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Legal Control of International Terrorism: A Policy-Oriented Assessment

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Legal Control of International Terrorism: A Policy-Oriented Assessment

M. Cherif Bassiouni*

I. INTRODUCTION

Terrorism has existed, in one form or another, in many societies for as long as history has been recorded. The differences between its various manifestations, however, have been as to methods, means, and weapons. As the means available to inflict significant damage to society improve, the harmful impact of terrorism increases. And as weapons of mass destruction become more accessible, the dangers to the world community increase.

In times of national crisis similar to the one that the United States is experiencing in the wake of the incidents of September 11, renewed interest in the phenomenon of terrorism arises. For many who are just now delving into the subject of terrorism, there is a tendency to rediscover the wheel. The manifestations of terrorism and the means to prevent and control them have long been studied, but governments have tended to ignore the dangers. The lessons of the past, particularly those of Europe and the Middle East from the 1960s onward, have been largely ignored. As a result, we have not recognized the increasing global dimension of this criminal activity. Transnational criminal activity of all kinds (for example, organized crime, drug trafficking, and trafficking of women and children for sexual exploitation) has benefited from the advantages of globalization. States, however, have not foreseen that consequence, and their modalities of interstate cooperation in penal matters have remained fragmented and substantially ineffective.

This Essay assesses substantive international norms and their enforcement, and highlights the weaknesses of the international system's effectiveness in combating transnational crime generally, and terrorism in particular. It starts with defining the phenomenon of terrorism and identifying its characteristics and manifestations, before proceeding into a critical assessment of the modalities of interstate cooperation in penal matters and offering a few recommendations thereto. It is necessarily more a survey than an in-depth study of the questions addressed. Hopefully, however, its contents will prove

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useful to bring about a better understanding of the phenomenon and how to deal with it in a rational, legal, and effective manner.

II. IDENTIFYING THE PRINCIPAL CHARACTERISTICS OF TERRORISM

A. *Terrorism's Root Causes, Actors, and Strategies*

Terrorism is a strategy of violence designed to instill terror in a segment of society in order to achieve a power-outcome, propagandize a cause, or inflict harm for vengeful political purposes. That strategy is resorted to by state actors either against their own population or against the population of another country. It is also used by non-state actors, such as insurgent or revolutionary groups acting within their own country or in another country. Lastly, it is used by ideologically motivated groups or individuals, acting either inside or outside their country of nationality, whose methods may vary according to their beliefs, goals, and means.

State and non-state actors who commit terrorist acts can be distinguished, *inter alia*, on the basis of their participants, their goals, their methods, and the means they have at their disposal. But these actors all resort to a strategy of terror-violence in order to achieve goals that include a power-outcome. The quantum or level of violence employed by actors in each category will usually depend on their access to means of terror-inspiring effects, and on whether these effects are likely to cause consequences conducive to attaining the desired power-outcome.

State terrorism is distinguishable from state-sponsored terrorism. In the latter, the actual perpetrators of terrorist acts are non-state actors operating with overt or covert support of a state. The former is carried out by state actors and is usually characterized by extensive, widespread, or systematic use of violence in violation of international humanitarian law and human rights law. It includes genocide,¹ crimes against humanity,² war crimes,³ and

1. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) removed substantive immunity for genocide, crimes against humanity, and war crimes. See Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 808, U.N. SCOR, 48th Sess., 3217th mtg., Annex, art. 7(2), U.N. Doc. S/RES/808 (1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, art. 6(2), U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute]. See also Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998) [hereinafter ICC Statute]; M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* (1998).

2. Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter]. See also ICTY Statute, *supra* note 1, art. 5; ICTR Statute, *supra* note 1, art. 3; ICC Statute, *supra* note 1, art. 7. See also M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (2d rev. ed. 1999).

3. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members

torture.⁴ The goals of states engaged in such terrorism might include the subjugation of a foreign or domestic population or the continuation of a regime in the face of domestic opposition. Sometimes a regime like the Nazis in Germany, the U.S.S.R. under Lenin and Stalin, and the Khmer Rouge in Cambodia will engage in systematic terror-inspiring violence against a segment of the civilian population exclusively because of its race or political views. In these extreme cases, the ultimate goal of the terror-violence is the total elimination of that social or political group.

Non-state actors' terrorism can be distinguished on the basis of the number of the groups' adherents, their goals, and their capabilities. For purposes of this study, they are divided into two groups: insurgent and revolutionary groups, and ideologically motivated groups.

Insurgent and revolutionary groups are larger groups at war with a particular regime, and whose goal is the regime's demise.⁵ Unlike the regimes they fight, insurgent and revolutionary groups do not have conventional military and police forces, but rather consist of volunteer fighters who do not have the military training and capabilities of their regime-force opponents. Anti-regime forces cannot therefore face the regime forces on the same military level, and must therefore resort to unlawful means of violence, including targeting civilians and public and private property in violation of international and humanitarian law and domestic criminal law.⁶

Ideologically motivated groups tend to have fewer members/adherents and do not have the capability of effectuating a regime change, but their terror-violence techniques are capable of destabilizing a regime and inflicting harm on members of its society to achieve politically related, often vengeful, goals. For instance, by revealing a regime's weaknesses, thereby causing terror in the society by exposing its vulnerability, such terrorist

of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Convention IV]. *See also* Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

5. Insurgent and revolutionary groups include those who participated in the 1917 revolution in czarist Russia, which resulted in the establishment of the U.S.S.R., and the VietCong in North Vietnam, who then spread into South Vietnam, resulting in the unification of the divided country. Most of the African and Asian countries under French colonization, such as Algeria, or British colonization, such as Kenya, had insurgent groups whose activities led to the removal of the colonial forces and the establishment of independent states.

6. Anti-regime forces include such groups as those in the 1960s and 1970s referred to as the Red Brigades in Italy, the Red Liberation Army in Japan, and the Bader-Meinhoff Group in Germany. The ETA in Spain continues its assassinations and bombings, as does the IRA in Northern Ireland and England.

groups place the regime in a situation where it is likely to overreact or commit unlawful acts, and thereby delegitimize itself. In turn, such terrorist groups gain a greater claim of legitimacy and engender more support among the domestic and foreign populations. Ideologically motivated groups engage in strategies of terror-violence to achieve a desired political result, propagandize a political message, punish the society with whom they deem themselves at odds or at war, obtain political concessions in exchange for either desisting from harm they can inflict (e.g., threat to bomb) or providing articles/persons they have taken from the regime (e.g., hostages).

In its common usage, the term "international terrorism" has come to exclude the activities of state actors and even insurgent and revolutionary groups. Instead it is applied to small, ideologically motivated groups, and whose strategies of terror-violence are designed to propagate a political message, destabilize a regime, inflict social harm as political vengeance, and elicit over-reactive state responses likely to create a political crisis.

