

TERRORISM AND THE CRIMINAL JUSTICE SYSTEM

*Justice Iftikhar Muhammad Chaudhary**

I

Let me start by thanking the Hon'ble Chief Justice of India for inviting me to participate in the Golden Jubilee Celebration of Indian Law Institute. On my own behalf and on behalf of members of my delegation, I wish to extend felicitation on completing 50 years of meritorious services to the cause of research and study in the legal field. Indeed, I am honored to be among such distinguished luminaries and men and women of scholastic achievements. I should like to express my views on "Terrorism and the Criminal Justice System", which is a burning issue of the contemporary world.

The phenomenon, though very old, has been attracting increasing attention and concern of the international community for, the last three or four decades. The international community is not one on the question of defining 'terrorism' but has made significant headway in combating it in specific areas. About a dozen major International Conventions/Protocols, apart from the regional legal instruments, have been adopted to provide legal framework to check the menace of terrorism in specific forms and in specific fields.

Earlier, three international Conventions were adopted on the issue.

They are:-

- 1) Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963);
- 2) Convention for the Suppression of Unlawful Seizure of Aircraft of 1970; and
- 3) Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation, 1971.

The offences which, threatened the lives of innocent people traveling by air was considered to be so clear cut a form of terrorism that the international community did not feel necessary to go into motive or purposes or causes for which these acts were committed.

In 1972, the UN General Assembly appointed an Ad-hoc Committee to study the question of international terrorism and to recommend practical measures of cooperation for the speedy elimination of this menace. The salient features of the General Assembly Resolution adopted at that time were:-

- (a) Unequivocal condemnation of all acts of international terrorism which endanger or take innocent human lives or jeopardize fundamental freedoms;
- (b) Underlining the need of all States devoting immediate attention to find just and peaceful solutions to the underlying causes for which give rise to such acts of violence;
- (c) Condemnation of the continuation of repressive and terrorism acts by colonial, racist and alien regimes in denying people their legitimate right to self-determination and independence and other human rights and fundamental freedoms;
- (d) Taking of the appropriate measures at the national level with a view to speedy and final elimination of the problems of international terrorism and urging the States to become parties to international conventions which relate to various aspects of the problem;

* Chief Justice of Pakistan.

(e) Recognition of the importance of international cooperation in devising measures to effectively prevent terrorism acts and studying their underlying causes in order to find just and peaceful solution.

In 1985 the UN General Assembly, by consensus, adopted Resolution on measures to prevent international terrorism, which, inter alia, unequivocally condemned all activities, methods and practices of the terrorism by whomsoever committed and urged all States to contribute towards progressive elimination of causes underlying terrorism and to pay special attention to all situations, including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien occupation that may give rise to international terrorism and may endanger peace and security.

The international community thus has continued to adopt international legal instruments to combat various forms of terrorism. In the context of Civil Aviation, following International Conventions/Protocols of universal nature were adopted subsequent to the three conventions relating to terrorism.

- I. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973.
- II. International Convention against the Taking of Hostages, 1979.
- III. Convention on the Physical Protection of Nuclear Material, 1979.
- IV. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988.
- V. Convention for the Suppression of unlawful Acts against the Safety of Maritime Navigation 1988;
- VI. Protocol for the Suppression of Unlawful Acts against the Safety of the Fixed Platform located on the Continental Shelf, 1998,
- VII. Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991.
- VIII. International Convention for the suppression of the Terrorism Bombings, 1997.
- IX. International convention for the suppression of the Financing of Terrorism, 1999.

Article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, 1973 provides that intentional commission of any of the following shall be made a crime by each State party:-

- I. The murder, kidnapping or other attack on the person or liberty of an internationally protected person;
- II. A violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;
- III. A threat to commit any such attack;
- IV. An attempt to commit any such attack; and
- V. An act constituting participation as an accomplice in any such attack.

Article I of the International Convention against Taking of Hostages of 1979 provides that any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hostage) in order to compel a third party, whether a State, and International Inter-Governmental third party, Organization, a natural or juridical person or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage, commits the offence of taking hostage in terms of the Convention.

