of stolen nuclear material, and requires that states parties make certain serious offenses involving nuclear material punishable, and that they extradite or prosecute offenders.

The effectiveness of these global conventions as deterrents to terrorism is questionable. While much of the decline in aircraft hijacking since the conclusion of the I.C.A.O. Conventions was due to the preventive techniques of airport and aircraft security mandated by those conventions, aircraft hijacking has increased recently as hijackers have become skilled at avoiding security devices. There is ample evidence that hijackers have been submitted for prosecution either in the states where they have been found or in states to which they have been extradited.[18] It is unclear, however, whether these prosecutions can be attributed to the terms of the I.C.A.O. Conventions. Expulsion or deportation has been utilized more frequently than extradition to return hijackers, and the extradition of hijackers that has occurred appears to have been effected pursuant to bilateral treaties rather than the multilateral conventions. Some prosecutions of terrorist attacks on diplomats have also taken place, in some cases under legislation enacted to implement a state's obligations under the U.N. Convention of Internationally Protected Persons, but it appears that this U.N. Convention has not been relied upon for extradition. What the practice will be under the Hostages Convention remains to be seen.

Most of the global conventions have relatively strong dispute settlement provisions that allow for binding arbitration or adjudication, although, in some cases, parties are allowed to "opt out" by reservation made at the time they became a party. The United States relied in part on such a provision in the U.N. Convention on Internationally Protected Persons as the basis for bringing its action against Iran before the International Court of Justice. None of these conventions contains, however, provisions for economic or other sanctions against states that offer safe haven or other assistance to terrorists. Efforts in September 1973 to conclude an independent enforcement convention for the I.C.A.O. Conventions at the Rome Security Conference and the I.C.A.O. Extraordinary Assembly were unsuccessful.

Other efforts to conclude a sanctions convention have met with a similar fate. To date, only the Bonn Declaration, a non-binding instrument discussed below, has been adopted.

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18. *See* Alona E. Evans, "Aircraft and Aviation Facilities," in Alona E. Evans & John F. Murphy, eds., *Legal Aspects of International Terrorism*, Lexington: Lexington Books, 1978, pp. 3-147.

Regional Conventions

There are three regional conventions designed to ensure that apprehended terrorists will be either extradited or prosecuted: The European Convention on the Suppression of Terrorism (The European Convention),[19] The Agreement on the Application of the European Convention for the Suppression of Terrorism (The Dublin Agreement),[20] and The Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crimes Against Persons and Related Extortion that are of International Significance (The OAS Convention).[21] The OAS Convention has been largely superseded in scope of coverage and importance by the U.N. Convention on Internationally Protected Persons. The European Convention and the Dublin Agreement do not attempt to define terrorism. Instead, they list offenses, such as offenses under the I.C.A.O. Conventions and the U.N. Convention on Internationally Protected Persons, as well as kidnapping, hostage-taking, and the use of certain lethal weapons, in an effort to exclude them from the political offense exception in the extradition process between states parties.

The European Convention is not itself an extradition agreement. Rather, it is intended to influence existing extradition arrangements—multilateral and bilateral—entered into by member states of the Council of Europe. However, while Article 1 of the Convention purports to eliminate the listed offenses from the political offense exception, Article 13 permits a state party to make reservations to Article 1:

> [P]rovided that it undertakes to take into due consideration, when evaluating the character of the offense, any particularly serious aspects of the offense, including: a. that it created a collective danger to the life, physical integrity or liberty of persons; or b. that it affected persons foreign to the motives behind it; or c. cruel or vicious means have been used in the commission of the offense.

At this writing, 13 countries have ratified the European Convention.[22] Among the significant nonratifiers is France and the Mitterand

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19. European Convention on the Suppression of Terrorism, *entered into force* Oct. 25, 1978, art. 4, 1978 Gr. Brit. T.S. No. 93 (Cmd. 7390), Europ. T.S. No. 90, *reprinted in International Legal Materials*, vol. 15 (1976), p. 1272.

20. The Agreement on the Application of the European Convention for the Suppression of Terrorism (the Dublin Agreement), *International Legal Materials*, vol. 19 (1980), p. 325.

21. The Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crimes Against Persons and Related Extortion that are of International Significance, *done at* Washington, Feb. 2, 1971, [1971] 27 U.S.T. 3949, T.I.A.S. No. 8413, O.A.S.T.S. No. 37, at 6, O.A.S. Off. Doc. OEA/Ser. A/17.

22. See Appendix 2, Fourth Interim Report of the Committee on International Terrorism, International Law Association, *Report of the Sixtieth Conference*, Canada, (1982) pp. 349, 358.

government is deemed unlikely to ratify, since the French left has traditionally opposed the extradition of political offenders. Also, the Republic of Ireland has not even signed the European Convention on the debatable ground that its Constitution precludes it from becoming a party. Despite these notable absent parties, the European Convention has reportedly had a positive impact on several recent extradition cases in Western Europe.

The Dublin Agreement, sponsored by the European community, attempts to tighten the application of the European Convention's extradite or prosecute formula to terrorist acts. It seeks to do this in two ways. First, under the Agreement,[23] member states of the community accept the proposition that extradition proceedings between two member states of the European Convention would apply in full (i.e., without reservations) *even if* one or both of the states are not parties to it, or if one or both have made the political offense reservation. Second, the Agreement seeks to restrict still further the effect of such reservations between member states of the Community. Hence reservations made to the European Convention will not apply in extradition proceedings between E.C. member states, unless a further declaration to this effect is made. Also, parties to the Dublin Agreement that are not parties to the European Convention are required to indicate by declaration if they wish to retain the political offense defense in extradition proceedings between E.C. member states. However, all nine member states of the Community (as it then was) are required to ratify the convention before it comes into force, and France has expressly declined to do so.

Bilateral Agreements

In addition to the I.C.A.O. Tokyo, Hague and Montreal Conventions dissussed above, there are at least seven bilateral agreements on aircraft hijacking.[24] One of the more interesting examples of these bilateral agreements is the 1973 United States-Cuba Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offenses.[25] It provides that any person who hijacks an aircraft or vessel registered under the law of one party to the territory of the other party shall be

23. The Dublin Agreement, *supra* note 20, arts. 1-3.

24. Cuba has agreements with Canada, Mexico, Venezuela and Colombia; the Soviet Union has agreements with Iran, Finland and Afghanistan. *See* Evans, "Aircraft and Aviation Facilities," *supra* note 18, at 20, 21, 25.

25. Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offenses, *entered into force*, Feb. 15, 1973, Cuba-United States, 24 U.S.T. 737, T.I.A.S. No. 7579. The Memorandum was denounced by Cuba on the ground that the United States had failed to control anti-Castro terrorists who had planted a bomb on a Cuban civilian aircraft. *See* Editorial, Washington Post, Oct. 19, 1976, at A18, col. 1.

returned to the party of registry or "be brought before the courts of the party whose territory he reached for trial in conformity with its laws for the offense punishable by the most severe penalty according to the circumstances and seriousness of the acts to which this article refers."[26] Thus the Memorandum incorporates the extradite or prosecute formula but does so in a more meaningful way than do the multilateral antiterrorist conventions. Unlike the multilateral conventions, the United States-Cuba Memorandum requires that the accused actually be tried and not merely submitted "for the purpose of prosecution."

