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TERRORISM AND INTERNATIONAL LAW

Louis René Beres*

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I. INTRODUCTION

Everyone, it seems, is opposed to terrorism. Yet from the perspective of international law, not every insurgency is terroristic. Indeed, in a world that continues to deprive millions of individuals of the minimum standards of human dignity, certain insurgencies are fundamentally law-enforcing (a condition that should be especially familiar to all those who celebrate the American Revolution of 1776). With such facts as a starting point, this paper will identify the differences between lawful and unlawful insurgency under international law.

II. STANDARDS AND EXPECTATIONS

International law has consistently proscribed particular acts of international terrorism.1 At the same time, however, it codifies the right

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1. On December 9, 1985, the United Nations General Assembly unanimously adopted a resolution condemning all acts of terrorism as "criminal." (See United Nations Resolution on Terrorism, G.A. Res. 40/61, 40 U.N. GAOR Supp. (No. 53) at 301, U.N. Doc. A/40/53 (1985)). Never before had the Assembly adopted such a comprehensive resolution on this question. Yet the issue of particular acts that actually constitute terrorism is left largely unresolved, except
of insurgents to use certain levels and types of force when fundamental human rights are repressed and where non-violent methods of redress are unavailable. Inhabiting a sovereignty-centered system wherein the normative rules of the human rights regime are normally not enforceable by central global institutions, the individual victims of human rights abuse must seek relief by humanitarian assistance or by rebelling. Indeed, without such self-help remedies, the extant protection of human rights in a decentralized legal setting would be entirely a fiction, assuring little more than the primacy of *Realpolitik*.

The current human rights regime originated in ancient Greece and Rome. From Greek Stoicism and Roman law to the present, the *jus gentium* (law of nations) and modern international law have accepted individuals’ rights to overthrow tyrants and to forcefully oppose tyrannical regimes when necessary. This acceptance can be found primarily in international custom, the general principles of law recognized by nations, United Nations General Assembly resolutions, various judicial decisions, specific compacts and documents, the writings of highly


3. See, e.g., the Magna Carta (1215); the Petition of Right (1628); the English Bill of Rights (1689); the United States' Declaration of Independence (1776); the Declaration of the Rights of Man and of the Citizen (1789).
qualified publicists (e.g., Cicero; Francisco de Vitoria; Hugo Grotius and Emmerich de Vattel) and, by extrapolation, from the convergence of human rights law with the absence of effective, authoritative central institutions in world politics.

The first jurisprudential standard for differentiating between lawful insurgency and terrorism is "just cause." Where individual states prevent the exercise of human rights, insurgency may express law-enforcing reactions under international law. However, the means used in that insurgency must be consistent with the second jurisprudential standard, "just means."

Discrimination, proportionality and military necessity are some of the factors states should use when deciding whether a particular insurgency is an instance of terrorism or law enforcement. Terrorism takes place when insurgents apply force broadly to any segment of human population. Similarly, terrorism begins when insurgents apply force to the fullest possible extent, restrained only by the limits of available weaponry.

The legitimacy of a certain cause does not legitimize the use of certain forms of violence. As in the case of war between states, every use of force by insurgents must be judged twice, once with regard to the justness of the objective, and once with regard to the justness of the means used in pursuit of that objective.

The explicit application of codified restrictions of the laws of war to non-international armed conflicts dates back only as far as the four Geneva Conventions of 1949. However, recalling that the laws of war, like the whole of international law, are comprised of more than treaties and conventions, it is clear that the obligations of jus in bello (justice in war) are part of the general principles of law recognized by civilized nations and are binding upon all categories of belligerents. Indeed, the Hague Convention (No. IV) of 1907 declared in broad terms that in the absence of a precisely published set of guidelines in humanitarian international law concerning "unforeseen cases," all belligerency is governed by all of the pre-conventional sources of international law:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.4

This “more complete code” became available with the adoption of the four 1949 Geneva Conventions. These agreements contained a common article (3) under which the convention provisions would be applicable in non-international armed conflicts. Nevertheless, the 1949 Geneva Diplomatic Conference rejected the idea that all of the laws of war should apply to internal conflicts, and in 1970 the United Nations Secretary General requested that additional rules relating to non-international armed conflicts be adopted in the form of a protocol or a separate convention.