A person who attempts to commit such an offence or participates as an accomplice of anyone who commits or attempts to commit such an offence, would also commit an offence for the purposes of the Convention.

The international human rights law permits the use of lethal force against a criminal suspect only if necessary to stop an imminent threat of death or serious bodily injury. But if a person is an enemy combatant, the law of war permits him to be killed summarily, so long as he is not in custody, incapacitated, or surrendering. If an enemy combatant is detained, the law of war permits him to be held until the end of the armed conflict and such detainee is entitled to the protection accorded under a Geneva Convention.

The criminal justice system may be considered from at least three perspectives. First, it can be considered a normative system that is a body of legal rules expressing social values through prohibitions backed by penal sanctions against conduct viewed as seriously wrong or harmful. Second, the criminal justice system can be regarded as an administrative system. This view comprehends the official apparatus for enforcing the criminal law, including the police and other front-line enforcement agencies, prosecutorial authorities, the judiciary, and penal and correctional facilities and services. A third view of criminal justice is that of a social system. In this perspective, defining and responding to criminal conduct involves all elements of society. This definition of criminal conduct includes not only the penal law enacted by the legislature but also the way in which these provisions are interpreted by the citizenry at all levels. The arrest and persecution of an offender for the theft can be considered simultaneously as a manifestation of a legislative prohibition against knowingly taking another's property, as a response by the police, prosecutor, judiciary, and penal-correctional system to conduct that appears to be criminal and as a community interpretation of the behaviour in question. Criminal justice as a whole results from the interaction between legal rules, administrative practices, and social attitudes and behavior. The criminal justice system does indeed have a substantial degree of coherence in this sense. Thus, in the law of crimes itself the penalties for deliberate homicide are much more severe than the penalties for assault. This differential is rationally coherent if one assumes that the underlying value is protection of human life and that an attack resulting in death is a more serious impairment of that value than an attack which leaves the victim alive. Similarly, it is rational that adjudication of guilt by the court system should follow after investigation of an offence by the police, if the underlying value is that guilt should be determined on the basis of a disinterested weighing of evidence and not upon predisposition.

The criminal justice system does have and will continue to have a role and important one, in addressing terrorism in all its forms. It has proven effective and fair in many cases and it will continue to be an important counterterrorism tool. But surely, the justice system is not the panacea for it. There are reasons for it.

Money crimes are committed with premeditation and under certain arrangement conceived by the criminal. That is why, the prosecutors find it difficult to trace such crimes and book the culprits. Terrorism is a more organized crime. There is no precise or widely accepted definition of the word, 'terrorism'. 'Terrorism' often refers to and is applied to a variety of acts of violence that are not strictly within the realm of terrorism. The definition of terrorism has become a matter for political as well as intellectual struggle. Because the term is pejorative, politically antagonistic parties label their opponent's activities with it. The United Nations is striving to provide a definition of terrorism. This is essential to prevent and punish various acts of terrorism. But there are difficulties. Despite it, core elements of a definition. Seem clearly to include the use or threat of violence; political motivation; and the creation of psychological pressure for some specific or generalized purpose.

It is essential that the problem of crime should receive careful attention at the hands of legislations and a reformer for human happiness is directly dependent on it. There is always an apprehension of danger to life

and property if crime is not properly put under control. In the absence of security, trade and commerce cannot flourish. There is thus loss of national dividend to the country. Besides, there is huge expenditure of money in the prevention and detection of crime. A large contingent of police force has to be employed for this justice. All this involves huge resources.

Crime is a malady and the aim of every punishment should be reclamation of the offender by prescribing proper treatment. As observed by Victor Hugo, "we should look upon crime as a disease. Evil will be treated in charity instead of anger. The change will be simple and sublime. The cross shall displace the scaffold." This theory of punishment identifies crime with disease.