Under the United States-Cuba Memorandum, each party expressly recognizes an affirmative obligation to prevent the use of its territory as a base for committing the illegal acts covered by the Memorandum.[27] Each party must try "with a view to severe punishment" any person who "within its territory, hereafter conspires to promote, or promotes, or prepares, or directs, or forms part of an expedition which from its territory or any other place carries out acts of violence or depredation against aircraft or vessels of any kind or registration coming from or going to the territory of the other party or . . . carries out such acts or other similar unlawful acts in the territory of the other party."[28]

Finally, the United States-Cuba Memorandum severely limits the extent to which the party where the hijacker arrives may take his motivation into account. It provides, in pertinent part, that there may be taken "into consideration any extenuating or mitigating circumstances in those cases in which the persons responsible for the acts were being sought for strictly political reasons and were in real and imminent danger of death without a viable alternative for leaving the country, provided there was no financial extortion or physical injury to the members of the crew, passengers, or other persons in connection with the hijacking."[29]

In 1976, Cuba denounced the Memorandum on the grounds that the United States had failed to control anti-Castro terrorists who had planted a bomb on a Cuban civilian aircraft.[30] Nevertheless, in practice Cuba has shown that hijackers still face imprisonment in Cuba or extradition to the United States.

Bilateral extradition agreements are also relevant to any consideration of law and the deterrence of international terrorism. These agreements do not contain the "extradite or prosecute formula" of the multilateral conventions. They do require the state party, where an al-

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26. United States-Cuba Memorandum *supra*, note 25, Art. 1.
27. *Id.* art. 2.
28. *Id.*
29. *Id.* art. 4.
30. *See supra*, note 25.

leged perpetrator of an extraditable offense is found, to extradite him for prosecution upon request to the state party in which the offense was alleged to have been committed. This obligation, however, is subject to a number of exceptions, including the one most pertinent to international terrorism: the political offense exception. We shall consider this problem in some detail later in this article.

Bonn Declaration

As noted above, none of the multilateral antiterrorist conventions contains provisions for ecnomic or other sanctons against states that offer safe haven or other assistance to terrorists. Also, efforts to include an independent enforcement convention have proven unsuccessful.

As a partial substitute for a sanctions convention, the heads of state and government of the Seven Summit Countries (Canada, United States, Great Britain, West Germany, France, Italy and Japan) meeting in July 1978 in Bonn, issued what has become known as the Bonn Declaration.[31] Under this Declaration, which constitutes a political rather than a legal commitment, the signatories agree to halt bilateral air traffic service with countries that refuse to extradite or prosecute airplane hijackers or refuse to return the aircraft, passengers and crews. Follow-up efforts have succeeded in obtaining more widespread support for the Declaration and in inducing additional countries to become parties to the I.C.A.O. Conventions.

On December 1, 1982, the United Kingdom, the Federal Replublic of Germany and France implemented the Bonn Declaration by terminating all air traffic with Afghanistan.[32] Scholars have questioned whether the Bonn Declaration can be implemented consistently with the obligations of the Summit Countries and other states under the International Air Service Transit Agreement, the Convention on International Civil Aviation, and bilateral aviation agreements.[33] In this instance, the bilateral aviation agreements between Afghanistan and the United Kingdom, the Federal Republic of Germany and France posed no problem, because they had been terminated in accordance with their terms. Similarly, no difficulty is likely to arise under the International Air Service Transit

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31. The Bonn Declaration on Hijacking of 1978, *reprinted in International Legal Materials*, vol. 17 (1975), p. 1285.

32. This information was supplied the writer by persons in the Legal Adviser's Office, U.S. Department of State.

33. *See*, e.g., Philipp, "Die Terrorismus-Erklarung des Bonner Weltwirt-Schaftsgipfels aus Vollerrechtlicher Sicht," 33 *Juristenzeitung*, vol. 33 (1978), p. 750. For a more positive view on the legality of the Bonn Declaration sanctions, see Comment, "Skyjacking and the Bonn Declaration of 1978: Sanctions Applicable to Recalcitrant Nations," *California Western International Law Journal*, vol. 10 (1980), p. 123.

Agreement or the Convention on International Civil Aviation, since these agreements cover overflight and emergency landings, neither of which is expected to be involved in the case of Afghanistan. Nor is the appication of the sanctions provided for in the Bonn Declaration likely to affect third states—states which are nonsignatories of the Declaration and which are not the targets of sanctions.

This happy congruence of circumstances, however, will not necessarily be present in future cases, and these legal question marks regarding the Declaration remain. Moreover, application of the sanctions against Afghanistan is likely to have little economic impact. More generally, past experience with economic sanctions against Rhodesia and South Africa does not give cause for optimism that application of the Bonn Declaration sanctions will be effective in inducing the target country to cease its support for terrorist activity. Accordingly, the primary value of the Bonn Declaration and of its application to Afghanistan is likely to be the symbolic effect of the Summit Countries implementing a united stand against terrorism.

Terrorism and Intelligence Operations

There is general agreement that the collection and use of information or intelligence is an effective law enforcement response to terrorism. Ideally, the gathering of intelligence serves a preventive role and enables law enforcement officials to intercept terrorists at the launching stage before they have inflicted injury on persons or property. This has proven to be a difficult goal to accomplish, however.

Numerous problems have arisen at the national level. In the United States, for example, there is evidence that post-Watergate intelligence constraints imposed from 1975 to 1980 on intelligence activities may have adversely affected the timing and availability of preventive intelligence to the extent that the proportion of cases in which violence or other crimes were prevented declined.[34]

On the international level, the problems are compounded. For example, Article 3 of the International Criminal Police Organization (Interpol) Constitution provides that "[i]t is strictly forbidden for the organization to undertake any intervention or activities of a political, military, religious or racial character." Because of this restriction, Interpol has felt constrained to proceed cautiously in its involvement with law enforcement agencies combatting terrorism. Interpol will not involve itself in intelligence activity aimed at preventing terrorist acts; how-

34. *See* Brian M. Jenkins, Sorrell Wildhorn, Marvin M. Lavin, *Intelligence Constraints of the 1970s and Domestic Terrorism*, Santa Monica: Rand Corporation, 1982.

ever, once a criminal act has occurred, it will assist law enforcement efforts aimed at apprehending individuals responsible. This policy also has led Interpol to include in its files only those individuals who are directly implicated in a crime. Those individuals only suspected of involvement in terrorist activities are excluded.[35]

Interpol's cautious approach greatly limits the scope of its files and the effectiveness of preventive action by the international police community. Also, the "directly related" standard is imprecise, and it is unclear whether it covers co-conspirators, accessories, and sympathizers. On the other hand, there is a strong argument to be made in support of the Interpol position. Greater involvement by Interpol in antiterrorist activity might well embroil it in political controversies that would substantially reduce its effectiveness in carrying out a range of law enforcement activities that do not involve international terrorism. It is possible that the cost of broader Interpol involvement in antiterrorist activities would be unduly high, especially when alternatives could be developed to fill the gap, such as some which will be considered below.