Some of these groups are characterized by the international composition of their members, the transnational dimension to their operations, and their reliance on financial support from more than one state. Such groups necessarily rely on public sympathy and the support of others in several countries, which permit them to maximize their harmful capabilities. They also rely on easy access to the worldwide financial system for money-laundering purposes, and the lack of international cooperation in penal matters between states, including the lack of cooperation in law enforcement, intelligence, the extradition of suspects, and other prosecutorial/investigative activities.⁷

These ideologically motivated terrorist groups select particular targets with a view to enhance collective social fear and to demonstrate the government's vulnerability and inability to offer society adequate protection. Experience reveals that governments inevitably fall into the trap of responding to such acts in ways that increase social and political tensions. These reactions enhance levels of fear in society, which in turn place more pressure on governments to act. The result is usually the escalation of the violence, which is almost always what the terrorists want to accomplish.

Target selection is also based on the expectation of media attention, particularly from the sensationalistic elements of the media, which often both promote greater public visibility of such groups and contribute to collective social fear.⁸ The media frequently develops a symbiotic relationship with the terrorist groups; by disseminating news about terrorist events, the media contributes further to terrorist goals. Extensive media coverage of these acts are almost always assured, and often lead to the government's over-reactive response. The extensive media coverage of the over-reactive state response

7. See M. Cherif Bassiouni, *The Face of Terror*, CHI. TRIB., Oct. 21, 2001, at 1; M. Cherif Bassiouni, *Cutting off the Easy Flow of Blood Money*, CHI. TRIB., Nov. 4, 2001, at 1.

8. See M. Cherif Bassiouni, *Terrorism, Law Enforcement and the Mass Media: Perspectives, Problems, Proposals*, 72 J. CRIM. L. & CRIMINOLOGY 1 (1981).

tends to undermine the legitimacy of the state's response and to give such groups more legitimacy in the eyes of their constituencies.

One example of such a state over-reaction is the U.S. war against Afghanistan on the basis of "credible," but unconfirmed, evidence that Osama bin Laden was involved in the September 11 attack, and that the Taliban government provide him support and was shielding him from extradition.⁹ The United States, however, never formally sought bin Laden's extradition from Afghanistan, nor did it present to Afghanistan's government any evidence of his criminal involvement in the terrorist attacks on New York and Washington. The United States concluded that the Taliban regime was sponsoring international terrorism and should be removed from power by means of military force.¹⁰ The war, however, has exacerbated Afghanistan's humanitarian and economic problems, creating an estimated two million new refugees and aggravating the situation for the country's existing millions of refugees,¹¹ many of whom may die as a result of starvation and the cold. U.S. bombings have also resulted in civilian casualties.¹² Without massive humanitarian and economic aid, the level of harm suffered by the country's civilian population will delegitimize the U.S. action in the eyes of its populace, and provide legitimacy to the terrorist network called Al Qaeda. This can play into the hands of that terrorist group, providing it more general support and adherents from among the 1.3 billion Muslims in over 100 countries around the world. The criminal acts of September 11 were surely calculated to bring about that type of massive reaction. Even if bin Laden is killed, he becomes a martyr, and that will rally others to his movement or motivate them to engage in terrorist acts against the United States. But what else could the United States do? It was compelled by the circumstances to defend itself as best it could, and time will tell whether these measures were wise and effective in protecting it from such attacks in the future. This is precisely the type of conundrum that terrorist acts of that significance are intended to produce.

B. The Impact of Globalization on Terrorism

The advent of globalization has helped terrorist groups such as Al Qaeda. Globalization is characterized by the elimination of time and distance barriers.

9. Various officials in the U.S. government have indicated that the Taliban government provided Osama bin Laden and Al Qaeda with a base of operation and support. *See, e.g.*, Interview by Peter Jennings with Secretary of State Colin L. Powell, Washington, D.C. (Sept. 20, 2001).

10. *See, e.g.*, President George W. Bush, Address to the Nation (Oct. 7, 2001), <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html>.

11. *See* Press Release, United Nations, Afghan Civilians to Face Increased Vulnerability after U.N. International Staffers are Evacuated to Pakistan (Sept. 14, 2001), <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/104CE9B697960E77C1256ACA0028CE35?opendocument>.

12. *See* Press Release, Amnesty International, Afghanistan: Accountability for Civilian Deaths (Oct. 26, 2001), <http://web.amnesty.org/ai.nsf/Index/ASA110222001?OpenDocument&of=COUNTRIES\AFGHANISTAN> (noting that "U.S. officials have admitted that a number of civilian targets have been hit as a result of error," but lamenting the lack of public information on such attacks).

ers and the increased popular access to information, technology, and communications. These characteristics have been exploited by both legitimate and illegitimate enterprises. They have particularly benefited terrorist groups by allowing the groups' members and supporters to cross state borders, acquire and move equipment, obtain information, communicate with one another, and transfer funds transnationally with much greater ease, all the while relying on the worldwide media to broadcast both their message and the success of their operations. Globalization has also allowed terrorist groups to network with one another, permitting terrorist groups to develop strategic alliances with other groups engaged in transnational criminality in order to develop synergetic connections and to maximize respective capabilities and effectiveness. These networks have particularly developed between terrorist groups and organized crime; in Columbia, for example, the Revolutionary Armed Forces of Colombia (FARC) funds its rebellion by protecting the drug traffickers.¹³ Terrorist groups also rely on techniques perfected by organized crime, particularly their methods of and sources for obtaining funding, arms, and military equipment on the illegal market. Because of economic globalization and the lack of international control of arms trafficking, terrorist groups seldom lack access to weapons and military equipment; the so-called "black market" is quite open and accessible to those with funds. For example, with arms purchased from funds obtained in the illegal diamond trade and laundered in European financial institutions, the Liberian and Sierra Leone rebels have terrorized their respective peoples for a decade, leaving an estimated 200,000 and 300,000 people dead, thousands of children mutilated, and thousands of women raped.¹⁴ These rebels, particularly their leaders, have benefited from the loopholes in financial and criminal controls that have resulted from globalization.

III. THE WEAKNESSES OF EXISTING INTERNATIONAL LAW IN ADDRESSING TERRORISM

A. *Non-Specific Conventional and Customary International Law Applicable to Terrorism*

Given the advent of globalization and the development of international terrorism, the international community must establish effective means of punishing such international criminal acts. Currently, the conduct of state actors and insurgent or revolutionary groups is governed by the 1948 Genocide Convention,¹⁵ customary international criminal law governing crimes against humanity (since there is no applicable international convention other than the 1998 Statute of the International Criminal Court which is not yet

13. M. Cherif Bassiouni & Eduardo Vetere, *Organized Crime and its Transnational Manifestations*, in 1 INTERNATIONAL CRIMINAL LAW 883 (M. Cherif Bassiouni ed., 2d ed. 1999).

