decision-makers. But that appeal is held in check or mitigated by a belief that more substantial benefits relating to international stability and other are derived by working within the international legal order[15].

Indeed, the U.N. and other multilateral enforcement mechanisms do not function to deter terrorism effectively. However, internationalists see that, independent of the effectiveness of deterrence, international norms restraining the use of force will endure as tha central postulate of international law and order.

IV. Conclusion: internationalists resurgent

With the Cold War over, internationalists have gradually prevailed. The Bush administration increasingly took the internationalist posture toward the end of his office. In this period, the administration refrained from unilateral use of force, instead leading multilateral intervention under the flag of the United Nations, typically shown by the Desert Storm Operation in the Persian Gulf War. The administration also exerted a maximum diplomatic pressure on Isreal not to retaliate against Iraqi randam attack with Squd missles. The fact that Israel did not retaliate and the United States did not defend Isreal reduced the relevancy of a perrenial Arab assertation that the U.S. approach toward Arab terrorism and the Israeli alien domination in Pale-

12) Farer, *op. cit.*, p. 29.
13) Farer, *op. cit.*, p. 41.
14) Piper, Don, "On Changing or Rejecting the International Legal Order", *International Lawyer*, Vol. 12, No. 2, p. 294.
15) *Ibid.*, p. 307.

stine involve a double standard. Concurrently, the Bush administration's policy toward South Africa stopped discouraging the internal democratization of the racist regime[16].

Internationalists refrain from supporting norm-busting violence of Israel and South Africa, thereby depriving radicals of rational grounds in justifying their tolerance over terrorism in the name of national self-determination. The evolutionary change of world opinion is highlightened by the fact that the U.N. General Assembly repealed its resolution of 1975 linking Zionism to racism in 1991, on the ground that the resolution was an expression of Arab as well as other nonaligned developing nations to reject or dispprove "the international legal order" and the U.S. hegemony[17]; Israel was used as the sole strategic bridge head in the region against the Soviet challenge which received massive U.S. military assistance. Apparently, the post-Gulf War situation has created an impressive durability of the Middle East Peace Process because various parties to the conflict first have to appeal to "peace" in principle before objecting to an element of a "peace" proposal[18].

Hitherto, this study has analyzed legal approaches to terrorism as a form of international politics. Under the new international political and economic conditions after the Cold War, legitimating the U.S. hegemony in terms of legal reasoning has emerged as an important international political instrument; it is essential for the United States to ensure compliance of the developing nations with "the international legal order" congruent with the U.S. hegemony. Practically, U.S. policymakers need to eliminate a double standard concerning the use of force and foreign policy, thereby depriving opposing local political forces of rational grounds to reject and obstruct the U.S. hegemony. The Clinton administration fundamentally continues the internationalist posture, while becoming increasingly prudent for the use of force in Yugoslavia and other regional conflict areas.

16) See, for example, Arnold, Millard W., "Engaging South Africa After Apartheid", *Foreign Policy*, No. 87, pp. 139–156.

17) The U.N.Resolution on Zionism was adopted by the General Assembly on November 10, 1975. Seventy two nations voted in favor of the resolution while thirty five nations opposed and thirty two nations absteined from voting. The Resolution states that, "taking note ... of the political declaration and strategy to strengthen international peace and security and to intensify solidarity and mutual assistance among nonaligned countries, ... [which] condemned Zionism as a threat to world peace and security and called upon all countries to oppose this racist and imperialist ideology ..., [the General Assembly] determines that Zionism is a form of racism and racial discrimination". See, *The Washington Post*, 1991.12.17.

18) See, for example, Bannerman, M. Graeme, "Arabs and Israelis: Slow Walk Toward Peace", *Foreign Affairs*, Vol. 72, No. 1.