TERRORISM: THE PERSISTENT DILEMMA OF LEGITIMACY[*]

M. Cherif Bassiouni[†]

I am honored to join such a distinguished group of experts in discussing a topic of significant contemporary relevance. My appreciation goes to Professor Michael Scharf, and to the Frederick Cox Center for hosting this conference, and for inviting me to deliver the keynote address.

Precisely because there are so many experts present at this conference, I would like to confine myself to a few eclectic and provocative questions as a way of contributing to the debate.

At an international conference held at the International Institute of Higher Studies in Criminal Sciences, in Siracusa, Italy in 1973, I coined the phrase "what is terrorism to some is heroism to others."[1] Though the maxim may seem banal, it represents the contrasting legitimacy-based views of those who resort to violence as a way of accomplishing a power-outcome.

The issue of legitimacy of use of force has existed for as far back as organized societies have existed. For some there is in it the echo of Niccolo Machiavelli, that the ends justify the means, and that violence is only one of the means. For others, surely since the emergence of what constitutes just and unjust resort to violence in civilizations such as Greece and Rome, there is a moral dimension that limits both *jus ad bellum* and *jus in bello*. As of the nineteenth century, political realists see legitimacy as a reflection of the asymmetry of power between competing groups seeking to justify as their means by focusing on the ends. No matter what the debate is about, it is always those with dominant power who control the characterization of their opponents' violence. This is what led Mao Tse Tung to say in his Red Book, that "political power grows out of the barrel of a gun."[2]

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[1] For the proceedings of the conference, see M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM AND POLITICAL CRIMES (1975).

[2] Mao Tse Tung, *Problems of War and Strategy, in* 2 MAO TSE TUNG, SELECTED WORKS 224 (1938).

For centuries, the international community has sought to develop neutral rules in times of war which preclude the use of certain forms of violence and certain weapons by establishing boundaries designed to protect certain persons and certain targets.[3]   However, the neutrality of these rules have also historically favored the more powerful, leaving those with less power few alternatives to their violation. This explains why since WWII the largest quantum of victimization occurred during conflicts of a non-international character.

Consider also that international law's failure to provide effective mechanisms for the peaceful resolution of conflicts has all too frequently left protagonists with no other option but to resort to violence and, because of the power-asymmetry factor, to transgress the rules on the limits to violence. President Kennedy, at a meeting of heads of states in the Americas in 1961 eloquently described the issue as, "those who make peaceful revolution impossible make violent revolution inevitable." Thus, without effective mechanisms of peaceful resolution of conflicts, and without the rule of law equally applicable to all protagonists, the alternative is violence—and more often than not, violence in violations of international humanitarian law and human rights law, which falls within the meaning of terrorism.

For States, it has always been easier to advocate self-defense and legitimacy, while for aggrieved groups, the same claims are more difficult to make. A good example is the Israeli-Palestinian conflict, where no matter what the violent action is, when performed by Israel it is legitimate, though with admission of possible excessive use of force in isolated cases, while when performed by the Palestinians, it is almost always terrorism.

The resort to forms of violence that instill terror in a given population has been a constant feature of history. The rhetoric of contemporary politicians notwithstanding, terrorism, as we have now come to call it, is not new, and neither are responses thereto. Tyrannical regimes throughout history have resorted to terror-violence, from Ghengis Khan in the Middle Ages to the Nazi and Stalinist regimes in modern times. Most revolutions have also been accompanied by a reign of terror such as during the French, Leninist, and Maoist revolutions, to name only a few. How do we characterize the Spanish Inquisition? States, groups, organized religion, revolutionaries, zealots, and individuals with all sorts of causes have resorted to terror-violence with all sorts of justifications.[4] Yet, we seem to periodically re-discover the phenomenon and reinvent responses to it. What remains constant are the competing claims of legitimacy, even when

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[3] *See* A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS (M. Cherif Bassiouni ed., 2000).

[4] *See* INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS (1937-2001) (M. Cherif Bassiouni ed., 2001); 1, 2 INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS (1972-2001) (M. Cherif Bassiouni ed., 2002).

the actions of its claimant are of the same type as those claimed to be "terrorists."

In more recent times, ethnic, religious and political conflicts have also brought their share of terror-violence to different societies all over the world. Since the end of WWII, in almost every region in the world, there have been conflicts characterized by terror-violence. It seems like déjà vu, even when the means and consequences have not been previously experienced.