14. See Human Rights Watch, *Sierra Leone: A Call for Justice*, <http://www.hrw.org/campaigns/sleone>.

15. Genocide Convention, *supra* note 1.

in effect), the 1984 Convention against Torture,¹⁶ and the various norms against war crimes as reflected in the customary law of armed conflict, and the Four 1949 Geneva Conventions and their two 1977 Protocols.¹⁷

There is significant overlap between conventions and custom within the international criminal framework. The Convention against Torture, the Genocide Conventions, and the prohibitions on crimes against humanity apply in times of war and peace. However, the customary law of armed conflict and the Geneva Conventions apply only in times of war or armed conflict, either of an international or non-international character. These norms, applicable in the context of armed conflict, while sufficient, are seldom enforced against state actors and even less often enforced against non-state actors.¹⁸ Furthermore, none of them makes distinctions in criminal responsibility between decision-makers and senior executors and lesser-rank personnel.¹⁹

In addition, these conventions lack an enforcement mechanism to truly deter and punish criminal behavior on an international scale. Certain international attempts have been made in the course of the last decade to provide effective enforcement. The Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994 to prosecute persons charged with the first three of these crimes (genocide, crimes against humanity, and war crimes), committed in the context of these two conflicts. In no other conflict since World War II has such a post-conflict justice mechanism been established. Perhaps, when the ICC enters into effect after the sixtieth ratification (expected by the end of 2002), it will in time become a universal accountability mechanism for these three crimes. The extent to which the existence of such a system of international criminal justice can be an effective deterrent is, however, to be seen.

Further, universal jurisdiction of international conventions has spurred domestic attempts at enforcement of such laws against international crime.²⁰

16. Torture Convention, *supra* note 4.

17. Geneva Convention I, *supra* note 3; Geneva Convention II, *supra* note 3; Geneva Convention III, *supra* note 3; Geneva Convention IV, *supra* note 3. Note that only Additional Protocol I applies to conflicts of an international character, while Additional Protocol II applies to conflicts of a non-international character. See Additional Protocol I, *supra* note 3; Additional Protocol II, *supra* note 3.

18. There is an absence of criminal prosecutions after conflicts occur, as evidenced by the fact that the Security Council had to establish the ICTY and ICTR in order to bring about the prosecution of crimes committed in, respectively, the former Yugoslavia and Rwanda. See M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 L. & CONTEMP. PROBS. 1, 9–28 (1996); STEVEN RATNER & JASON ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* (2d ed. 2001); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

19. See BASSIOUNI, *supra* note 2, at 369–446.

20. See INTERNATIONAL LAW ASSOCIATION, *FINAL REPORT ON THE EXECUTION OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENCES* 404 (2000); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. (2001) (forthcoming). See also PRINCETON UNIVERSITY PROGRAM IN LAW AND PUBLIC AFFAIRS, *THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION* (2001) (prescribing principles to govern the

Indeed, the Torture Convention may become more effectively enforced as the Pinochet experiment in the United Kingdom.²¹ provides the precedent for increased state use of universal jurisdiction for national prosecutions. Universal jurisdiction can also be relied upon by national legal systems to prosecute genocide, crimes against humanity, war crimes, and torture. However, as crimes against humanity are not yet posited in conventional international criminal law other than in the two *ad hoc* tribunals of the ICTY and ICTR, and in the ICC Statute, it would be useful to have a specialized international convention on crimes against humanity, which, like Article 7 of the ICC Statute, would include non-state actors. In that way, crimes against humanity would encompass certain forms of terrorism committed by an "organization" which, on the basis of a "policy," engages in "widespread" or "systematic" attack upon "a civilian population," by means of killing and other specified acts.²² An international convention prohibiting such crimes would likely allow for universal jurisdiction of the acts committed and thus increase national prosecution of terrorist acts.

The lack of coordinated international control of other dangerous and international criminal conduct also prevents effective enforcement. There is a significant legal gap, for example, in the control of weapons of mass destruction, such as nuclear, chemical, and biological weapons. For instance, there are no conventions on the prohibition of the use of nuclear weapons, whether by state or non-state actors. In addition, the 1993 Chemical Weapons Convention²³ lacks effective enforcement provisions applicable to unlawful terrorist use, and the 1972 Bacteriological Convention²⁴ does not criminalize the use of such agents for terrorist attacks. The Bacteriological Convention had been in the process of being amended for years, only to have a final draft opposed by the United States in 2001 as a result of pressures from the chemical and pharmaceutical industries. Thus, progress toward adopting a new convention with effective criminal provisions has been forestalled.

There is, in short, no normative fabric to international criminal law, just bits and pieces of overlapping norms with significant gaps as to their coverage. Even those norms that could be enforced, are subject to the recurring problem of a lack of effective enforcement by states. When states are permitted to rely on universal jurisdiction to enforce such norms, through their national legal systems, they fail to do so, even though such enforcement is

application of universal jurisdiction in light of its potential for abuse).

21. *Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), 1 A.C. 147 (2000); Christine M. Chinkin, *International Decision, Regina v. Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No. 3), 93 AM. J. INT'L L. 703, 704 (1999).

22. ICC Statute, *supra* note 1, art. 7. See also M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (2d rev. ed. 1999).

23. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 3.

24. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Feb. 25, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

required by international humanitarian law and other norms. International criminal law, therefore, suffers from both substantive and enforcement deficiencies, leading to a substantial lack in deterrence.

B. Specific Treaty-Based International Law Applicable to Terrorism

Treaty-based international legal efforts to combat terrorism have suffered from similar problems in enforcement and deterrence, and are characterized in particular by the absence of a comprehensive convention governing the international dimensions of the fight against terrorism. Instead, the legislative international legal framework is comprised of thirteen international conventions,²⁵ adopted over a span of thirty-two years (1969–2001), that apply to different types of terrorist acts, including: airplane hijacking (4);²⁶ piracy on the high seas (2);²⁷ attacks or kidnappings of internationally protected persons, U.N. personnel, and diplomats (2);²⁸ attacks upon civilian maritime vessels;²⁹ attacks upon platforms on the high seas;³⁰ the taking of civilian hostages;³¹ the use of bombings and explosives in terrorist acts;³² the financing of terrorism;³³ and nuclear terrorism (pending).³⁴ Several regional intergovernmental organizations have established anti-terrorism conventions as well, including the Organization of American States (1971);³⁵ the Council of Europe (1977);³⁶ the South Asian Association for Regional Cooperation

25. See M. CHERIF BASSIOUNI, *INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS 1937–2001* (2001).

26. Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, Feb. 24, 1988, S. TREATY DOC. NO. 100-19, 27 I.L.M. 627; Hague Convention for the Suppression of Unlawful Seizure of Aircrafts, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

27. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11.

28. Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, G.A. Res. 49/59, U.N. GAOR, 49th Sess., Supp. No. 49, at 299, U.N. Doc. A/49/49 (1994); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

29. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 27 I.L.M. 668.

30. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 27 I.L.M. 685.

31. Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205.

32. International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, S. TREATY DOC. NO. 106-6, 37 I.L.M. 251.

33. International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, Agenda Item 160, at 408, U.N. Doc. A/54/109 (1999).

34. Draft Convention on the Suppression of Acts of Nuclear Terrorism, Jan. 28, 1997, U.N. Doc. A/AC.252/L.3.

35. Organization of American States: Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, 1986 U.N.T.S. 195.

36. European Convention on the Suppression of Terrorism, Jan. 27, 1977, EUROP.T.S. No. 90, 1979

(1987);³⁷ the League of Arab States (1998);³⁸ the Organization of African Unity (1999);³⁹ and the Organization of the Islamic Conference (2000).⁴⁰ Of these, only the European Convention on Terrorism has been invoked by its member-states.

As mentioned earlier, there is no comprehensive convention on terrorism that even modestly integrates, much less incorporates into a single text, these thirteen conventions so as to eliminate their weaknesses. The logic of such a comprehensive convention on terrorism is compelling, as is the logic against the current piecemeal approach taken by the separate conventions. Nevertheless, the United States has consistently opposed such a convention since 1972, ostensibly so that it can pick and choose from these disparate norms those that it wishes to rely upon. Above all, the United States does not want to have an effective multilateral scheme that would presumably restrict its unfettered political power to act unilaterally.

C. International Institutions

International legal crime-fighting institutions, in place to facilitate prevention of transnational crime, have also been ineffective. The United Nations has a Centre for International Crime Prevention in Vienna whose mandate includes fighting terrorism;⁴¹ but the Centre has historically been underfunded, understaffed, and bereft of political influence within the U.N. system. Furthermore, in recent years it has suffered from disastrous leadership, further reducing its effectiveness.⁴² Therefore, not only does it need new leadership, staff, and resources, but it needs a new mandate that better incorporates the fight against terrorism in this globalization-induced era of increased international and transnational criminal activity.

U.N.T.S. 94 [hereinafter *European Terrorism Convention*].

37. South Asian Association for Regional Cooperation Convention on Suppression of Terrorism, U.N. GAOR, 44th Sess., U.N. Doc. A/51/136 (1989).

38. The League of Arab States, The Council of Arab Interior and Justice Ministers: The Arab Convention on the Suppression of Terrorism, Apr. 22, 1998, http://www.leagueofarabstates.org/E_News_Antiterrorism.asp.

39. Organization of African Unity: Convention on the Prevention and Combating of Terrorism, July 14, 1999, <http://untreaty.un.org/English/Terrorism.asp>.

40. Organization of the Islamic Conference: Convention of the Organization of the Islamic Conference on Combating International Terrorism, Oct. 11, 2000, *reprinted in* U.N. Doc. A/54/637, Annex, <http://www.oic-un.org/26icfm/c.html>.

41. Operated within the United Nations' Office for Drug Control and Crime Prevention, the Center works closely with the United Nations' Terrorism Prevention Branch, also based in Vienna.

42. See Report of the Office of Internal Oversight Services, U.N. GAOR, 56th Sess., Agenda Item 130, U.N. Doc. A/56/381 (2001), http://www.un.org/Depts/oios/reports/a56_381.pdf. Report of the Office of Internal Oversight Services on the Inspection of Programme Management and Administrative Practices in the Office for Drug Control and Crime Prevention, U.N. GAOR, 56th Sess., Agenda Items 123, 124, 134, 143, U.N. Doc. A/56/83 (2001), http://www.un.org/Depts/oios/reports/a56_83.htm; Triennial Review of the Implementation of the Recommendations Made by the CPC at its Thirty-Eighth Session on the In-Depth Evaluation of the U.N. Crime Prevention and Criminal Justice, U.N. ESCOR, 41st Sess.

In October 2001, the Security Council established a committee to deal with terrorism, at the behest of the United States, following the adoption of Security Council Resolution 1373.⁴³ Because the Security Council deals only with international "peace and security" threats under its powers contained in Chapter VII of the U.N. Charter, the new committee's focus is necessarily confined to a limited set of terrorist acts (those that threaten international peace and security).⁴⁴ The *ad hoc* nature of this Committee also portends that it may not outlive its present usefulness.

The International Criminal Police Organization (INTERPOL) has been only marginally effective in combating terrorism because major powers, like the United States, do not fully trust it. Furthermore, INTERPOL is a police association and does not include intelligence agencies. It is self-evident that combating international terrorism cannot succeed while beholden to the same bureaucratic boundaries that exist between law enforcement and intelligence agencies in domestic contexts. In this sense, INTERPOL merely reflects a political and bureaucratic reality that exists in almost all countries of the world, and which inevitably reduces its effectiveness. In fact, until 1993, INTERPOL was effectively precluded from dealing with terrorism altogether because its Charter prohibited it from dealing with such "political" matters.⁴⁵ While INTERPOL has since changed, it remains ineffective for the reasons expressed above.

Certain regional intergovernmental organizations have bodies or committees that deal with transnational criminal activity, including terrorism;⁴⁶ but not one of these bodies has any intelligence or law enforcement function.⁴⁷ Instead, they essentially do research, develop policy recommendations, and prepare draft treaties—functions that only indirectly contribute to combating terrorism.

D. Interstate Cooperation in Penal Matters

There are presently 189 member-states of the United Nations, with significant variation among them in intelligence, law enforcement, prosecu-

43. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/Res/1373 (2001).

44. See *id.* § 6.

45. See INTERPOL CONST., art. 3, <http://www.interpol.int/Public/ICPO/LegalMaterials/constitution/constitutionGenReg/constitution.asp> ("It is strictly forbidden for the organization to undertake any intervention or activities of a political, military, or religious or racial character."). However, the organization recognized the role it could play in combating international terrorism as early as 1985. See International Terrorism and Unlawful Interference with Civil Aviation, INTERPOL G.A. Res. No. AGN/54/RES/1 (1985), <http://www.interpol.int/public/terrorism/default.asp>. See also Mary Jo Grotenroth, *INTERPOL's Role in International Law Enforcement in LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS* 375, 381 (1988) (INTERPOL resolution on terrorism); J. Nepote, *The Role of the International Criminal Police (INTERPOL)*, in I A TREATISE ON INTERNATIONAL CRIMINAL LAW: CRIMES AND PUNISHMENT 676 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

46. These organizations include the Commonwealth Secretariat, the Council of Europe, the European Union, the League of Arab States, and the Organization of American States.