In 1974 the Swiss government convened in Geneva the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. On 8 June 1977 the Conference formally adopted two protocols additional to the Geneva Conventions of 12 August 1949. Protocol II relates “to the Protection of Victims of Non-International Armed Conflicts” and develops and supplements common article 3 of the 1949 Conventions. In the fashion of common article 3 and article 19 of the 1954 Hague Cultural Property Convention, Protocol II does not apply to situations of internal disturbances and tensions such as riots or isolated and sporadic acts of violence. It does, however, apply to all armed conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.5

Geneva Protocol I also constrains insurgent uses of force in “armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.” Thus, even where the peremptory rights to self-determination are being exercised, insurgent forces must resort to lawful means of combat. According to article 35, which reaffirms longstanding norms of international law: “in any armed conflict, the rights of the parties to the conflict to choose methods or means of warfare is not unlimited.”6


States also have an obligation to treat captured insurgents in conformity with the basic dictates of international law. Although this obligation does not normally interfere with a state's right to regard as common or ordinary criminals those persons not engaged in armed conflict (that is, persons involved merely in internal disturbances, riots, isolated and specific acts of violence, or other acts of a similar nature), it does mean that all other captives remain under the protection and authority of international law.

In cases where captive persons are engaged in armed conflict, it may mean an additional obligation of states to extend the privileged status of prisoner of war (POW) to such persons. This additional obligation is unaffected by insurgent respect for the laws of war of international law. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules do not automatically deprive an insurgent combatant of his right to protection equivalent in all respects to that accorded to prisoners of war. This right, codified by the Geneva Conventions, is now complemented and enlarged by the two protocols to those conventions.

III. JUSTICE AND GEOPOLITICS

Since the end of the Second World War, there has been a revolution in international legal affairs. Among other things, this revolution has essentially removed a state's treatment of its own nationals from the realm of "domestic jurisdiction" whenever such treatment fails to conform to particular normative standards. Expanding upon the long-standing principle of humanitarian intervention, the Nuremberg judgment and Nuremberg principles placed additional and far-reaching limits on the authority of particular states. Reasoning that the individual human being, as the ultimate unit of all law, is entitled to the protection of humankind when the state tramples upon its rights "in a manner that outrages the conscience of mankind," the Tribunal firmly established the obligation of states to intervene in other states whenever such outrages are committed.

In the absence of viable community enforcement capabilities in our decentralized international society, the opportunities for justice require voluntary patterns of compliance and support by individual governments. The prevailing expectation is that such patterns will be especially and consistently acknowledged by the world's major powers. It follows that punishment of gross violations of human rights is now well within the jurisdictional scope of the general community of humankind.

If states continue to turn their back on responsible enforcement of the international law of human rights, they will forfeit their last
practical chance for coping with terrorism. The problem, as we have seen, lies in recognizing the principle of "just cause" for insurgency (a principle enshrined in our western traditions and in the law of nations) and in distinguishing between lawful and unlawful insurgencies under international law.

The global imperative, therefore, must be to condemn not only insurgent terror, but also "regime" terror. Regime terror, which contradicts the extant rules and principles of international law, breeds insurgent terror. If states are to be true to their international legal obligations and long-term geopolitical interests, they cannot continue to selectively support the former while selectively combatting the latter.

Consider United States support for South Africa. The South African constitution does not contain a Bill of Rights to protect the natural rights of the individual. Even under the best of circumstances, i.e., one without the special harshness of emergency powers, police officers can arrest any person suspected of being a terrorist without warrant. The suspect may be held for interrogation for as long as it takes "to reply satisfactorily to all questions of the said interrogation." In other words, a suspect may be held until a carefully-orchestrated pattern of beatings and torture elicit the desired response.

Detainees can be held for more than a year without being formally charged. While under detention, a detainee may not receive any visits from family, friends, clergy or counsel. There is, of course, no right of habeas corpus or recourse to the courts. If the courts find the suspect guilty, he can be sentenced to death.

What is the shape of "freedom" within United States client regimes in Central America? In El Salvador death squads and government troops kill, rape and mutilate thousands of noncombatant civilians. The types of torture reported to Amnesty International include beatings, sexual abuse, use of chemicals, mock executions and the burning of flesh with sulphuric acid. According to Amnesty International, "[t]he units responsible for these abuses have included El Salvador's regular armed forces, naval as well as land forces, and special security forces such as the National Guard, the National Police and the Treasury Police."