In awarding punishment to the offenders, the criminal justice system mainly remains wedded to the deterrent theory of punishment. The primary objective of criminal justice is to administer a stern warning to the potential perpetrators of the crime and deter people from committing crime. Commission of offences must be made a bad bargain for the offender so as to stop him and other members of the society from taking to criminal ways. The infliction of punishment serves as a check on others who are evil minded. The rigour of penal discipline is made a terror and a warning to himself and others.

Efficacy of the criminal justice system in dealing with terrorist accused is clogged with obvious, and way be some not so obvious-limitations. One limitation of the criminal justice system is that it necessarily has only limited deterrent effect. This is true in relation to other offences too. In any event, putting dangerous terrorists in jail and taking them out of circulation for life or for many years means that some bombs are not built and detonated; some planes are not hijacked; some innocent people are not assassinated. Thus, some would-be terrorists are deterred from engaging in terrorist acts. Any measure of general deterrence is obviously a good thing.

Justice demands that the parties should have an opportunity of submitting to the person by whose decision they are to be bound such considerations as in their judgment ought to be brought before him. Fair hearing ensures the scrupulous administration of justice. The rule cannot be sacrificed at the altar of administration convenience or celerity, for "convenience and justice", as Lord Atkin put it, "are often not on speaking terms". The hearing must be genuine and not formal. Assurance of a fair trial is the first imperative of the dispensation of justice. Every accused person in a criminal case has an unqualified right to a fair hearing in accordance with the principles of fundamental justice. Even the most detested person has a right to be heard.

Another limitation of the criminal justice system in dealing with international terrorism in particular is the difficulty of using it successfully. They are very difficult cases, especially when the terrorist act occur abroad or when much of the evidence of the terrorist plot is obtained abroad inasmuch as in such eventuality, evidence is obtained and suspects are often first questioned by the foreign officials under very different systems and rules. Although as a legal matter, those differences do not generally prevent the difference being used at the place of trial, sometimes these differences lead prosecutors to decide, in their discretion, not to use evidence obtained in ways that deviate sharply from their own system.

Most people believe governments should not rely on military force when a criminal justice system is available. This may not be practical policy, both as a matter of fairness and as an effective counterterrorism strategy. Terrorism is a global phenomenon and the strategy of fighting against it, if it is to be successful, must be universal. Terrorism has no religion and knows no boundaries.

There is a need for broader, more comprehensive measures to detect and prevent terrorism. Greater emphasis on intelligence and prevention is critical; if we are to get better at preventing terrorist attacks, it is vital that we enhance our abilities to collect information and analyze it real-time, and then share it real-time

throughout the world. A global, systematic, military, diplomatic, and financial strategy to effectively deal with the ultimate causes of terrorism is plainly necessary if we are to be successful in preventing as many terrorist attacks as possible in the long term.

We have to engage in the public debate about all or the issues associated with the war against terrorism, we must distinguish between what is constitutional and lawful in these times of heightened threat, should or should not be done as a matter of sound policy.

III

Pakistan is a victim of terrorism and the loss human life and property, both private and public, suffered has been immense. The situation led to framing of anti-terrorism law, which established Special courts to deal with cases involving terrorism.

