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THE ORIGINAL SIN: “TERRORISM” OR “CRIME AGAINST HUMANITY”?

*Chibli Mallat**

Once the Middle East connection was established over the September 11 attacks, apprehension and uneasiness gripped the region. Eyebrows are now raised over the word “terrorism,” and there is hardly a newspaper in the Arab and Muslim world that does not question everyday the “definition of the word,” amidst large-scale suspicion of its use for a new form of Western domination over the east.

Within the Arab world, “terrorism” is a word negatively associated with the more extreme characters in Israeli governments, from Benjamin Netanyahu, sometime founder of an international “anti-terrorism center” in the 1970s, to Ariel Sharon, who regularly depicts Yasser Arafat as a “murderous terrorist,” whom he will have nothing to do with. Arab uneasiness is shared by governments and peoples, who hear the current Prime Minister of Israel rave on the one hand about the self-righteousness of “targeted killings” and the uprooting of Palestinian dwellers in “Zionist land,” while on the other hand describe any violence by Palestinians as pure, unadulterated “terrorism.” In addition, terrorism triggers conflicting responses for much of the populations in the region, who see how their governments flag it systematically and indiscriminately to repress their own opposition movements, at a time no Arab government can claim to be genuinely democratic (with the possible exception of Morocco).

The word becomes therefore a fig leaf for selective repression at various levels, none of which garners any sympathy from the person on the street. *Mutatis mutandis*, this is also true in other parts of the world, including the West. The term “terrorism” was first associated with 19th century anarchist attacks against Russian czars, or even earlier, Robespierre’s terror. No definition of terrorism since then has been very useful. The difficulty of defining “terrorism” with any accuracy, in law or in politics, appears even more acute towards the Middle East since September 11.

The contradictions any definition of “terrorism” is bound to carry has not escaped American policy-makers. Several months after the September 11 massacres, countries traditionally depicted in Washington as “rogue” or “terrorist” countries, such as Sudan, Libya and Yemen, are being cultivated and praised for their “collaboration over the fight against terrorism” since September 11.

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This contradiction has not prevented all international resolutions since then from adopting "terrorism" as the keyword, the original sin from which all evil arguably derives. On September 12, U.N. Security Council Resolution 1308 characterized the events of the previous day as "terrorist attacks." That same day The General Assembly adopted a unanimous resolution condemning "heinous acts of terrorism" and called "for international cooperation to prevent and eradicate acts of terrorism." SCR 1373, adopted on September 28, has put in place a Committee devoted to preventing and punishing "terrorism."

At the same time, a few domestic and international voices remind us of the word's uncertainties, particularly the voices of Mary Robinson, the UN Human Rights Commissioner and of Antonio Cassese, a highly respected authority in international law who served on the International Criminal Tribunal for Former Yugoslavia. In its extraordinary meeting on September 20, the European Council acknowledged the problem in noting "the urgent need for a common understanding, not only politically but also legally, of what terrorism means." This is an acknowledgment that there is no common European understanding of the term, and it stems from the long European experience in fighting "terror." With all the anti-terrorist laws adopted, some form of accommodation with "terrorist" organizations, like the IRA or the Basque or Corsican nationalists, has invariably followed. The same uncertainties can be found, on a different mode, in American law. The joint resolution in Congress, adopted on September 14, authorized the president to use military force against "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on Sept. 11, 2001." But terrorism is ill-defined in federal statutes, practically all of which are linked to plane hijacking or the criminal use of poisonous substances (and which are inspired by some nine international conventions on terrorism ratified by Washington). Normally, criminal law should be perfectly capable of dealing with these acts. However, the violence, wantonness and scale of the September 11 attacks put them at a different level than repetitive killings, or serial murders carried out by one person or group.

This explains the problem, in Europe, America, and the Arab or Muslim world: what happened on September 11 is not simply a plane hijacking turned tragic. Nor is it a replica of the 1985 killing of a handicapped civilian in a hijacked cruise-liner, nor the painful death of a child, in front of the world cameras, at the beginning of the Intifada. Nor even of the many cases of bombs planted in thoroughfares or indiscriminately lobbed at civilian areas by fighter jets.

September 11 is different because of its context and its magnitude. By its sheer size, its wantonness, its ferocity, its callousness, its suddenness, the means used, the thousands of innocent civilians destroyed in minutes, September 11 qualifies as a crime against humanity, a category which,

unlike “terrorism,” is well defined in international law and carries the common responsibility of humankind.

Article 7 of the International Criminal Court Statutes of 1998, for example, clearly describes a crime against humanity as an act “committed as part of a widespread or systematic attack directed against any civilian population.” There is a profound pedigree to this concept, which can be found in the very early principles of “the law of people:” the great European publicist Vattel wrote in 1758 that even if justice is normally limited territorially to the state in which a crime is committed, “one must except from the rule those thugs who, because of the magnitude of their crimes...declare themselves the enemy of human kind.”

This international principle—which was also adopted in Nuremberg—opens a number of legal avenues which the nebulous concept of terror is unable to address in the present state of international law. The crime against humanity category offers a far more precise description of what happened on September 11. The Belgian law of June 16, 1993 (modified on February 10, 1999), under which a case was recently lodged against the current Prime Minister of Israel for his responsibility in the 1982 massacres of Sabra and Chatila offers a good example of such precise language: not only does it condemn massive killings and other crimes as crimes against humanity, but it also calls for the prosecution of “those who design, hold or carry an instrument...or transform an existing instrument or construction... for the purpose of carrying such crimes.” The details of the use of aircraft as mass murder instrument on September 11 could hardly be better qualified.

The consequences of the definition are important. When the acts of September 11 are defined as a crime against humanity, rather than as terrorism, the response under international law must involve the whole of mankind. Every single person in the world is concerned, and every government is bound to cooperate to produce the suspects and culprits and assist in the investigation. This is not the case for acts of terrorism. States do not have a clear responsibility under international law to respond actively to terrorism, and the next bomb in Kashmir will not see the mobilization of the whole world to attack the perpetrators or the states that harbor them—and this not only because it has not happened on U.S. soil. There is in crime an economy of scale which has been accurately described in such classic cases as the 1961 Eichmann case in Israel, or the Rwanda and Yugoslavia ongoing cases. As graphically expressed by a French author, it is inconceivable “to allow the Holocaust getting divided, and losing its nature (*dénaturer*), into six million times one murder.”

Unlike terrorism, the mechanism for crimes against humanity carries serious precedents which can be invoked unanimously, and are clear. They stress process, both short-term and long-term measures, systematic and worldwide investigation, accountability and responsibility, the need to pursue actively the perpetrators and accomplices, and the rejection of “sovereign” obstacles in both investigation and trial.

If the September 11 attacks were defined as a crime against humanity, rather than as terrorism, many would find it easier to follow the American lead in the search for the perpetrators of the massacres, rather than the open-ended and ill-defined crusade against an indeterminate foe. By changing its definition, the originally named (and in our view properly so) "infinite justice" operation would take its rightful place in the history of mass crime, and join the search for justice elsewhere in the world, such as in the killing fields of Cambodia, the Sierra Leone brutalities, and the Sabra and Chatila massacres.