In Guatemala, one regime picks up where the other has left off. Whoever happens to be in power at the moment resolves dissent by administering torture. During the Lucas Garcia period (1978-1982), those who had "disappeared" were discovered, says Amnesty Interna-

tional, with "cigarette burns, castration, traces of insecticide in the hair indicating the use of a 'capucha,' a hood impregnated with noxious chemicals, allegedly used to the point of suffocation, multiple slashing often inflicted with machetes, sometimes severing entire limbs." After a new government took power, nothing changed. In July 1982, Amnesty International issued a special briefing paper (Massive Extrajudicial Executions in Rural Areas Under the Government of General Afrain Rios Montt) which concluded that Guatemalan government troops continued "the widespread use of torture and the killing of large numbers of rural noncombatant civilians including young children..."

Honduras, centerpiece of American military operations in Central America, has been instrumental in supporting indiscriminate attacks, including the use of torture and mutilation upon fleeing Salvadoran refugees, consisting of mostly women and children. According to Amnesty International, "[o]n a number of occasions torture has led to deaths of prisoners in custody, as well as of non-combatant civilians killed by soldiers carrying out counter-insurgency operations in areas near the Salvadoran border."

Who, exactly, are the terrorists? Are they the black South African guerrillas who oppose a white minority-ruled apartheid regime? Are they the individuals amongst the neighboring frontline states who support black South African insurgents? Are they the Namibians who support the South-West African People's Organization (SWAPO) in a United Nations-sanctioned opposition to South African control? Are they the Salvadoran rebels? Are they also the rightist "death squads" that operate throughout Latin America? What about the Afghan Moslem guerrillas combatting Soviet troops or Iran's ethnic Kurds? What about Unita? What about the contras?

And what about states that support or even sustain insurgent organizations? The problem, of course, is exceedingly complex, depending, in part, on the cause and in part on the means. Although state sponsorship of insurrections in other states may be lawful as an indispensable corrective to gross violations of human rights, such sponsor-

8. Id. at 158.
9. Id. at 160.
10. Id. at 165.
ship is patently unlawful whenever its rationale lies in presumptions of geopolitical advantage. Today the long-standing customary prohibition against foreign support for lawless insurgencies is codified in the United Nations Charter and in the authoritative interpretation of that multilateral treaty at article 1 and article 3(g) of the General Assembly’s 1974 Definition of Aggression.

The legal systems embodied in the constitutions of individual states are an interest that all states must normally defend against aggression. Hersch Lauterpacht expressed this peremptory principle. According to Lauterpacht, the following rule concerns the scope of state responsibility for preventing acts of insurgency or terrorism against other states:

International law imposes upon the State the duty of restraining persons within its territory from engaging in such revolutionary activities against friendly States as amount to organized acts of force in the form of hostile expeditions against the territory of those States. It also obliges the States to repress and discourage activities in which attempts against the life of political opponents are regarded as a proper means of revolutionary action.  

Lauterpacht’s rule reaffirms the Resolution on the Rights and Duties of Foreign Powers as Regards the Established and Recognized Governments in Case of Insurrection adopted by the Institute of International Law in 1900. His rule, however, stops short of the prescription offered by Emmerich de Vattel. According to Vattel’s The Law of Nations, states that support terrorism directed at other states become the lawful prey of the world community:

If there should be found a restless and unprincipled nation, ever ready to do harm to others, to thwart their purposes, and to stir up civil strife among their citizens, there is no doubt that all others would have the right to unite together to subdue such a nation, to discipline it, and even to disable it from doing further harm.  

IV. TAKING STANDARDS SERIOUSLY

The greatest danger of terrorism lies in misconceived intuitions of Realpolitik. To meet the requirements of effective counterterrorism,

decent states must oppose repressive regimes and movements whatever their ideological stripe. They must also support those insurgencies that spring from genuinely “just cause” and that are carried out with due regard for the laws of war of international law. 14

It follows from all this that it is pointless to speak of the control of terrorism per se. Rather, the control of terrorism must always be contingent upon context — on the nature of the regime within which insurgency is taking place, and — where appropriate — the reasonableness of transnational force. To respond to insurgencies directed against repressive regimes with assistance for those regimes would be wrong from the perspective of international law. Indeed, states in world politics, when recognizing the principle of “just cause,” should always consider the reasonableness of supporting the insurgents in such cases — especially where the insurgencies are conducted according to the laws of war of international law. Ideally, the judgments of other states here should be determined exclusively by the standards of jus ad bellum and jus in bello, and should ignore the presumed expectations of Realpolitik.