47. See M. Cherif Bassiouni, *Policy Considerations on Interstate Cooperation in Criminal Matters*, in II INTERNATIONAL CRIMINAL LAW, *supra* note 13, at 3.

torial, and judicial capabilities. Thus, it is easy for groups that engage in transnational criminality, including terrorism, to find countries where they can seek refuge, obtain support, or operate without much concern of detection.

Experience in combating transnational criminal activity, including terrorism, reveals that the first and most important stage in interdiction is intelligence and law enforcement cooperation. Such cooperation serves primarily as a means of prevention and deterrence, and only ultimately as a means of bringing perpetrators to justice. National systems, however, distribute these functions between competing bureaucratic agencies, thus reducing their individual and combined effectiveness. Furthermore, each separate national agency tends to develop *ad hoc* relationships with its counterparts in a select number of countries; so whatever information that is shared between corresponding agencies of different countries runs into the same intra-national bureaucratic impediments to information sharing and cooperation.

There is so far no international treaty that governs interstate law enforcement and intelligence cooperation. Thus, the international cooperation that does exist takes place outside international and national legal scrutiny. Therefore, there exists no protection of citizens against abuse of power and invasion of privacy, leading to a greater risk that those who are the victims of mistaken identity will have fewer means of protection at their disposal.

International criminal law has so far developed six modalities for international cooperation in penal matters. Agreements, in some form, exist covering extradition, legal assistance, transfer of criminal proceedings, recognition of foreign penal judgments, transfer of sentenced persons, and freezing and seizing of assets. These six modalities, however, are not contained in a single international convention that integrates them in a way that makes them more effective. Instead, they are scattered in the provisions of a number of multilateral regional conventions.⁴⁸ There are no U.N.-sponsored international conventions dealing with any of these areas.⁴⁹

In dealing with cooperation in international criminal enforcement, states rely on a web of bilateral treaties, each dealing with a separate modality of interstate cooperation in penal matters. While multilateral conventions dealing with substantive international criminal law, such as the thirteen

48. See, e.g., Inter-American Convention on Extradition, O.A.S. T.S. No. 60 (February 25, 1981), <http://www.oas.org/juridico/english/signs/b-47.html>; Inter-American Convention on Mutual Assistance in Criminal Matters, O.A.S. T.S. No. 75 (May 23, 1992); European Convention on Extradition, Dec. 13, 1957, 359 U.N.T.S. 273. See also I-II EKKEHART MÜLLER-RAPPARD & M. CHERIF BASSIOUNI, EUROPEAN INTER-STATE CO-OPERATION IN CRIMINAL MATTERS: THE COUNCIL OF EUROPE'S LEGAL INSTRUMENTS (2d ed. 1991) (for a discussion on the Council of Europe's conventions). The League of Arab States also has a convention on extradition and one on mutual legal assistance.

49. See U.N. Model Treaty on Extradition, G.A. Res. 116, U.N. GAOR, 45th Sess., Annex, at 211-15, U.N. Doc. A/RES/45/116 (1990); U.N. Model Treaty on Mutual Assistance in Criminal Matters, G.A. Res. 117, 45th Sess., Annex, at 215-19, U.N. Doc. A/RES/117 (1990).

aforementioned conventions dealing with terrorism,⁵⁰ do contain provisions on extradition and mutual legal assistance, these provisions are not consistent from convention to convention, and are usually limited to a few lines.⁵¹ Instead, the United States, for example, has 137 bilateral extradition treaties applicable to 103 states, and 34 bilateral treaties on mutual legal assistance.⁵² Worldwide, there are hundreds of bilateral treaties on extradition and mutual legal assistance. Other modalities, such as recognition of foreign penal judgments and transfer of criminal proceedings are seldom the subject of such bilateral agreements, while others still, such as the freezing and seizing of assets, are used only by a few states. Even the most significant for combating terrorism, the freezing and seizing of assets, until now has seldom been used except in connection with drug trafficking, due to the financial incentives that governments have in seizing assets derived from drug sales and then distributing them among their prosecutorial and law enforcement agencies.

States also rely on domestic legislation to enact these six modalities of interstate cooperation into law; as stated above, with the exception of Austria, Germany, Italy, and Switzerland, all other states deal with each of these modalities separately, thus precluding the integration of these modalities in order to make them more effective. For instance, the United States only has statutory provisions that deal with extradition and transfer of sentenced persons.⁵³ The extradition statute was drafted in 1825 with some recent modification.⁵⁴ At present, however, the provision is ridden with gaps that treaties and court decisions attempt to fill with considerable variation, rendering enforcement cumbersome, lengthy, and costly.⁵⁵

The absence of both multilateral and domestic enforcement regimes that integrate the six modalities mentioned above has resulted in making interstate cooperation in penal matters cumbersome, lengthy, and, more often than not, ineffective. Developing countries, in particular, lack not only the legislative resources to engage in these modalities of interstate cooperation, but also the required expertise in their ministries of justice, interior, and foreign affairs to deal adequately with these processes. The United Nations' efforts to train experts in these areas, for instance, through its Crime Prevention Centre in Vienna, have been few and far between. Regional organiza-

50. See *supra* notes 26–34 and accompanying text.

51. See M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO PROSECUTE OR EXTRADITE IN INTERNATIONAL LAW* 7–19 (1995). See also M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE* 295–382 (3d ed. 1996).

52. See 18 U.S.C. §§ 3181–3196 for a listing of these treaties.

53. *Id.* §§ 3181–3195.

54. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 443(a), 110 Stat. 1280 (1996).

55. A 1984 proposal for comprehensive revision of the statute was rejected because it was deemed to contain too many individual guarantees. See also M. Cherif Bassiouni, *Extradition Reform Legislation in the United States: 1981–1983*, 17 AKRON L. REV. 495 (1984); *United States and United Kingdom Supplementary Extradition Treaty: Hearings Before the Subcomm. on Foreign Relations, United States Senate*, 99th Cong. (1985).

tions such as the Council of Europe, the Organization of American States and the Commonwealth Secretariat, have been better about undertaking such efforts. But these actions, too, have been limited.

In sum, the international community has not undertaken the effort of codifying international criminal law, either in its substantive or procedural aspects. Academic efforts in this direction have been sporadic,⁵⁶ and have not received significant governmental attention. As a result, there is a substantial weakness in the normative and procedural framework that is necessary to provide the bases for international cooperation in penal matters. Even reliance on national legal systems, for both the reasons stated above and those left unaddressed, has proved weak and inefficient.