Once the information is gathered and filed, the problems do not cease. Law and procedures regarding the sharing and dissemination of information regarding international terrorism among law enforcement officials in various countries are ambiguous and uncertain.[36] The standards here are found in national law, normally enacted without any contribution from other countries. High level intelligence gathering is virtually non-existent, and the quantity and quality of informal collaboration among middle level officials is unsatisfactory. There is, in short, no international network of shared information among democracies regarding terrorism. Some of the reasons for this problem, as well as possible steps to resolve it, are discussed later in this article.

Evaluation of Existing Measures

There is little question that the measures outlined above constitute, in their totality, a grossly inadequate response to international terrorism. With few exceptions, the international agreements discussed above are nonoperative documents that do not constitute a working system of criminal jurisprudence designed to combat international terrorism.

In part, this is because the international agreements are very narrow in their focus, covering only particular manifestations of international

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35. John F. Murphy, *Legal Aspects of International Terrorism: Summary Report of an International Conference*, St. Paul, Minn.: West Publishing Co., 1980, pp. 13-14.

36. Regarding the situation in the United States, *See* Wayne A. Kerstetter, "Practical Problems of Law Enforcement," Alona E. Evans & John F. Murphy, *Legal Aspects of International Terrorism, supra* note 18, at 535-51.

terrorism and not the whole panoply of possible actions. However, even in respect to these limited manifestations, the conventions have proved to be of very limited utility. Either certain key states have failed to become parties to the conventions, and indeed may actively work to undermine them, or states parties simply have not employed the procedures available under the convention in order to prevent international terrorist acts or to prosecute and punish the perpetrators of them.

As noted above, the problem of state supported terrorism has become particularly acute recently—perhaps best demonstrated by the murderous attack in London by members of Libya's "peoples bureau"—and the response of the world community has been largely a resounding silence. The Bonn Declaration covers only terrorist attacks against aircraft, is in nonbinding form and of questionable legality if applied under certain circumstances, and has proven ineffective in the one instance it has been applied. The major obstacle facing more severe sanctions against states supporting international terroism is that members of the world community are unwilling to risk economic ties with many of such states.

Intelligence operations against terrorism, at least when viewed on a worldwide basis, are inadequate, especially with respect to the *prosecution* of international terrorists. Also, as we shall see more fully below, even if law enforcement officials succeed in ascertaining the whereabouts of an international terrorist, the political offense exception to extradition and inadequately developed procedures for international judicial assistance make it extremely difficult to prosecute and punish him.

ALTERNATIVE RESPONSES TO INTERNATIONAL TERRORISM: DESCRIPTION AND EVALUATION

In this section we consider alternative responses to international terrorism. Some of these responses have been employed to some extent already, and the question is whether they should be extended or improved in various ways. Other alternative responses discussed below have been proposed but not yet adopted by governments. The issue is whether they should be, and, if so, how this might be accomplished.

The Quest for a Comprehensive Approach

International Intelligence Networks

As indicated previously, there is at present no international network among democracies of shared information regarding terrorism. This situation should be changed. Many, perhaps most, of the changes would involve revision of national law and practice. There are, for example, many ambiguities in United States law and practice regarding the gather-

ing, analysis and dissemination of intelligence regarding international terrorism that hampers United States efforts to participate in multilateral intelligence efforts.[37] These should be clarified.

Because of the severe limitations Interpol's charter places on its involvement with law enforcement agencies combatting terrorism, there is a need for heightened cooperation among intelligence officers outside of the Interpol context. There appears to be a substantial amount of such cooperation among law enforcement officials in Europe.[38] But there appears to be general agreement that otherwise present arrangements for international cooperation among law enforcement officials combatting terrorism are inadequate.

To remedy this situation, some have proposed an international clearing house of information regarding terrorists in order to permit law enforcement officials to trace their whereabouts.[39] Under this proposal an international working group would be established that would consist of senior level officials. While the working group would consist of representatives from like-minded states, it would go beyond the regional framework.

Others have warned against setting up too highly structured an arrangement. In their view, informal links between law enforcement officials best serve to maintain the flexibility necessary for efficient law enforcement activities.

Whatever form they should take, efforts to coordinate activities between law enforcement officials need to be expanded.

An International Criminal Code and an International Criminal Court

As we have seen above, in part because of its inability to agree on a definition of international terrorism, the world community has attempted to resolve the problem of definition by ignoring it and focusing instead on identifying particular criminal acts to be prevented and punished and on particular targets to be protected. In 1973, Professor Leo Gross, an eminent international law scholar, questioned this approach, suggested alternatives and sparked an extensive debate.[40]

Gross began his comments by recounting the efforts of the League of Nations to combat international terrorism by adopting two conventions,

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37. *Id.*

38. *See* John F. Murphy, *Legal Aspects of International Terrorism: Summary Report of an International Conference, supra* note 35, at 17-18.

39. *Id.* at 17.

40. Leo Gross, "International Terrorism and International Criminal Jurisdiction," *American Journal of International Law*, vol. 67 (1973), p. 508.

one for the Prevention and Punishment of Terrorism and another for the Creation of an International Criminal Court. He suggested that the failure of member states to ratify these conventions was "not a conclusive argument against the soundness of the League approach which was thorough and coherent, concerned with both substantive law and its impartial and uniform applicaton by an international tribunal. A High Contracting Party to the convention was entitled to commit the accused for trial to the international criminal court if it did not wish to try them before its own courts or to grant extradition in accordance with the principle *aut dedere aut judicare*."[41]

Gross further noted that, initially, the United Nations followed a similar approach. That is, in 1954 the International Law Commission elaborated a revised Draft Code of Offenses against the Peace and Security of Mankind, and another organization of the General Assembly drafted a Statute for an International Criminal Court. Consideration of the draft Code and draft Statute, however, was repeatedly postponed as the General Assembly debated the question of defining aggression.

Next Gross contrasted these approaches with the work of the United Nations on terrorism which "has been in response to events and consequently piecemeal."[42] He doubted whether the piecemeal approach would add up to a comprehensive system for the prevention and punishment of terrorist actions and that "without a tribunal to give a degree of coherence and consistency to the several international instruments, their application by national tribunals may well fall short of the objectives of certainty and impartiality."[43]

Gross accordingly commended the work of the Foundation for the Establishment of an International Criminal Court, which "is devoted to the study of the problem of terrorism in the broad framework of the League and the draft Code of Offenses against the Peace and Security of Mankind rather than in the current response-to-events manner of the United Nations."[44] He suggested that government officials would find it very worthwhile to study the Foundation's draft Convention on International Crimes and its Statute for an International Criminal Court and to draw upon them when the appropriate stage is reached on the official level.

In conclusion, Gross stated:

> The former Secretary-General of the United Nations, U Thant, was reported to have suggested the creation of an international tribunal to deal

41. *Id.*
42. *Id.* at 509.
43. *Id.*
44. *Id.* at 509-10.