What distinguishes these different experiences is the ability of certain societies to restrain themselves in counter-terrorism measures, and to avoid engaging in the same tactics of those who oppose them.[5] In the last forty years, Europe in particular has gone through these experiences with the Red Brigades in Italy, the Baader-Meinhof group in Germany, the Basque separatist movement in Spain, and the IRA in Ireland, to name only a few. In all of these cases, the governments in question have avoided resorting to terror-violence as a way of quelling the terrorism inflicted upon their societies by rebellious groups, irrespective of the validity of any of these groups' claims. More importantly, these governments have sought to restrain their violent responses in the exercise of their legitimate rights of defending their societies by making sure that the costs to freedom and democracy would not be so high as to hand the rebellious groups a victory over governmental legitimacy.

Older civilizations seem to have a better historic memory, and a greater appreciation of the value of hard-earned civil liberties. Newer civilizations tend to think more of security over liberty and short-term over long-term. In that context, it is relevant to recall the words of Benjamin Franklin during America's war of independence, that "they that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

The perception of terrorist threats in all societies depends on a variety of factors, one of which is context, and the other is the way in which governments project threats and their assessments to their population. When some governments enhance the threats, they predispose their societies to greater fear, and thus condition them to accept measures which in and of themselves contravene fundamental social values, erode civil liberties, and curtail human rights. When that occurs, the loss to society is sometimes greater than the threats they may face. In those cases, the "terrorists" win a moral victory, only because these governments lost the high moral ground.

Some societies may have a lower threshold of vulnerability to the socio-psychological impact of terror-violence because they come to it with historic baggage that magnifies collective fear, and thus increases that

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[5] *See* INTERNATIONAL TERRORISM: LEGAL CHALLENGES AND RESPONSES (International Bar Association Task Force on International Terrorism, 2003).

society's perception of vulnerability. In these situations, individual acts of terrorism operate as a psychological trigger recall mechanism which bring to the fore the harms suffered by that society in the past. For example, Palestinian suicide bombing in Israel has a much greater socio-psychological impact than for example in Iraq, because of the history of the Jewish peoples' vulnerability throughout their 2,000 year history.

The psychological significance of terrorism is also largely dependent on a society's perception of vulnerability, as well as on how a given government may heighten that perception. In these cases, quantitative or comparative analysis of harm lose their significance. 9/11 is such a case. It resulted in approximately 3,600 deaths. However, in the United States, there are approximately 25,000 persons killed every year as a result of drunken driving, and 20,000 killed a year as a result of violent homicides. Notwithstanding the extraordinary amount of casualties produced every year in this country by criminal activities, the sense of vulnerability in American society is not as acute as with respect to prospective acts of terrorism.

Interestingly, few institutional changes have occurred over the years in this country to prevent violent homicides and drunken driving homicides, yet major institutional changes have occurred as a result of the single incident that resulted in 3,600 people killed. Some may see that phenomena as caused by the yearly recurrence of some 45,000 casualties to which we have become accustomed, while we cannot accept the vulnerability of being exposed to the unexpected attacks of foreign source terrorism. Others will see it as the reaction of national pride. It is not so much the harm as the offense. The point is that the quantum of harm brought about by criminal behavior is not what shapes perceptions of threat, and reactions to its occurrence. It is what we make of it, or rather what politicians and media dissemination engenders in a given society at a given time. Objectivity has nothing to do with perception, and that is one of the more intractable issues in dealing with terrorism.

The randomness in terrorism heightens the sense of risk and the perception of risk. The inability to control the source of violence heightens the risk assessment. Consequently, it does not only become a question of numbers, it becomes a question of intangibles. This includes the psychological impact of vulnerability on the one hand, and a lack of predictability of the prospective harm on the other. In the area of ordinary common crime, the responses are simpler: one does not go into certain neighborhoods; one does not go into certain neighborhoods at certain times; precautions can be taken. As a result, what one does can minimize the risks, and therefore render the risk assessable. But there is no way that an individual can make such an assessment when s/he gets on a plane and risks a hijacking. Therefore, the vulnerability increases because the risk assessment is imponderable. The need to respond to it, in a particular case, becomes different than the need to respond to more predictable crimes.

Nevertheless, the essential question is—what is the role of policy in making certain that an appropriate balance is struck between risk and response?