IV. STATE RESPONSIBILITY FOR THE SPONSORSHIP OR FAILURE TO TAKE APPROPRIATE PREVENTIVE MEASURES OF TERRORISM

International law establishes a principle whereby states that breach their international obligations are held responsible for their breaches. That responsibility has historically been of a civil nature. The remedy for a state that is aggrieved by such a breach is to bring an action before the International Court of Justice, and to obtain damages or reparations. A breach based on omission occurs where a state's failure to take appropriate action to carry out its obligations, or to prevent harm from occurring to other states, can trigger liability.

Since the late 1970s, the International Law Commission, which had been working on the codification of the Principles of State Responsibility,⁵⁷ has also considered the concept of state criminal responsibility.⁵⁸ But the concept of state criminal responsibility has met with a great deal of opposition, as evidenced by the fact that the ICC Statute does not contain such international criminal responsibility. Nevertheless, in recent years the Security Council has imposed sanctions on both Libya⁵⁹ and Sudan⁶⁰ on the basis that these states have permitted terrorist organizations to operate from within their respective territories, but with the implication that these countries may have even been involved in more direct support for such organizations, both within and beyond their own territories. The imposition of sanctions, which have the effect of collective punishment on a given population, are certainly punitive. Consequently, even though state criminal responsibility has not been officially recognized, punitive consequences have been attached

56. See M. CHERIF BASSIOUNI, *A DRAFT INTERNATIONAL CRIMINAL CODE AND A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL* (1987).

57. The International Law Commission concluded its work in 2001. See International Law Commission, Report by the International Law Commission on the Work of its Fifty-Third Session, Apr. 23–June 1, July 2–Aug. 18, 2001, U.N. GAOR, 53d Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001).

58. See M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in 1 INT'L. CRIM. L. 3, *supra* note 13, at 27 (2d ed. 1999).

59. S.C. Res. 748, U.N. SCOR, 42d Sess., 3063d mtg., U.N. Doc. S/Res.748 (1992).

60. S.C. Res. 1054, U.N. SCOR, 46th Sess., 3660th mtg., U.N. Doc. S/Res/1054 (1996).

to states whenever the Security Council has determined that such state action constitutes a breach of peace under Chapter VII of the U.N. Charter.

International criminal law since the Nuremberg judgment has, however, recognized the concept of criminal responsibility for organizations such as the S.S. and S.A. of Nazi Germany.⁶¹ The events of September 11 should raise the question of whether or not state responsibility should include the concept of state criminal responsibility, much in the same way as it includes breaches of other international obligations, including failure to act. Failure to act should encompass the failure to develop appropriate national legislation to prevent and suppress terrorism—and all other international crimes as well—and to enforce both international law and national legislation in connection with such crimes. The area of state criminal responsibility is an area of international law that has not so far been adequately developed, probably for the reason that international criminal law has not sufficiently evolved as a new discipline which bridges international and criminal law.

V. OLD AND NEW CONCEPTS OF CONFLICTS OF A NON-INTERNATIONAL CHARACTER

Conflicts of a non-international character are regulated in conventional international humanitarian law by Common Article 3 of the four Geneva Conventions of August 12, 1949;⁶² and further developed in Additional Protocol II of 1977.⁶³

These norms were originally intended to give some protection to combatants and civilians in the context of wars of national liberation, which reached their height during the decolonization era of the 1950s to the 1970s. In turn, this period of national liberation insurgency was followed by a period of uprisings by revolutionary groups who fought their governments for regime-change. These insurgents and revolutionary groups⁶⁴ resorted to acts of terror-violence against colonizers/settlers and domestic regimes, acts which led to their being referred to as terrorists. While the term "terrorism" clashed with the legitimacy of such a right to engage in a war of national liberation or to topple dictatorial regimes, it properly described the means employed to those ends. This legitimacy-versus-means issue is still with us today.

61. See Bassiouni, *supra* note 58, at 24.

62. See Geneva Convention I, *supra* note 3, art. 3; Geneva Convention II, *supra* note 3, art. 3; Geneva Convention III, *supra* note 3, art. 3; Geneva Convention IV, *supra* note 3, art. 3. See also DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelf eds., 3d ed. 2000). With respect to the customary law of armed conflict, see INTERNATIONAL COMMITTEE FOR THE RED CROSS, INTERNATIONAL LAW CONCERNING THE CONDUCT OF HOSTILITIES (1996).

63. See Additional Protocol II, *supra* note 3.

64. The terms "insurgents" and "revolutionary groups" are just two of the terms used to describe groups of this type. See THE INTERNATIONAL LAW OF CIVIL WAR (Richard Falk ed., 1971); ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM, AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT (1996); 1 RESTRUCTURING THE GLOBAL MILITARY SECTOR: NEW WARS (Mary Kal-dor & Basker Vaske eds., 1997).

The Geneva Conventions and Additional Protocols are based on the unarticulated premise that even legitimate ends do not justify certain means. Insurgents and revolutionaries, though not without right to resort to armed conflict, must nonetheless abide by the rules of armed conflict applicable to combatants and non-combatants in the context of non-international armed conflicts. The same applies to state forces fighting against such groups.⁶⁵ Violations by one side do not allow reprisals in kind by the other.⁶⁶ Thus, symmetry in legal obligations is established.

Insurgent and revolutionary groups, however, do not have the same military means and capabilities available to conventional state forces, and therefore feel that they cannot abide by the same rules if they are to succeed. They are reinforced in their disregard of these norms by the fact that state forces also seldom respect these rules. In addition, these groups are not professional combatants and have neither the command and control nor the training that regular and well-disciplined armed forces have. Additional Protocol II tried to take some of these factors into consideration by inducing compliance of insurgent and revolutionary groups with international humanitarian law through the relaxation of conditions for prisoner of war status under the 1949 Conventions.⁶⁷ This inducement – essentially one of status recognition – has naturally been met with considerable resistance on the part of states, who fear that this gives such groups misplaced legitimacy.

These problems were seldom resolved in the many conflicts of a non-international character that have occurred since World War II, where neither governments nor insurgent and revolutionary groups abided by either the terms of Common Article 3 or those of Additional Protocol II.⁶⁸ In fact, there has almost always been a premium for insurgent and revolutionary groups to increase their violence, including terror-violence, to levels that will garner them recognition and legitimacy, and eventually political settlements.⁶⁹ The result is that in conflicts of a non-international character the norms exist but are neither followed nor enforced.

