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International law related to terrorism

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You got an interesting view of international law from Merav, from a little bit on high, and then Natalie reminded us that the devil is in the details. I am going to try and navigate between the two of you. But first I want to tell all of you that you constitute an extremely important group at this point. Right now, under the exalted leadership of the only remaining superpower, international law is about to be pushed off the table of world society and Arjun, John and Nicole are trying to catch it. They cannot do it alone, so they need all of you and many more people.

I had a very dispiriting couple of days in Washington two weeks ago, making the rounds of various Senate offices and trying to encourage them to speak up about their right to say something about the termination of the Anti-Ballistic Missile (ABM) treaty. Carol Wolman organized this for a group of us. The answer that we got is "Yes, you are absolutely right. It is a terrible thing. The ABM treaty should not be terminated and it sets a very bad precedent for the whole treaty regime. The Nuclear Posture Review is a horror." So we asked them what they were going to do about it. And they said, "Nothing." We asked why and they responded, "Because we can only get 35 votes in the Senate." If you cannot win, you do not even speak up. You do not even start a dialogue. Therefore, that dialogue has to come from civil society, which is all of you.

I want to say a couple of things in response to Merav before I launch into my topic. A very interesting thing that is happening here in the UN building today is that, while we are talking about the decline of international law, a major step forward in international law is being taken in another conference room: the Prepcom for the International Criminal Court (ICC), which is now a reality. This underscores the correctness of what I call the Weiss Theory of Contrary Parallelism in History, which is that history often moves simultaneously in opposite directions. The idea is to hang on to the right direction. The ICC is definitely a great step forward.

It also relates to the question that Merav raised about accountability. How do you hold states accountable? It is very difficult to grab hold of states, but you can grab hold of individuals, prime ministers, presidents, foreign ministers, Rumsfelds, and Cheneys; those people can be held accountable. Now that there is an international criminal court, it is going to be easier to hold them accountable. It is not only in a criminal sense that people who commit crimes against

humanity and war crimes can be held accountable, but also through civil litigation. My colleagues at the Center for Constitutional Rights and I brought a case in 1978 against a Paraguayan torturer on behalf of the relatives of a young man who had been tortured to death by this man. It was a civil case brought under principles of international law. We were told originally that this was crazy, because international law only applied to relations between states. However, the court accepted the notion that, after Nuremberg and after all the other things that happened, we were now in a period in which international law applies to individuals and individuals can avail themselves of international law.

The role of civil society in the formation of international law is not that new. More than a hundred years ago, people like Bertha von Sutter and organizations like the Peace Society in Boston, and the Quakers, insisted that governments get together in The Hague and do something about the horrors of war. This led to the first codification of the laws of war, which we now know as the Geneva Conventions. Had it not been for the intensive lobbying of the peace groups in the United States, there would not have been a follow-up session in 1907. So civil society, contrary to Merav's British friend who was alarmed at the presence of civil society in the landmines treaty negotiations, not only does have a place, but it must have a place in the formation of treaties and the development of international law.

I am supposed to talk to you about terrorism. Natalie already mentioned a few things, only one of which I disagree with: according to the standard definition of a terrorist, somebody who merely wants to kill is not a terrorist. This person may be a psychotic mass murderer, but as I will show, the one thing that everybody agrees on in talking about terrorism is that its purpose is political. What do we make of terrorism when we consider what Nelson Mandela, Menachem Begin, Gerry Adams, and Yasir Arafat have in common? They were all regarded as terrorists at one time. Then two of them got the Nobel Peace Prize and all were eventually regarded as great leaders of their people. So terrorism is a difficult concept to get hold of.

International lawyers have struggled with the definition of terrorism for nearly a century, largely without success, because in the words of the cliché, one man's terrorist is another man's freedom fighter. Or in the horrible agonizing context of Israel-Palestine today, those whom the Israelis call terrorists, the Palestinians call martyrs. In his post-September 11 speech to the General Assembly, Sir Jeremy Greenstock, the British Ambassador to the United Nations, attempted a definition of terrorism. He said what looks, smells, and kills like terrorism is terrorism. This is not exactly a workable definition.

But it is interesting to note that for about 20 years countries have enacted treaties dealing essentially with terrorist acts, and known as anti-terrorist treaties, without ever using the word terrorism. There are treaties dealing with hijacking, attacks on diplomatic agents, hostage-taking, theft of nuclear material, unlawful acts against maritime navigation, and protection of fixed platforms located on the Continental Shelf, etc. All of them carefully skirted around not only trying to define terrorism but even using the word. However, the last two of these do finally mention terrorism: the International Convention for the Suppression of Terrorist Bombings, 1997, and the International Convention for the Suppression of the Financing of Terrorism, 1999, both of which the United States was very reluctant to sign or ratify and did not get around to doing so until after September 11.