Some lessons regarding responses to terrorism can be learned from Europe's experience during the sixties and seventies. One of them is that leaders should never heighten a society's fear and expectations of harm. This does not mean forgoing any measures of prevention and control, but when a leader increases the level of fear in society, s/he plays into the hands of the terrorists, because s/he admits to the society's level of vulnerability, and also enhances the standing of a terrorist group to the level of a counterpart. This is how Osama Bin Laden and al-Qaeda became America's counterpart enemies. What an extraordinary recognition of status to such a person and to such a group of people whose only merit is to advocate violence, and on occasion to successfully carry it out. Such status gives the person and the group the type of recognition and success that they hope for. Worse yet, it is an incentive for similar groups to emulate them, as in the case of Abu Musa Al-Zarqawi in Iraq, who before getting a Bin Laden franchise, fell into a maverick category.

The last thing that a terrorist group wants is a governmental reaction that downplays its importance because the very purpose of terror-violence attacks is to create an imbalance in society that demonstrates its vulnerability and disrupts normalcy. Accomplishing these purposes gives the terrorist group status, negotiating ability, and the likelihood of obtaining certain desired results. By overreacting, heightening fear levels, curtailing civil liberties, and sometimes engaging in abuses, governments lose the high moral ground in the struggle, and diminish their ability to engage in effective prevention and control, and, ultimately, genuine suppression of this type of activity.

Another political or operational lesson to be learned is that in responding to terrorist events, governments should never engage themselves at the highest level. In other words, when a terrorist event occurs, it should be dealt with as a crime problem, and not by a declaration of war against what is usually a small group or in the case of al-Qaeda, an amorphous organization or network of groups and individuals. When higher level of governments get involved, a political dimension is introduced that can hardly be de-escalated from the heights of political rhetoric to the level of a criminal activity to be dealt with effectively and judiciously. This in no way should be interpreted as restricting the use of all available means of lawful responses to protect, prevent, control, and suppress terrorism. Nor is the reference to criminal activity intended to denote that there is no room for a military and intelligence role. All the forces of society should be marshaled to insure the goals of protection and prevention. However, contemporary reactions to international terrorism demonstrate that leaders have lost sight of these lessons with far greater consequences to peace and security than could be imagined. Suffice it to

recall that 9/11 led to wars in Afghanistan and Iraq, and the latter situation speaks for itself, to Guantanamo and Abu Ghraib.

Considering the Pan Am 103 trial, to be discussed at this conference, Professor Scharf argues that the trial was a great experience that demonstrates how international criminal law can be imaginative and solve political problems through legal inventiveness. I agree with him. The solution to that international impasse shows that international criminal law can be imaginative by shifting gears from national prosecutions or extradition to a change of venue. The European Convention on Transfer of Criminal Proceedings and the European Convention on Transfer of Prisoners offer such solutions. There are a number of modalities in international criminal law that are designed to allow the system to shift gears in order to enhance accountability and diminish the opportunities for impunity. To that extent, the Pan Am 103 trial in The Netherlands was a success. However, was the trial intended to record history or to make sure that history is not to be recorded? One hypothesis is that the trial was designed to make sure that history would not be recorded because the political interests of certain states were at stake.

Trials cannot always establish the truth or the full record of historic events.[6] Sometimes they even alter the truth and distort the record. The Eichmann case in Jerusalem was made to establish a historic record and it succeeded.[7] Israel's Prime Minister Ben Gurion urged Chief Prosecutor Gideon Hausner to establish the record of the Holocaust in a court of law since it was not fully established during the Nuremburg trials. The difficulty in such an effort is that a trial deals with a given individual—it focuses on a given case. The individual case is like a tree in a forest, and if you focus on the tree, you cannot see the forest. In the Eichmann case, the prosecution made a tremendous effort to establish the entire record of history of what occurred during the Holocaust. This effort was successful because the focus of the trial was not limited to looking only at the individual tree, thus it established a valid historic record.

On the other hand, Nuremberg was an extraordinary opportunity for the USSR to change the record, even to distort it. The USSR wanted the world to forget about the Molotov-Rippentrop Pact of Non-Aggression, the agreement between Nazi Germany and Stalinist Russia to split Poland into two parts, dividing it between themselves. More specifically, the USSR wanted to make certain that the 12,000 Polish officers they killed in the Katyn Forest Massacre would be blamed on the Germans.[8] So, the USSR distorted the record at Nuremberg by condemning the German army for the

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[6] *See* STEPHAN LANDSMAN, CRIMES OF THE HOLOCAUST: THE LAW CONFRONTS HARD CASES (2005).