This situation of lawlessness in the non-international context still exists. Governments do not want to give legitimacy to insurgent and revolutionary groups, while the latter are unwilling to abide by international humanitar-

65. See, e.g., HOWARD S. LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* (1993). See also Hans-Peter Gasser, *Prohibition of Terrorist Attacks in International Humanitarian Law*, 1985 INT'L REV. RED CROSS 200, 203 (1985);

66. See FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* (3d ed. 2001).

67. See Additional Protocol II, *supra* note 3, art. 43. See also COMMENTARY ON THE PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987).

68. The failure to resolve these problems has generated considerable harm in these conflicts. For a survey of such harm, see Jennifer Balint, *Conflict Victimization and Legal Redress*, 14 NOUVELLES ETUDES PENALES 101 (1998).

69. This was the case with recent rebellions in Liberia and Sierra Leone, which resulted in approximately 200,000 and 300,000 victims, respectively, most of whom were innocent civilians, and many of whom had their limbs cut off or were raped.

ian law in view of the imbalance of power that exists between them and the states or regimes they are fighting against. They claim that legitimacy is on their side and that a double standard is used against them. Thus, they legitimize their terror-violence in their own perception.

With few exceptions, until September 11, conflicts of a non-international character occurred between an insurgent or revolutionary group and a state or regime. Probably the first conflict that at least began as one of a non-international character was the Vietnam conflict. The Viet Cong used Laos as a base and a travel route for operations in South Vietnam, which was deemed to be another country.⁷⁰ Another example is that of the U.S.-sponsored Nicaragua Contras whose base of operation was in Honduras. In the first case, the United States bombed Laos in violation of that state's sovereignty but the United States considered it an exercise of a legitimate right of self-defense. In the second case, the United States had no such legal justification.⁷¹

The operations of Al Qaeda against the interests of the United States, including both domestic⁷² and foreign-based⁷³ actions, emanated from Afghanistan but with a support network in several countries. This raises novel questions in international humanitarian law. The first of these is whether a state can be at war with a group operating from another country (or from more than one country) with membership consisting of multiple nationalities, whose members comprise various nationalities. The second regards the legal implications of such an armed conflict.

The answer to the first question is in the negative, because only states can be at war. Clearly, however, a state can be engaged in an armed conflict with an insurgent or revolutionary group, irrespective of that group's legitimacy, and vice versa. This is reflected in Common Article 3 and Additional Protocol II.⁷⁴ The fact that, historically, such conflicts were confined to the territory of a given state does not alter the legal status of the participants in that conflict and the international humanitarian law applicable to them. The laws of armed conflict are not geographically bound. They relate to the conduct of combatants with clear limits and inderrogable prohibitions with respect to what these norms refer to as "protected targets." Thus, under no circumstances can, *inter alia*, non-combatant civilians, POWs, the sick, the wounded, and the injured at land, at sea, and in hospitals, be attacked. The rationale is simply a humanitarian one and the prohibition is absolute. The only available exonerating circumstance is a reasonable mistake of fact. But

70. North Vietnam and South Vietnam were legally deemed two different countries, but North Vietnam rejected that contention and argued that all of Vietnam was one country. See *THE VIETNAM WAR AND INTERNATIONAL LAW* (Richard Falk ed., 1976).

71. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), [1986] I.C.J. 14.

72. With respect to the September 11 attacks, both the hijacking and the subsequent destruction of the four airplanes occurred within the continental United States.

73. Foreign-based actions include attacks upon the U.S. Embassies in Kenya and Tanzania and against a U.S. naval vessel, the U.S.S. Cole, in Yemen.

74. See George Aldrich, *The Laws of War on Land*, 94 AM.J. INT'L L. 42 (2000).

no rule of military necessity exonerates those who commit such violations from criminal responsibility.⁷⁵

International humanitarian law opted for a neutral rule that protects certain targets, but by implication it favors state forces over insurgent or revolutionary forces in light of the balance of power. Regardless, however, the law is binding on both state and insurgent or revolutionary forces.⁷⁶

Al Qaeda's attacks against the United States on September 11 and earlier fall within this paradigm: they are subject to the strictures of international humanitarian law, regardless of the legitimacy of their perpetrators' cause. If Al Qaeda violates such norms (as it has), those who committed such acts may properly be considered war criminals. Furthermore, a country such as Afghanistan that has given such a group a base of operation is also responsible for the actions of that group, and the United States is entitled to use force based on its "inherent right of self-defense" under Article 51 of the U.N. Charter. If combatants from that group are seized in the field, that is, in Afghanistan, they can be tried by a Military Commission established by the Commander of U.S. forces in the field. This is permissible under the customary law of armed conflict, and there certainly is precedent. The United States did so in the Far East after World War II, and one case reached the United States Supreme Court, *In re Yamashita*.⁷⁷

With respect to combatants from a foreign state with which the United States is formally at war and who are caught within the United States, the only precedent for a Military Commission was in 1942 when President Roosevelt established one to try eight German saboteurs. The validity of such a Commission was recognized by the Supreme Court in *ex parte Quirin*,⁷⁸ even if its jurisdiction in this case applied to U.S. citizens.⁷⁹ But these combatants were also nationals of a state with which the United States was at war in accordance with a proper declaration of a state of war by Congress in accordance with Article I of the Constitution.

There is therefore a valid legal basis for the Presidential Military Order of November 13, 2001, with respect to Military Commissions in the field that are outside the United States, and for Military Commissions in the United States for Violations of the Laws and Customs of War.⁸⁰ Not so for jurisdic-

75. See, e.g., CHRISTOPHER GREENWOOD, A MANUAL OF INTERNATIONAL HUMANITARIAN LAW (1995); LESLIE C. GREEN, ESSAYS ON THE MODERN LAW OF WAR (2d ed., 1999); THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES (Timothy L. H. McCormack & Gary J. Simpson eds., 1997) [hereinafter LAW OF WAR CRIMES].

76. See LAW OF WAR CRIMES, *supra* note 18.

77. 327 U.S. 1 (1946) (upholding the authority of Supreme Allied Command General Douglas MacArthur to establish such Commissions). See also *In re Homma*, 327 U.S. 759 (1946) ("The motion for leave to file petition for writ of habeas corpus and writ of prohibition is denied and the petition for writ of certiorari is also denied on authority of Application of Yamashita, and *Yamashita v. Stryer* . . ."); LAWRENCE TAYLOR, A TRIAL OF GENERALS: HOMMA, YAMASHITA, MACARTHUR (1981).

78. 317 U.S. 1 (1942).

79. *Id.* at 37.