In those cases where insurgencies are directed against democratic regimes (circumstances wherein the criterion of “just cause” is unlikely to be met), the control of terrorism becomes an entirely different matter. In these cases, the protection of human rights compels vigorous anti-insurgent methods rather than possible support of insurgents. The reasonableness of such methods is enhanced where the insurgents conduct their operations with flagrant disregard for discrimination and proportionality.

States may need to enact appropriate forms of domestic law to implement these methods. In the United States, as part of the Comprehensive Crime Control Act of 1984, Congress approved an Act for the Prevention and Punishment of the Crime of Hostage-Taking. Following the provisions of the Hostages Convention (1979), the Act punishes the seizure or detaining of a person, coupled with threats to

14. Significantly, official United States government definitions of terrorism do not allow for “just cause,” a situation that is contrary not only to prevailing international law but also to the current administration’s own geopolitical arguments. These definitions, therefore, are not only lawless but profoundly unintelligible. According to the September 1984 definition offered by the Department of State, Bureau of Public Affairs, which has been reaffirmed regularly: “Terrorism is the use or threatened use of violence for political purpose to create a state of fear that will aid in extorting, coercing, intimidating or otherwise causing individuals and groups to alter their behavior.” (See International Terrorism, GIST). By this definition, of course, the 18th century revolutionary insurgency that led to creation of the United States was terrorism. Similarly, the United States-supported contras are also terrorists under this definition.
kill, injure or continue to detain the person, for the purpose of compelling a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the detained person.

To fully implement its responsibilities under the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (the Montreal Convention, 1972) the United States enacted the Aircraft Sabotage Act as part of the Comprehensive Crime Control Act of 1984. Moreover, to authorize the United States (specifically the Attorney General and the Secretary of State) to pay rewards of up to $500,000 for information concerning terrorist activity, Congress enacted the Act to Combat International Terrorism of 1984. Taken together, these recent United States legislative measures contribute to this country's ability to cooperate internationally against terrorism.

There are other contexts, however, that are more complex. For example, the threat of terrorism that now confronts the United States and its interests abroad flows largely from the Reagan administration's effective indifference to human rights in anti-Soviet states (e.g., Chile, Paraguay, South Korea, South Africa). Recognizing the alliance between their oppressive rulers and United States policy, the oppressed in these states may increasingly target Americans as well as oligarchs. In this connection much depends on the willingness of the Bush Administration to change direction.

Careful analysis suggests that the most promising new initiative in controlling terrorism is an early sensitivity to the terrorism-generating qualities of certain foreign policies. This raises the issue of individual states that oppose terrorism selectively, or — stated differently — oppose certain terrorist groups while supporting others. In this connection, the Reagan administration's position on the contras was revealing. In distinguishing between "terrorists" and "freedom fighters" (what we might call here unlawful and lawful insurgents), the former President embraced no jurisprudential standard of judgment. Rather, his only criterion was anti-Sovietism. It follows from this criterion that efforts to overthrow allegedly pro-Soviet regimes (even ones with which the United States has diplomatic relations) were always conducted by "freedom fighters," while efforts to oppose anti-Soviet regimes (e.g., South Africa) were always conducted by "terrorists."

From the standpoint of international law, this manner of distinction has absolutely no validity. Before we can proceed with appropriate initiatives in the control of terrorism, we must recognize settled jurisprudential standards that distinguish lawful from unlawful insurrections. We cannot accept any other criteria that would deform the natural rights of humankind.
The alternative, for international law, is to remain little more than an instrument of national policy, rationalizing decisions that are grounded exclusively in geopolitical calculations. Worse, the day may not be far off when governments no longer even feel the need to seek legal camouflage to justify their most illegal policies. In almost all of the recent, major United States foreign policy controversies — e.g., arms for Iran; the contras and Nicaragua; complicity in apartheid with South Africa — international law was almost never raised as a serious factor. Even when the former President of the United States declared his "Cry Uncle" standard for determining force levels against Nicaragua, there was little or no reaction to his flagrant disregard for the United Nations Charter and international law.