> with hijacking of airplanes because such crimes were 'directed against an international service affecting a diversity of nations, men and interests.' They were in a different category from other crimes and therefore 'could not be dealt with by national courts defending the interests of one particular people or nation.' The Foundation, like the League of Nations and the United Nations in its earlier phase, is concerned with at least offering the possibility of an international proceeding for what are substantially international crimes, that is, crimes affecting more than one state or international service. The Foundation has performed and it will continue to perform a useful function in educating jurists of different countries in a vital problem area of an evolving body of international law, in both its substantive and procedural aspects.[45]

Others have been more skeptical regarding a return to a more comprehensive approach. This writer, while agreeing that a comprehensive approach, including the drafting of an international criminal code and the statute of an international criminal court, would be the *ideal*, continues to doubt whether it accords with the *real*.[46] The failure of member states to ratify the League's draft Convention and Statute for an International Criminal Court, as well as the United Nations inaction with respect to the International Law Commission's draft Convention and Statute, are significant factors that cannot be ignored. However, as indicated below in the conclusions and recommendations section of this article, the time may have come for a wide-ranging initiative not involving the drafting of conventions but rather the acceptance by a large number of states of fundamental principles and statements of law. A possible basis for such an initiative would be the report of the International Law Association's Committee on International Terrorism, discussed below in the next section.

Analogies to the Law of Armed Conflict

Report of the International Law Association Committee on International Terrorism

One of the more innovative alternative approaches to combating international terrorism has been set forth by the International Law Association Committee on International Terrorism. Specifically, the Fourth Interim Report of the Committee[47] proposes that well-accepted norms in the Law of Armed Conflict be accepted as a limit on a government's

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45. *Id.* at 510-11.

46. *See* John F. Murphy, "Professor Gross's Comments on International Terrorism and International Criminal Jurisdiction," *American Journal of International Law*, vol. 68 (1974), pp. 306-08.

47. *See* International Law Association, *Report of the Sixtieth Conference*, Canada: Harpell's Press, 1982, p. 349.

discretion to exclude political offenders from the extradition process. On the ground that nearly all states in the world have agreed to extradite or prosecute soldiers in international armed conflicts who commit atrocities, the Committee concludes that there is no political or legal basis for allowing persons not granted soldiers' privileges by international law a greater leeway for violence than soldiers have.

The Committee's proposal was not accepted by all of its members. In a dissenting statement, Professor L.C. Green of Canada and Dr. J. Lador-Lederer of Israel reject "any approach to the problem of international terrorism which relates the issue in any way to the Law of Armed Conflict."[48] In their view, any attempt to compare acts of terrorism with those forbidden during armed conflict is unwarranted and confusing. Also, they contend, many states which have accepted an obligation under the treaties regulating armed conflict to seek out, punish or extradite war criminals in their midst have failed to do so. There is, they argue, no reason to assume that such states would act any differently in the case of terrorism. Their view is influenced by the Arab-Israeli conflict and Israel's resistance to any political or legal development that might serve as support for an argument that members of the Palestine Liberation Organization are engaged in an "international armed conflict" and entitled to the status of combatants under the laws of war.

Following publication of the Fourth Interim Report, a quorum of the Committee met on November 1-3, 1983, at the Fletcher School of Law and Diplomacy, Tufts University, U.S.A. After heated discussion, the participants unanimously agreed on principles, a working definiton of international terrorism, and statements of law to be reported in the form of a resolution to the Sixty-First Conference of the International Law Association. Some of these principles, the working defintion and statements of law will be referred to later in this article.

Another reference to the Law of Armed Conflict as a possible model for development of the law relating to private acts of international terrorism has been based on traditional doctrines of neutrality. That is, under the traditional approach, at least in situations where the level of conflict in a civil war had risen to the magnitude that might be termed a "belligerency" (as compared to a "rebellion" or "insurgency"), various rights and duties for both neutral states and belligerents would arise.[49] Most particularly, neutral states were under an obligation to act toward belligerents with an impartial attitude and, conversely, belligerents had to

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48. *Id.* at 354.

49. *See generally*, Edwin Brown Firmage, "Summary and Interpretation," Richard A. Falk, ed., *The International Law of Civil War*, Baltimore: The John Hopkins University Press, 1971, p. 405.

act toward neutral states in accordance with their attitude of impartiality. A primary purpose of this law of neutrality was to limit the scope of the civil conflict and prevent it from spreading beyond the borders of the state where the conflict was taking place or from drawing outside states into the conflict.

Although there is a serious question whether the traditional law of neutrality remains extant—in light of state practice since World War II, e.g., the civil wars in Algeria and Nigeria, where it was largely ignored—the basic principles underlying this law may be applicable by analogy to private acts of international terrorism. Many terrorist acts occur in situations which would be described as rebellions or insurgencies under traditional doctrine and which are often characterized as wars of national liberation in the modern vernacular. Under a strict regime of neutrality, outside states would not intervene on the side either of the rebels or the target government. For their part, the rebels would limit their attacks to military personnel of the government in power and would not commit even these attacks on the territory of any outside state. The concept of nonintervention by outside states is reflected in the Declaration on Priciples of International Law Concerning Friendly Relations and Cooperation Among States,[50] a General Assembly declaration that is widely regarded as an authoritative interpretation of the United Nations Charter. In its first principle, ninth paragraph, the Declaration provides:

> Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed toward the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

As we shall see in the next section, a primary purpose behind the 1972 United States Draft Convention on Terrorism was to limit the range of conflict in wars of national liberation to their theater of operations.

1972 U.S. Draft Convention on Terrorism

The kidnapping and killing at Munich on September 6, 1972, of eleven Israeli Olympic competitors by Arab terrorists, as well as a number of other spectacular acts of terrorism, resulted in the United Nations General Assembly consideration of the problem of international terrorism and in the introduction by the United States on September 25 of a Draft Convention for the Prevention and Punishment of Certain

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50. U.N.G.A. Res. ES-612, reproduced in *UN Chronicle*, March 1980, p. 5.

Acts of International Terrorism.[51] In introducing the Convention, and in subsequent debates on it, United States representatives attempted to obviate the concern of some member states that the Convention was directed against so-called wars of national liberation. To this end, they pointed out that the Convention was limited in its coverage to "[a]ny person who unlawfully kills, causes serious bodily harm or kidnaps another person . . ." and they noted further that, even as to these acts, four separate conditions had to be met before the terms of the Convention applied. First, the act had to be committed or take effect outside the territory of the state of which an alleged offender was a national. Second, the act had to be committed or take effect outside the state against which the act was directed, unless such acts were knowingly directed against a non-national of that state. Under this provison, an armed attack in the passenger lounge of an international airport would be covered. Third, the act must not be committed either by or against a member of the armed forces of a state in the course of military hostilities. And, fourth, the act had to be intended to damage the interest of or obtain concessions from a state or an international organization. Accordingly, United States representatives pointed out, exceedingly controversial activites arguably terrorist in nature, such as fedayeen attacks in Israel against Israeli citizens and a wide range of activities by armed forces in Indo-China and in Southern Africa, were deliberately excluded from the Convention's coverage. A particularly broad loophole was a requirement that the act be committed or take effect outside of the country of which the alleged offender was a national. This provision would have excluded from the scope of the Convention most terrorist attacks in Latin America and elsewhere against international business personnel and facilities.