80. Military Order, *Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57, 833 (Nov. 13, 2001). But see Jordan Paust, *After MyLai: The Case for War Crimes Juris-*

tion over persons in the United States or outside the United States who do not fall within these categories. With respect to persons within the United States, other than those mentioned above, the Military Order violates the Constitutional doctrine of separation of powers, and in particular, Article 1, Section 8, Clause 4; Article III, Section 2; and the due process clauses of the Fourteenth and Fifth Amendments and the Fourth, Fifth, Sixth and Eighth Amendments. Regrettably, this type of legal analysis and resort to the norms of international humanitarian law have not been sufficiently aired in the post-September 11 context.

Finally, it should be noted that the attacks upon the United States of September 11 constitute "Crimes Against Humanity" as defined in Article 7 of the Statute of the International Criminal Court (ICC).⁸¹ The provisions of the ICC Statute are not applicable to the United States, as the treaty establishing the ICC has not yet entered into effect and the United States has not ratified it. Further, the United States, unlike other countries, does not have a domestic statute on "Crimes Against Humanity," and the Uniform Code of Military Justice does not apply to acts committed by civilians in the United States.⁸² This is an opportunity to pass appropriate legislation to include these crimes in Title 18 U.S.C. and make them subject to the jurisdiction of Federal Courts.⁸³

VI. CONCLUSION

"Terrorism" is a value-laden term. Consequently, it means different things to different people, a characteristic that perhaps is best expressed in the saying, "What is terrorism to some is heroism to others," and has never been satisfactorily defined. Yet the phenomenon is as old as history, even as its manifestations have changed as a result of new technology. Both state and non-state actors have resorted to the same approaches in terrorizing civilian populations, while using different weapons and techniques. For both, the goals of terror-violence are political. However, where non-state actors are often ideologically motivated, state actors, soldiers and police personnel who are either conscripts or persons seeking a career or temporary job in these bodies, are usually not.

The need for a comprehensive convention on terrorism that is, as much as possible, value-neutral, encompassing all actors, and covering all modalities and techniques of terror-violence, is self-evident. Such a convention, though, has been politically elusive. Governments understandably seek to exclude state actors from the definition of terrorism, and reject the notion that a

diction over Civilians in Federal District Courts, 50 TEX. L. REV. 6 (1971).

81. See ICC Statute, *supra* note 1; BASSIOUNI, *supra* note 1; *International Criminal Court Ratification and National Implementing Legislation*, 71 REV. INT'L DE DROIT PENAL (2000).

82. See 10 U.S.C. §§ 801-946 (2000). See also JORDAN PAUST, M. CHERIF BASSIOUNI, ET AL., *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* (2d. rev. ed. 2000).

83. See Paust, *supra* note 80.

causal connection even exists between state-sponsored acts of terror-violence and terror-violence committed by non-state actors. Since governments inevitably prevail in the international arena, the definition of terrorism has been limited to encompass unlawful conduct by non-state actors. Even with respect to this confined definition, however, governments have avoided developing an international legal regime to prevent, control, and suppress terrorism, preferring instead the hodgepodge of thirteen treaties that currently address its particular manifestations. The absence of a coherent international legislative policy on terrorism is consistent with the *ad hoc* and discretionary approach that governments have taken toward the development of effective international legal responses to terrorism. Thus, international legal norms governing terrorism rest essentially on the identification of certain types of conduct or means employed. To date, there is no international initiative to systematize, update, integrate, or even harmonize these international norms.

Interstate cooperation in penal matters is also limited due to this lack of a coherent and cohesive international legal regime. National legal systems are therefore left with whatever jurisdictional and resource means they have at their disposal, making them ineffective in dealing with terrorism's international manifestations.

The exclusion of state actors' unlawful terror-violence acts from inclusion in the overall scheme of terrorism control highlights the double standard that non-state actors lament and use as a justification for their own transgressions. This disparity of treatment between state and non-state actors is plainly evident, and constitutes one of the reasons for the attraction of adherents to non-state terrorist groups.

Since the current renewed interest in the subject of terrorism is due to the tragic events of September 11, 2001, it may be useful to confront certain controversial questions. First, these attacks were not only criminal, but unconscionable as to their harmful consequences, both human and economic. Additionally, the incidents were a blow to the invulnerability of the world's only superpower. But in comparative terms, the estimated 3000 casualties of September 11 pale in contrast to some 15,000–23,000 people killed by other forms of violence, and the 15,000 people killed by drunk driving, in the United States every year.⁸⁴ The effect of the reaction on many throughout the Arab and Muslim world, which consists of 1.3 billion people worldwide is to ask why, applying the same legal and moral standards, is the U.S.-sponsored embargo on Iraq, which has caused the deaths of an estimated five hundred thousand innocent children, acceptable? Of course, there are several valid distinctions between the embargo and the attacks upon the United States, but not in comparative human terms. In the end, the United States bears an indirect responsibility for that outcome in Iraq. Similarly, a large

84. 23,040 cases in 1990, and 15,530 cases in 1999. See Federal Bureau of Investigation, Uniform Crime Reports: Crime in the United States—1999, Index of Crime, tbl.1, <http://www.fbi.gov/ucr/99cius.htm>.

segment of the world population asks why Israel's repression of the Palestinian people, which includes the commission of "grave breaches" of the Geneva Convention and what the customary law of armed conflict considers "war crimes," is deemed justified, while Palestinians' unlawful acts of targeting civilians are condemned? These are only some contemporary examples of the double standard that fuels terrorism. All these acts are unjustifiable, and one wrong does not make another right.

Terrorism springs out of despair and injustice; it is the weapon of the weak, not the coward; it is indiscriminate and a crime against its innocent victims. It must be addressed with effective and legitimate means by law enforcement and the national justice systems of all countries of the world. The control of its manifestations depends on international cooperation, but its prevention requires addressing its causes.

In 1961, President John F. Kennedy, addressing an Organization of American States heads of states meeting in Punta del Este, Uruguay, said "[t]hose who make peaceful evolution impossible, make violent revolution inevitable."⁸⁵ If we want to put an end to the forms of violence that we call terrorism, then we need an effective international legal regime with enforcement capabilities that can, as Aristotle once said, apply the same law in Athens as in Rome.⁸⁶ This is the only alternative to Mao Tse-tung's exhortation, to paraphrase, that truth comes out of the barrel of a gun.⁸⁷

85. *THE LAW OF DISSENT AND RIOTS* 1 (M. Cherif Bassiouni ed., 1971).

86. See ARISTOTLE, *THE NICOMACHEAN ETHICS* (David Ross trans., Oxford Univ. Press, 1998).

87. QUOTATIONS FROM CHAIRMAN MAO TSE-TUNG 33 (Stuart Schram ed., 1967) ("Every communist must grasp the truth, 'Political power grows out of the barrel of a gun.'").