The last of these, the financing convention, finally has a kind of useful definition. It defines terrorism as "Any act intended to cause death or serious bodily injury to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict (in other words, military personnel not engaged in military activities) when the purpose of such act by its nature or context is to intimidate a population or to compel a government or an international organization to do or abstain from doing any act." There we finally have an attempt at a definition. It has two characteristics. First, it is supposedly intended to inflict death or serious bodily harm on civilians or other persons. I think that is too limited a definition. Just think of a terrorist attack on the cyber network of an entire country or an entire region, which certainly could have extremely deleterious consequences. The second part goes to the heart of what is a proper definition of terrorism. That is, its purpose is to intimidate a population or persuade a government or international organization to adopt a certain policy.

As far back as 1996, the UN General Assembly adopted, without dissent, a resolution called "Measures to Eliminate International Terrorism." The definition in this resolution reads "criminal acts (which somewhat begs the question) intended or calculated to provoke a state of terror in the general public, a group of persons, or particular persons for political purposes." Then it went on to say, "...and that these acts are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnical, religious or other nature that may be invoked to justify them." In other words, no more good or justified terrorism. This is what was said in this building when they adopted the resolution. Unfortunately it is not what hundreds of millions of people are saying about Al Queda, or about suicide bombers right now.

The 1996 resolution that I just mentioned set up a committee to try to formulate a definition. They have been working on it for six years. At their last attempt, from January 28 to February 1 of this year, they failed again. The reason they failed is interesting. They could not agree on state versus non-state actors. The United States and its friends introduced two provisions reading as follows: "The activities of armed forces during an armed conflict as those terms are understood under international humanitarian law are not governed by this convention." In other words, the bombing of Hiroshima and Nagasaki is not governed by the convention on terrorism. And secondly, this gets a little metaphysical here: "The activities undertaken by military forces of a state in the exercise of their official duties are not governed by this convention." In other words, "superior orders" is a complete defense. A couple of months ago, when they were debating these definitions, the 52 member states of the Organization of the Islamic Conference, proposed alternative versions that would have made an exception for people acting in a state of occupation. This is one reason why there is still no internationally accepted definition of terrorism.

To come back to nuclear weapons, Mexico introduced a proposal that "This convention does not address nor can it be interpreted as addressing in any way the issue of the legality of the use or threat of use of nuclear weapons by states." What that means is we do not want this convention to be used as a shield for exempting acts by armed forces using nuclear weapons. In other words, we want to make it absolutely clear that the use or threat of use of nuclear weapons will be governed by other principles of international law and will not receive protection from this convention.

I have been very disturbed by the way in which the United States, from September 11 onwards, has used terrorism as a way of providing political, moral and legal justification for a war without end. All of this started with Bush going to Congress and saying, "September 11 was an act of war." September 11 was not, by any definition of act of war, an act of war. It was a horrible, unimaginable thing. It was a crime against humanity. It was not an act of war. Yet everyone seems to have accepted the fact that it was an act of war. That acceptance is now leading the United States to conduct this war making policy, starting in Afghanistan and nobody knows where it is going to go - Iraq, Iran, Korea, Lybia. And opposition to this notion is muted because people have somehow accepted the concept. I want to tell you that, under international law, an act of terrorism does not justify war as response.

I will say just a word about the question of root causes. We know some things about the root causes of terrorism, but not a great deal. There has been a lot of iffy speculation since 9-11. If we had not abandoned Afghanistan after the Soviet retreat, if we had not favored India over Pakistan on Kashmir, or Israel over the Palestinians, if we had done more to relieve poverty in the Third World and had not stationed U.S. troops in Saudi Arabia, 9-11 might not have happened. Maybe yes, maybe no. I do not think it matters. I think the only thing that matters is that you do the right thing because it is the right thing to do. You pursue a foreign policy of peace and justice, because it is the right thing to do and not because 9-11 happened. As T.S. Eliot said in "Murder in the Cathedral," the greatest treason is to do the right thing for the wrong reason.

Let me conclude with a lovely phrase from George Kennan that I came across the other day. He said: "International law has been the gentle civilizer of nations." I venture to say that never in modern times has the world been in greater need of this gentle civilizer.