Now I would be discussing the legislative response in my country. Legislative response from Pakistan to meet the challenges created by the terrorism began with the enactment of the Suppression of Terrorist Activities Special Act, 1975, which made special provision for the purpose of suppressing acts of sabotage, subversion and terrorism and provided for speedy trial of offences committed in furtherance of or in connection with such acts. With the unfolding of new dimensions of terrorism, new laws had to be framed from time to time. The Anti-Terrorism Act, 1997 which is the latest in the series of laws on the subject was promulgated to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences. The Act criminalises the striking of terrors in the people or any section of the people, or alienating in section of the people or adversely affecting harmony among the different section of the people through any act or thing by using bombs, dynamite and other explosive or inflammable substances or fire arms or other lethal weapons or poisons or noxious gases or the chemicals or other substances of hazardous nature in such a manner as to cause or to be likely to cause the death of or injury to any person or the persons are damaged or to destruction of the property, as disruption of any supplies of the services essential to the life of the community or displays firearms or threatens with the use of the force public servants in order to prevent them from discharging their lawful duties. The act makes cognizable by the anti-terrorism court the offences committed with a canon, grenade, bomb, rocket or a light or heavy automatic weapon, the offences committed against members of the Police, Armed Forces, Civil Armed Forces or public servants. Offences subjecting to the victim to cruelty, brutality, torture or burning. The act provides that the Officer-in-Charge of a Police Station shall complete the investigation of a terrorism case within seven working days and forward directly to the special court, a report Under Section 173 of the code of procedure. This is one of the most important aspect of this case that the investigation has to be completed by the investigating agency within the period of seven days. Default on the part of the investigation officer is deemed to be a willful disobedience of the orders of the special court and made punishable for contempt of court. Further failure of the investigation officer to pursue the case properly has been made punishable with imprisonment upto two years. A strong check has been provided on the police for the purpose of obeying the orders of the court and putting the challan within seven days against the terrorist. The special court is required to proceed with the trial of the case from day to day and decide the case within seven working days. Likewise, the Act provides for filing of the appeal by the convict and this decision by the appellate court within seven days. The Act prohibits the judgment of a case for more than two working days. As far as the court, Supreme Court of Pakistan is concerned it has also given response

towards the terrorism by pronouncing two important judgment reference which we making right now. The judicial response to the challenge of terrorism in Pakistan first came with the judgment of the Supreme Court in 1998 in *Marimall's* case, which defines various provisions of the Anti-Terrorism Act, the Supreme Court's verdict in Sheikh Liyakat Hussain's case rendered in 1999 was another important decision. In as much as the court further strengthened and clarified the provision of anti-terrorism court bringing the law in accord with the fundamental rights guaranteed in the Constitution, the court inter-alia directed, on case we assign at a time to a special court and till the judgment pronounces in such a case, no other case be entrusted to it. Challan of the case should be submitted to a special court after full preparation and after ensuring that all witnesses are produced as and when required by the Court. The Chief Justice of the High Court concerned shall nominate one or the more judge of High Court for monitoring and ensuring that the cases and appeals are disposed off termed of these guidelines while the Chief Justice of Pakistan may nominate one or more judges of the Supreme Court to monitor the implementation of the guidelines. The judge or the judges so nominated will also ensure that if any petition for leave or appeal with the leave is filed, the same is disposed off without any delay in the Supreme Court. So these guidelines are fully being followed.

According to my wisdom terrorism is both national as well as International phenomena, it has no religion and knows no boundaries. The whole of the world is in the grip of terrorism, no region of the country is safe. Terrorism in all its forms, political struggle, national liberation moment, tribal rivalries and secretarience conflict ethnicity and cross border afflicts the region. It attacks the poor nations heavily, it impedes their already slower pace of development. It require deeper analysis, it calls for a multi-dimensional approach and strategy. We have to decide where force is needed to suppress it and where other means need to be employed to resolve the outstanding issues. There are cross versions and cross allegations in our region, this is unfortunate. Our interest requires us to sit together and make individual as well as collective efforts aimed at eradication of this menace. To leave no hiding place for the guilty we have to wrestle with the injustice that provide the noxious fumes in which the terror is conceived. There has to be cohesion, cooperation and understanding. It must be sought through better peacemaking through engaging with the needs of the neediest and forming partnerships with the oppressed so that they are natured and the helped. It must light a part to the common edifice of the compassion that it is shared inheritance for all people. We have the potential to deal with it.

In the end, I congratulate the Indian Law Institute in organizing the present conference and giving an opportunity to the participants to discuss and deliberate on this issue of the common concern. In conclusion, let me again thank the organizers for their invitation and to express my thoughts on vital issue to such an illustrious gathering. I appreciate the excellent arrangements made by the Indian Law Institute to hold its Golden Jubilee and in particular the Organising Committee for the good work done by them in the holding of the present conference.