As to persons allegedly committing offenses covered by the Covention and apprehended in their territories, states parties would have been required to establish severe penalties for covered acts and either to prosecute such persons or extradite them to another state party for prosecution. The decision whether to prosecute or extradite the alleged offender would have been left to the sole discretion of the state where he was apprehended.

Nonetheless, despite strenuous efforts on the part of many states to reach a compromise, the U.S. initiative was unsuccessful. On December 18, 1972, the General Assembly adopted Resolution 3034 (XXVII) by a role call vote of 76 to 35 (including the United States), with 17 abstentions. Resolution 3034 (XXVII)—while expressing "*deep concern* over

51. The following discussion in the text is taken largely from John F. Murphy, "United Nations Proposals on the Control and Repression of Terrorism," M.C. Bassiouni, ed., *Terrorism and Political Crimes*, Springfield: Charles C. Thomas, 1975, p. 493.

increasing acts of violence which endanger or take innocent human lives or jeopardize fundamental freedoms," and inviting states to become parties to existing conventions on international terrorism and to take appropriate measures at the national level to eliminate terrorism—focuses its primary attention on "finding just and peaceful solutions to the underlying causes which give rise to such acts of violence." The Resolution also "*[r]eaffirms* the inalienable right to self-determination and independence of all peoples under the colonial and racist regimes and other forms of alien domination and upholds the legitimacy of their struggle. . . ."

By way of implementation, the Resolution invites states to study the problem on an urgent basis and submit their observations to the Secretary-General by April 10, 1973, and decides to establish an *ad hoc* committee, to be appointed by the President of the General Assembly, to study these observations and to submit a report with these recommendations for elimination of the problem to the 28th Session of the Assembly. The committee was appointed. However, after meeting from July 16 through August 10, 1973, the committee reported to the 28th Session of the General Assembly that it was unable to agree on any recommendations for dealing with the problem. Although the United Nations later adopted other measures against international terrorism as we have seen above, it has taken no further action with respect to the United States Draft Convention.

Coercive Measures against States Supporting International Terrorism

International Claims

As noted above, a major problem, perhaps the major problem, facing efforts to combat international terrorism is support given by some states to international terrorists of whom they approve. This support takes various forms. It may consist of no more than providing safe haven for terrorists who commit their acts in one state and flee to a state that is friendly toward their particular cause. In a more active manifestation of support, states may provide arms or even training and strategic direction to international terrorist groups. The United States Department of State has identified Syria, Libya, Iraq, the Soviet Union, South Yemen and Cuba as states actively supporting international terrorist activities.[52]

Unless a state has ratified an antiterrorist convention containing an extradite or prosecute obligation, it probably does not violate international law if it merely offers safe haven to a terrorist who commits his act in another state, although the matter is debatable. However, as reflected

52. *See* Leslie H. Gelb, "Administration Debating Antiterrorist Measures," *The New York Times*, June 6, 1984, p. A6.

in the provision of the Declaration on Friendly Relations noted above, there is a well-established rule of international law forbidding states to permit their territory to be used as a base for armed bands of whatever nature to operate in the territory of another state. Accordingly, it has been urged by some that international claims should be brought against states allowing terrorists to use their territory as a base for operations, either by diplomatic protest, or, if standing exists, before an international arbitral tribunal or the International Court of Justice.[53] Claims brought might inlude money claims for damages caused to a state's noncombatant, innocent victims.

Economic Sanctions

Although, as we shall see below, most authorities support the thesis that reprisals employing the use of armed force are no longer permissible under the United Nations Charter, this injunction does not appear to apply to ecnomic reprisals. It appears generally accepted that a state may resort to economic reprisals as measures of self-help, subject to the accepted, traditional preconditions for armed reprisals, namely (1) there must have been a prior international delinquency against the claimant state; (2) redress by other means must be either exhausted or unavailable; and (3) the economic measures taken must be limited to the necessities of the case and be proportionate to the wrong done.[54]

One may note that the power of the U. N. Security Council to authorize economic sanctions is expressly recognized by Article 41 of the U. N. Charter, and has in fact been exercised against Rhodesia. However, such action by the Security Council against states supporting international terrorism is simply not feasible. Also, the legal competence of the U. N. General Assembly or of a regional organization to impose economic sanctions is questionable. Finally, the political ostacles to the imposition of economic sanctions by a competent organ of the international community appear insurmountable at this time.

As to actions taken outside of existing competent legal institutions, the only example to date, as noted above, is the Bonn Declaration. Also as noted above, the Bonn Declaration may pose, under certain circumstances, substantial legal problems in its implementation. In any event, the Bonn Declaration is clearly an inadequate response to states that go way beyond offering safe haven to hijackers of airplanes and actively employ terrorist agents for assassination and other acts of violence abroad.

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53. Richard B. Lillich and John M. Paxman, "State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities," *American University Law Review*, vol. 26 (1977), p. 217.

54. *See* Derek Bowett, "International Law and Economic Coercion," *Virginia Journal of International Law*, vol. 16 (1976), p. 245.

The Bonn Declaration may, however, serve as a useful model for possible future economic sanctions against states supporting international terrorism. That is, it would seem preferable not at this time to press for the adoption of a multilateral sanctions convention. Reaching agreement, even in the form of a nonbinding declaration on the imposition of sanctions against states which, in some instances, have substantial economic power, will be difficult enough. To compound the problem by entering into the strenuous negotiations associated with a binding multilateral convention would seem unwise. To be sure, even if economic sanctions are imposed pursuant to a nonbinding international instrument, they may raise legal problems if they conflict with international treaties or rules of customary international law. The possible nature of such a conflict is beyond the scope of this article. Suffice it for present purposes to note that, in each instance, application of economic sanctions against a state supporting international terrorism would have to be judged in accordance with the applicable existing legal framework.

Perhaps the time has come, nonetheless, to press for economic sanctions against those states that are most egregiously supporting international terrorism. In the absence of such sanctions, the pressure to employ military force against such states, even on a unilateral basis, may become overwhelming.

Armed Force

The question of employing armed force against states supporting international terrorism has been brought into especially sharp focus by the United States announcement that it might employ preemptive military attacks against countries supporting terrorism and that the United States reserves the right to defend itself if so victimized.[55]

The United States has not made public precisely how, or under what circumstances, it might employ armed force by way of preemptive attack; nor has the United States defined state-sponsored terrorism. Apparently, however, the United States is contemplating employing armed force on a unilateral basis against states supporting international terrorism.

The issue of the use of armed force against states supporting international terrorism has been discussed in a variety of other forums,[56] and is beyond the scope of this article. Moreover, it would not appear useful to discuss the possible legality of the United States announcement in the absence of more information regarding the particular circumstances in

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55. *See* Leslie H. Gelb, "Administration Debating Antiterrorist Measures," *supra* note 52.