V. TERRORISM AND UNITED STATES FOREIGN POLICY

Let us look more closely at Nicaragua. There are two overarching problems with United States actions against Nicaragua under international law: their intrinsically illegal character and persistent American unwillingness to submit to the jurisdiction of the International Court of Justice (ICJ). According to the major law making treaty, article 94 paragraph 1 of the United Nations Charter: "(1) [e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." Although the United States argued that the ICJ did not have jurisdiction to decide upon the Nicaraguan complaint on its own merits, the Court — on November 26, 1984 — rejected this argument. In response, the United States, in clear violation of the obligations created at article 36 paragraph 6 of the Statute of the International Court of Justice, withdrew from any further participation in the Merits phase of litigation. This withdrawal took place on January 18, 1985.

There is not any legally defensible argument on behalf of a foreign policy that relies preeminently upon military force and the threat of armed coercion. According to article 2(3) of the United Nations Charter: "[a]ll members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endandered." This binding norm notwithstanding, United States policy toward Nicaragua has been founded upon the use of military pressure to produce a settlement presumed favorable to the United States.

15. U.N. CHARTER art. 94, para. 1.
16. Id. at art. 2, para. 3.
The clear impermissibility of United States actions against Nicaragua can be extrapolated from article 2 paragraph 4 of the Charter: "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." These actions, which were never authorized by the United Nations Security Council or by an authoritative regional organization, also violated other binding treaty obligations. According to article 20 of the Organization of American States (OAS) Charter: "[t]he territory of a state is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly." And article I of the Rio Treaty established, "[t]he High Contracting Parties formally condemn war and undertake in their international relations not to resort to the threat or use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty."

Another hemispheric treaty that points unambiguously to United States aggression against Nicaragua is the 1928 Convention on the Duties and Rights of States in the Event of Civil Strife. Article I of this treaty, to which both the United States and Nicaragua are parties, establishes:

[T]he contracting States bind themselves to observe the following rules with regard to civil strife in another one of them: First: To use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife.

In addition, the United Nations General Assembly's 1970 Declaration on Friendly Relations, adopted by consensus and with United

17. Id.
States approval, offered the following authoritative elucidation of article 2(4): "[e]very State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State."21

The Reagan administration rejected Nicaraguan claims before the ICJ, in part, on the ground that the Court had become politicized and that issues before it were no longer dealt with on their merits. In this connection, President Reagan intimated that the ICJ is not a court "in the true sense of the word," that is it does not consist of disinterested parties, and that it is primarily antidemocratic, anti-Western and anti-United States. This argument, which apparently did not obtain when the United States brought a complaint against Iran on November 29, 1979 (see below), is contingent upon a highly particularistic definition of "political," and stands in ironic contrast to American responses to the Nicaraguan claim.

From the beginning, the Reagan administration attempted to defend its manifold assaults upon the sovereignty of Nicaragua by discrediting the Sandinista regime. The clear purpose of this strategy was to create the impression that this regime was intrinsically criminal (because it was allegedly Marxist and pro Soviet) and therefore beyond the usual pale of jurisprudential protection. If, after all, a state is simply a shadow of an Evil Empire, what possible justification can there be for granting it the usual rights and privileges of statehood?

In support of its position before the ICJ, however, the Reagan administration relied upon the following political arguments. First, it argued that Nicaragua's request that the Court indicate provisional measures (to preserve its rights during the course of judicial proceedings) "could irreparably prejudice the interests of a number of states and seriously interfere with negotiations being conducted pursuant to the Contadora process." Second, it argued that other Central American states, especially El Salvador, Honduras and Costa Rica, had rights and interests that made them "indispensable parties in whose absence this Court cannot properly proceed." And third, it argued that the ICJ should decline Nicaragua's request for provisional measures because such questions regarding the use of force during hostilities are more properly committed to resolution by the political organs of the United Nations and of the Organization of American States.

None of these arguments has any basis in international law. The ICJ had appropriate jurisdiction over the case brought by Nicaragua, both under the compulsory jurisdiction established in article 36 of its Statute and pursuant to the 1956 United States-Nicaragua Treaty of Friendship, Commerce and Navigation. Moreover, the United States references to the Contadora process and political settlement were ironic in view of (1) persistent United States obstruction of that process and (2) the fact that the “hostilities” described had been initiated and sustained by the United States. It follows that the only rationale for these arguments was to bring a contentious matter away from an authoritative legal process, where United States defeat was certain, and into a context dominated by considerations of Realpolitik, where victory might be assured via military coercion.