[7] Attorney General of Israel v. Eichmann, [1962] S.Ct. (Isr.).

[8] *See* J. K. ZAWODNY, DEATH IN THE FOREST: THE STORY OF THE KATYN FOREST MASSACRE (1962).

killing of 12,000 Polish officers that the Soviets killed. Nothing since then has been done to correct that historic record.

What did the Pan Am 103 case add to the recordation of history on combating terrorism? I submit nothing much.

The experts participating in today's conference know much more about the Pan Am 103 case than I do, but why was there was a ten-year stalemate in this matter? The stalemate came from the fact that the United States and the United Kingdom wanted Libya to extradite the two accused operatives, while Libya invoked its right to prosecute them under the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. For over thirty years, the world's major powers never sought to resolve the competing obligations' priorities of whether prosecution or extradition comes first.

The language of the 1971 Montreal Convention is silent on whether prosecution precedes extradition and whether prosecution has a priority over extradition. The Convention's ambiguity is also evidenced by the absence of two unarticulated premises, namely, that the prosecution must be effective, not merely a sham, and that it must also be fair. Second, any extradition must also be effective and not a hollow showing. Thus, effectiveness and fairness are two unarticulated premises or conditions in both the prosecution and the extradition that are absent in the Convention's text. However, no treaty addresses effectiveness and fairness because diplomats typically abstain from addressing such complicated questions. As a result, the normative framework for pursuing justice for acts of international terrorism has an inherent ambiguity. This inherent ambiguity resulted in the United States and the United Kingdom arguing that Libya would be ineffective in its prosecution of the accused, thus justifying extradition to their respective countries to face effective prosecution. Libya argued a lack of trust in the fairness of any prosecution in the requesting states, and refused, citing the Convention's language to prosecute first. As a result, a ten-year stalemate ensued, ultimately resolved by further negotiations that lead to the Pan Am 103 trials. Even after Pan Am 103, the problems still exists.

It is interesting to note that "terrorism" has never been defined.[9] For over thirty years the United States government has opposed the adoption of a comprehensive definition of terrorism. The policies of several administrations have been to define terrorism in a narrower sense. The United States wanted a subject-matter or piecemeal approach, including separate conventions on aircraft hijacking, kidnappings, the kidnapping of diplomats, the use of explosives, terrorist financing, and nuclear terrorism. As a result, since the adoption of the 1969 Tokyo Convention, there are

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[9] *See A More Secured World: Our Shared Responsibility, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change*, U.N. Doc. A/59/565 (2 December 2004).

twelve international conventions dealing, sectorally, and having different subjects. Additionally, there are three other unrelated conventions that deal with the subject of terrorism, including the Geneva Convention on the Law of the Sea and the IMO Convention that resulted from the seizure of the Achille Lauro and the Klinghoffer murder. There are therefore a total of fifteen conventions dealing with terrorism with different signatory states. The language of these conventions is archaic and frequently ambiguous, but diplomats continue to follow the same formula of prosecute or extradite taken from the 1971 Montreal Convention. The result is ineffective international enforcement. Moreover, the current framework of international law fails to integrate the several modalities of international cooperation in penal matters to make the enforcement system more effective. There are no adequate policies of coordination at the international level. Over sixty international bodies and agencies deal with terrorism and confront terrorism in a piecemeal fashion. The Security Council's Counter-Terrorism Committee has not been able to coordinate all of these efforts. As a result, rather than developing a multilateral cooperation framework, the current approach emphasizes bilateral efforts.

While this favors the United States who can wield "the big club" against other States, there is a point of diminishing returns, and eventually resentment against the United States become an impediment to cooperation. Surely, when the United States resorts to kidnapping suspected terrorists and torturing them or sending them to other countries to be tortured, it loses legitimacy in the fight against terrorism. That is why "what is terrorism to some is heroism to others." As George Santayana once said, "Those who cannot remember the past are condemned to repeat it."[10] And we seem to be repeating our past in dealing with "terrorism."

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[10] GEORGE SANTAYANA, LIFE OF REASON (1905).