56. *See, e.g.,* John F. Murphy, "State Self-Help and Problems of Public International Law," Alona E. Evans & John F. Murphy, eds, *Legal Aspects of International Terrorism, supra* note 18, at 277.

which the United States might contemplate employing the use of armed force.

This writer would urge caution, however, in the use of armed force against states supporting international terrorism. It would seem particularly inappropriate and perhaps illegal to use armed force in the absence of any attempt to employ less coercive means of persuasion such as the bringing of international claims or the application of meaningful economic sanctions.[57] Moreover, this writer remains convinced that, in most instances, the danger to the maintenance of international peace and security of the use of force against states supporting international terrorism might be greater than that of international terrorism itself.

At the same time, the dangers that such armed force will be used increase as the world community continues to be ineffective in dealing with countries that are actively supporting international terrorism. Abdication of responsibility in this regard, therefore, may result in a spiraling upward of the level of international violence that greatly exceeds that of international terrorism.

Punishing International Terrorists

A primary goal of the antiterrorist conventions is to ensure that alleged international terrorists are prosecuted and, if found guilty, punished for their crimes. As described elsewhere, this goal may be likened to the labors of Sisyphus.[58] There are several reasons for this frustration.

Extradition and Political Offense Exception: Excluding Terrorist Offenses

As noted above, bilateral extradition treaties uniformly contain an exception to the obligation to extradite if the crime charged constitutes a political offense. This is not the forum in which to discuss the many tests that have developed with respect to defining a political offense.[59] For present purposes, it suffices to note that some countries would regard an act of terrorism as a political offense *par excellence*.

It is important to realize, moreover, that the global antiterrorist conventions do not by their terms eliminate the acts covered from the polit-

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57. Article 33(1) of the United Nations Charter would appear particularly apposite: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

58. John F. Murphy, *Punishing International Terrorists: The Labors of Sisyphus*, Totowa, N.J.: Rowman & Allanheald (1985) (forthcoming).

59. For such a survey, *see* M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, Dobbs Ferry: Oceana Publications, Inc., 1983, p. VIII § 2-1.

ical offense exception to extradition. Rather, a state still has complete discretion under these conventions not to extradite an alleged offender, and it presumably could make such a decision on the basis of its view that the act constituted a political offense.

To be sure, under these conventions, if a state declines to extradite, it is obligated to submit the alleged offender to its prosecutorial authorities, and this is contrary to the practice under bilateral extradition agreements. Nonetheless, as we shall see in the next subsection, this alternative obligation may be quite meaningless even among states of integrity and goodwill.

The only multilateral conventions that attempt to eliminate terrorism explicitly from the political offense exception to extradition are the regional European conventions—The European Convention on the Suppression of Terrorism and the Agreement on the Application of the European Convention on the Suppression of Terrorism. Unfortunately, these conventions nowhere define terrorism, and the European Convention includes within its compass a large number of violent crimes that do not necessarily constitute terrorism.

The time has come for states, at a minimum, to conclude bilateral agreements that expressly exclude from the political offense exception those crimes covered by the global antiterrorist conventions. Several recently concluded United States extradition treaties do this.[60] Ideally, like-minded states will go one step further and reach agreement on a definition of terrorism and expressly exclude any crime that falls within the definition from the political offense exception.

For this further step to be taken, states will have to reach agreement on a definition of terrorism. The International Law Association Committee on International Terrorism's draft report to the Sixty-First Conference of the Association has proposed a "working definition" along the following lines and given an explanation of its action:

> . . . .Acts of international terrorism include but are not limited to atrocities, wanton killing, hostage taking, hijacking, extortion, or torture committed or threatened to be committed whether in peacetime or in wartime for

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60. For example, article 4(2) of the U.S.-Costa Rica Extradition Treaty, ratified by the United States on August 17, 1984, provides that an offense shall not be considered a political offense if it is "An offense with respect to which the Contracting Parties have the obligation to prosecute or to grant extradition by reason of a multilateral international agreement." Similarly, article 4(2)(i) of the U.S.-Canadian Extradition Treaty, *entered into force* March 22, 1976, 27 U.S.T. 983; T.I.A.S. 8237, provides that "[a] kidnapping, murder or other assault against the life or physical integrity of a person to whom a Contracting Party has the duty according to international law to give special protection, or any attempt to commit such an offense with respect to such a person" is not to be considered a political offense for purposes of the treaty.

political purposes provided that an international element is involved. An act of terrorism is deemed to have an international element when the offense is committed within the jurisdiction of a country:

(a) against any foreign government or international organization, or any representative thereof; or

(b) against any national of a foreign country because he is a national of a foreign country; or

(c) by a person who crosses an international frontier into another country from which his extradition is requested.

EXPLANATION. To be classified as "international terrorism" for the purposes of applying the rules of law set out here, an act must be so reprehensible or so disruptive of the fabric of society that no motivation or political subordination can excuse it. The acts listed here as illustrative include acts which violate all known municipal criminal law codes and which, if done in wartime, would seem to be violations of the laws of war. In the absence of an international element, all these acts are properly handled by each state for itself. When an international element is involved, suppression of these and similar acts become a matter of international concern. Three situations are envisaged in which the international element must be deemed to exist.[61]

Grant Wardlaw, an Australian scholar and criminologist, recently advanced another possible definition, defining "political terrorism" as "the use, or threat of use, of violence by an individual or a group, whether acting for or in opposition to established authority, when such action is designed to create extreme anxiety and/or fear—inducing effects in a target group larger than the immediate victims with the purpose of coercing that group into acceding to the political demands of the perpetrators."[62]

Other definitions have been proposed. Whatever definition may ultimately be adopted, the important point is to ensure that, however the political offense may otherwise be defined, it will not cover acts of international terrorism.

Ensuring Effective Prosecution

Extradition, it should be remembered, is only a method of rendering alleged terrorists to a country where they will be subject to prosecution for their crimes. This is also true of other methods of rendition of terrorists, such as deportation and exclusion, that are used more frequently than extradition. The primary goal, then, is to ensure that an alleged

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61. The text of the draft report was kindly supplied this writer by Professor Alfred P. Rubin, Chairman/Rapporteur of the Committee.

62. Grant Wardlaw, *Political Terrorism: Theory, Tactics, and Counter-Measures*, Cambridge: Cambridge University Press, 1982, p. 16.

terrorist will be subject to prosecution for his crime, in accordance with due process and fundamental human rights.

Situations may arise with some frequency, however, where problems of jurisdiction over the crime may bar such prosecution. The global antiterrorist conventions, in effect, establish the offenses covered as "international crimes," subject to the universal jurisdiction of states parties. Indeed, states parties to the conventions are required to adopt national legislation that will permit them to exercise jurisdiction over the covered crime regardless of where it takes place, in order to fulfill their obligation under these conventions either to extradite or submit to prosecution alleged offenders.