On November 29, 1979, the United States submitted its case against Iran before the ICJ. In particular, the United States charged that Iran had violated the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1973 Convention on the Prevention and Punishment of Crimes against Diplomats, the 1955 United States-Iran Treaty of Amity and the Charter of the United Nations. The jurisdiction of the Court, said the United States, was established at paragraph 1 of article 36 of the Statute of the ICJ. The United States and Iran, as members of the United Nations, were parties to the Statute and were also parties to three international conventions that independently established the Court’s jurisdiction over the Teheran embassy affair.

On April 9, 1984, Nicaragua initiated proceedings against the United States in the ICJ. In particular, Nicaragua charged that both it and the United States had accepted the compulsory jurisdiction of the Court under the terms of article 36 (a position upheld by the Court) and that the Court held an independent basis of jurisdiction under the terms of the 1956 United States-Nicaragua Treaty of Friendship, Commerce and Navigation. In establishing the merit basis for its claim, Nicaragua also cited the United Nations Charter, the


24. See Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States) 1986 I.C.J. 14 (commonly known as the Military Activities Case or the Nicaraguan Mining Case).

Comparing these two cases, a clear pattern emerges. The claims brought before the Court by Nicaragua were founded upon the same essential sources of international law brought in the earlier case against Iran by the United States. Thus, the Reagan administration charges that the Nicaraguan claims were not well established in law were *prima facie* unreasonable.

To act in its own interests in Central America, the United States must restore respect for its own traditions and for the rules of international law. With such respect, the intuitions of *Realpolitik* could be replaced by the essential requirements of co-existence. Newly informed of the differences between violence and power, this nation could recognize that impermissible intervention in the region is inherently self-defeating.

Increasingly, international law is not often taken very seriously. One reason for this is that scholars have failed to communicate — to the public and to governments around the world — that compliance with international law is compatible with national interest. Another reason is that scholars have failed to speak publicly in support of independent normative standards, and in opposition to national policies that are in clear violation of international law. For whatever reasons, academicians have accepted for their discourse a concept of terrorism that often has nothing to do with international law. This concept is determined by their respective governments, by prevailing configurations of national and international power and by the Cold War.

More than we care to admit, we are prisoners of *Realpolitik*, offering lip service to peremptory norms while offering real allegiance only to power and ideology. If we sincerely seek to control terrorism, we must first remind ourselves that lawful definitions are created not by individual governments for adversary political purposes, but by the sources enumerated at article 38 of the Statute of the ICJ. We must also remind ourselves that international law has no place for selective concern about human rights — concern dictated, *inter alia*, by ritual deference to a contrived East-West struggle.

Today, of course, all states are expected to comply with a far-reaching and largely codified human rights *regime*. At the same time, of course, there is a significant gap between the normative expectations of this regime and actual state practice. In certain instances, the threat of terrorism is exaggerated by governments to justify repression. Ironically, as repression hardens, the pretext sometimes becomes
genuine; the prophecy is self-fulfilled. In these instances, where insurgents have manifestly “just cause,” international legal initiatives should be directed against regime terror—especially where the insurgents comply with the international laws of war.

VI. CONCLUSION

We know now that not every insurgency is an instance of terrorism. We also know that the fear of terrorism can occasion human rights abuse by particular governments — that such abuses can be undertaken in the name of counter-terrorism. But what can be done by international law to limit control of insurgency to genuine instances of terrorism and to prevent state manipulation of counter-terrorism for purposes of repression or propaganda? The answer to this question is largely political. It is not jurisprudential. The answer lies preeminently in reducing the primacy of geopolitics in world affairs. Unless states begin to reject the prevailing axes of conflict in global power relations they will never be able to control most forms of terrorism.

The world should no longer be willing to accept the caricature of Free World/Socialist World dichotomies. Although the Soviet Union has certainly been a repressive society, the United States is hardly blameless. If there is an essential difference between the Brezhnev Doctrine and the Reagan Doctrine from the perspective of international law (both doctrines invoke the “right” to violate the peremptory obligations of non intervention and to exempt their respective states from the normative expectations of the United Nations Charter) it has yet to be revealed.