As demonstrated, however, these global conventions do not cover terrorism *per se* but rather only particular criminal acts, regardless of whether, under the circumstances, they constitute acts of international terrorism. The draft report of the International Law Association's Committee on International Terrorism, in addition to setting forth its working definition of international terrorism, has included as a statement of law that "States Must Try or Extradite (*aut judicare aut dedere*) Persons Accused of Acts of International Terrorism. No state may refuse to try or extradite a person accused of an act of international terrorism, war crime, common crime which would be a war crime but for the absence of a legal status of belligerency or a crime against humanity, on the basis of disagreement as to which of these legal categories properly applies to the situation."[63]

This proposition, to understate the matter, is highly debatable as a statement of the *lex lata*, especially in view of the total failure of the world community to agree on a definition of international terrorism. Nonetheless, it has been proposed by an eminent and worldwide private international law association. Conceivably, depending on the reaction to it by other actors in the world community, the proposition could evolve to the point where it would become a rule of customary international law.

In the same vein Professor Paust has called for the adoption of federal legislation in the United States that would permit the United States, as a matter of its national law, to exercise jurisdiction over acts of international terrorism wherever they may have been committed.[64] The desirability of such legislation has been questioned on the ground that "terrorism should not be defined ultimately as a distinct form of criminal

63. *See supra* note 61.

64. Jordan J. Paust, "Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine," vol. 23 (1983), p. 191.

activity."[65] This is an issue that deserves to be explored more fully.

Regardless of the type of national legislation under which terrorists may be prosecuted, the problem of obtaining evidence sufficient to convict them in a court is a substantial obstacle. The problem is compounded by the relatively underdeveloped nature, with the possible exception of Western Europe, of methods of international judicial assistance. The term "international judicial assistance" may be broadly defined to include arrangements between states for the exchange of information regarding criminal investigations, service of documents, interrogation of witnesses, transfer of criminal proceedings, enforcement of criminal judgments, and transfer and supervision of offenders convicted in the other country.[66] In Western Europe, arrangements for judicial assistance in criminal matters are well developed. Elsewhere, however, states have not been involved in international agreements on judicial assistance with regard to criminal matters to an extent sufficient to meet the need.

International judicial assistance takes on particular importance in connection with the extradite or prosecute obligation contained in the global antiterrorist conventions. If a state decides not to extradite an alleged offender to the requesting country, it is obliged, as we have already seen, to submit the accused for the purpose of prosecution. But this obligation lacks meaningful content if the state concerned has no procedural means of obtaining the evidence necessary to ensure conviction of the accused.

To compound the problem, the political offense exception usually applies with respect to obtaining evidence abroad as well as to obtaining the presence of an alleged offender for extradition.[67] Recently concluded treaties of mutual judicial assistance commonly contain an exception to the obligation to cooperate in gathering and transmitting evidence regarding criminal matters if the offense charged is, in the opinion of the requested state, a political offense.[68] Moreover, as in the case of extradition treaties, there is no definition of a political offense, and no exlcusion from the political offense exception of acts of international terrorism.

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65. Brent L. Smith, "Antiterrorism Legislation in the United States: Problems and Implications," *Terrorism—An International Journal*, vol. 7, 1984, p. 213.

66. For a superb general survey, *see* Heinrich Grutzner, "International Judicial Assistance and Cooperation in Criminal Matters," II M. Cherif Bassiouni, Ved P. Nanda, eds., *A Treatise on International Criminal Law*, Springfield: Charles C. Thomas, 1973.

67. *See generally*, Michael E. Tigar & Austin J. Doyle, Jr., "International Exchange of Information in Criminal Cases," Michigan Yearbook of International Legal Studies, *Transnational Aspects of Criminal Procedure*, New York: Clark Boardman Co. Ltd., 1983.

68. *See, e.g.*, article 5 of the U.S.-Columbia Mutual Legal Assistance Treaty, which *entered into force* March 4, 1982.

In sum, then, there are three basic barriers to ensuring effective prosecution of international terrorists. First, extradition and other methods of rendition are often ineffective in returning the alleged offender to the place where the crime was committed. Second, if a state declines to extradite the alleged terrorist, it may not have jurisdiction under its national law or perhaps even under international law itself to prosecute him. Third, in any event, inadequate procedures of international judicial asisstance may make it impossible to obtain evidence sufficient to convict the alleged offender of the crime.

CONCLUSIONS AND RECOMMENDATIONS

The primary conclusion to be drawn from this survey of current efforts to combat international terrorism may be stated quite simply: they are grossly inadequate. Although, as we have seen, a large number of legal instruments designed to combat international terrorism have been concluded—on the global, regional, bilateral, and national levels—these, by and large, constitute only the appearance of action against international terrorism and not the reality.

This brief concluding section is not the place to discuss in detail what might be done to change this unhappy situation. Nonetheless, to this observer, several initiatives toward reform are urgently required.

Ideally, of course, the goal is to *prevent* terrorist acts from taking place. By far the most important tool to this end is the effective gathering, analysis, and dissemination of intelligence regarding terrorists, terrorist organizations and their activities. Reforms need to be made, again at the global, regional, bilateral, and national levels, toward a true international network among democracies of shared information regarding terrorism. Such reforms should, moreover, be pursued as a matter of the highest priority.

This writer has been among those most skeptical of the desirability of attempting to define international terrorism at the intenational level as a step toward combating it. I have changed my mind. To be sure, there is little or no possibility of reaching consensus, in the United Nations or elsewhere, on a single international convention defining international terrorism. But international lawmaking consists of more than the drafting of treaties and conventions. The process of customary international lawmaking may afford some opportunities for constructive action.

In particular, the draft report of the International Law Association's Committee on International Terrorism, referred to above,[69] could be the basis for an international initiative. Compiled by a distinguished group

69. *See supra* note 61 and associated text.

of international law scholars and practitioners, representing a wide variety of cultures and viewpoints, the report could serve as a neutral statement of a working definition, principles and statements of law regarding international terrorism that democratic states could present in appropriate forums, including the United Nations, as propositions of law. These propositions could be expressed orally or, where appropriate, in the form of a resolution, or, perhaps only on a regional or bilateral basis, in a treaty or similar legal instrument.

It might be particularly useful to introduce, in international forums the following statements of law advanced in the Committee report:

3. COMBATANT STATUS NO EXCULPATION
   (a) The claim of combatant status does not legitimize an act of international terrorism.
   (b) No state may permit a person to escape trial or extradition for an act of international terrorism, on the ground that that person should be regarded as a combatant, if the act is illegal under the laws of armed conflict.
4. POLITICAL MOTIVATION NO EXCULPATION
   No state may legally permit a person who has committed an act of international terrorism to escape trial or extradition on the ground of his political motivation.
5. INTERNATIONAL COMPETENCE OVER INDIVIDUALS
   Acts of international terrorism, no less than crimes against humanity, are violations of international law by individuals regardless of motivation or political context.
6. SUPERIOR ORDERS NO DEFENSE
   The official position of an accused or the existence of superior orders is no defense to a person accused of an act of international terrorism.
7. AUT JUDICARE AUT DEDERE
   States must try or extradite (*aut judicare aut dedere*) persons accused of acts of international terrorism. No state may refuse to try or extradite a person accused of an act of international terrorism, war crime, common crime which would be a war crime but for the absence of a legal status of belligerency, or a crime against humanity, on the basis of disagreement as to which of these legal categories properly applies to the situation.

Some of these statements may be advanced *de lege feranda*. All of them, however, represent, at a minimum, what the law ought to be. They should be pressed vigorously. As John Norton Moore has noted, "[T]here is a struggle for law, for authority, and it is necessary to show that terrorism is impermissible."[70] This struggle requires greater effort

70. Quoted in Israel E. Levine, "Combatting Terrorism at Home and Abroad," *The American Jewish Congress Monthly*, vol. 51 (1984), p. 7.

from the democracies than is currently being expended.

Particularly strenuous efforts should be undertaken at the regional and bilateral level by like-minded states to incorporate the Committee's statements of law noted above into international agreements. Extradition agreements should be revised so as expressly to exclude terrorist acts, as defined by the Committee or by some other mutually acceptable formulation, from the political offense exception to extradition. The same revision should be made with respect to statutes where states use legislative provisions as the basis for extradition.

Similarly, mutual judicial assistance treaties should be revised so as to exclude terrorist acts from the political offense exception to the obligation to supply information regarding crime. Improvements in the field of international judicial assistance might make it possible to incorporate the *aut judicare aut dedere* principle regarding international terrorism into customary and conventional international law, as suggested by the ILA Committee on International Terrorism.

Finally, there is the problem of states that actively support international terrorism. With the recent escalation in this type of activity, the problem can no longer be ignored. With the apparent failure of quiet diplomacy, the time may have come to employ more coercive measures. In keeping with United Nations Charter provisions, any coercive measures employed should be of the minimum intensity required. With few exceptions they should include only the bringing of international claims, economic sanctions, or similar measures. The use of armed force should be reserved for the most extreme cases and undertaken with scrupulous regard to the United Nations Charter and other international legal instruments imposing restraints on the unilateral use of armed force.

One more point should be made. International terrorism is only one manifestation, and not necessarily the most dangerous, of the rapidly increasing level of violence around the world today. Unless the world community is willing to address this larger crisis in a meaningful way, the problem of international terrorism may pale into insignificance in the resulting conflagration.

COMMENTS

JAW-LING JOANNE CHANG

As the title of this paper indicates, Professor Murphy has attempted to set forth the recent legal developments throughout the world to control terrorism. In his introduction, he laments the "paucity" of such developments both within and outside the United Nations, regardless of the increasing incidence of terrorist acts which he cites, using mostly United States Department statistics.

In Part II, Professor Murphy offers a comprehensive summary of the various legal developments including global, regional, multinational, bilateral conventions and agreements which, in their totality, he asesses "grossly inadequate" as a response to international terrorism.

However, how to control, suppress, and eliminate terrorism is not only a legal question but also a political question. Broader and closer international legal cooperation will be very helpful to combat terrorism. But the ultimate solution still lies in the hands of each individual country. The recent U.S. government record with regard to responding to the problem of terrorism has not been encouraging. President Carter's willingness to negotiate with hostage takers in 1980 set a dangerous precedent. President Reagan's flip-flop in Lebanon is another misfortune. In October 1983, 241 U.S. marines were killed in a truck-bombing of their barracks in Beirut by terrorists. President Reagan declared that keeping the U.S. force in Lebanon was "central to our credibility on a global scale." Several months later, Reagan decided, however, to "redeploy" the marines from their exposed position on land to the safety of U.S. ships offshore. The U.S. thus again ignored the no-concessions policy with respect to terrorist blackmail. Former Secretary of State Kissinger once said, "If terrorist groups get the impression that they can force a negotiation with the United States and an acquiescence in their demands, then we may save lives in one place at the risk of hundreds of lives everywhere else."[1]

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1. Henry Kissinger, "Beyond the Call of Duty," *Time*, September 1, 1975, quoted from Neil C. Levingston, *The War Against Terrorism*, Lexington, Mass.: D.C. Heath, Lexington, Books, 1982, p. 248.

Questions and Answers

NOTES

Murphy - Intl Victims Rights -

Abduction - Little Case in intl law.
Except - Where abduction occurs
where there is no functioning
government.

Mochary - Abduction is not necessarily a violation
of intl law - Article 51 - Self Δ

Deportation - because person entered
U.S. illegally

U.S. / U.K. Treaty -

Murphy - Deportation -

N O T E S

N O T E S

Panel on Civil Remedies Against Terrorists and Nations Supporting Terrorists

The National Conference on Law in Relationship to Terrorism

June 6

1:30 - 3:00 p.m. Panel on Civil Remedies Against Terrorists and Nations Supporting Terrorists

Moderator:

The Honorable Theodore B. Olson
Gibson, Dunn & Crutcher
Washington, D.C.

Panelists:

1. The Honorable Rudolph W. Giuliani
   United States Attorney for the
   Southern District of New York

2. Harold Koh
   Associate Professor of Law
   Yale Law School

3. Steven M. Schneebaum -
   Washington, D.C

THEODORE B. OLSON

Theodore B. Olson is the Partner in Charge at the Washington, D.C. Office of Gibson, Dunn & Crutcher, Los Angeles.

Mr. Olson received his B.A. from the University of the Pacific, Stockton, California, where he received recognition as the Outstanding Graduating Student in both Forensics and Journalism. He received his law degree from the University of California at Berkeley where he was a member of the California Law Review and Order of the Coif.

In 1965, Mr. Olson joined the law firm of Gibson, Dunn & Crutcher, Los Angeles. He became a partner in 1972.

In 1981, Mr. Olson was appointed by President Reagan to be Assistant Attorney General of the Office of Legal Counsel at the U.S. Department of Justice. The Office of Legal Counsel assists the Attorney General in the performance of his responsibility to provide legal advice to the President and to the heads of the Executive Branch departments.

On November 1, 1984, Mr. Olson returned to Gibson, Dunn & Crutcher to assume his present position.

Ted Olson

Terrorism — ① Deterrence - Prevention

② Apprehension & Punishment

③ Military Response

④ Civil Remedies -

THEODORE B. OLSON

Mr. Olson is a member of the California, Washington, D.C. and United States Supreme Court Bars as well as various others. He has handled cases at all levels of the California and federal court systems including the Ninth Circuit, the California Supreme Court and the United States Supreme Court.

RUDOLPH W. GIULIANI

Rudolph W. Giuliani took the oath of office as the United States Attorney for the Southern District of New York on June 3, 1983. He had been nominated for the position by President Reagan on April 26, 1983 and confirmed by the Senate on May 4, 1983.

Mr. Giuliani was born May 28, 1944. He received his A.B. degree in 1965 from Manhattan College and his J.D. degree in 1968 from New York University School of Law, where he was an editor of the Law Review.

From 1968 to 1970, he was a Law Clerk to the United States District Judge Lloyd F. MacMahon in the Southern District of New York.

Mr. Giuliani first joined the Justice Department in 1970 as an Assistant United States Attorney in the Southern District of New York. He served in turn as Chief of the Corruption Unit, Chief of the Narcotics Unit and finally in 1975 as Executive Assistant United States Attorney.

Later in 1975, he was appointed by Attorney General Edward H. Levi an Associate Deputy Attorney General in the Department of Justice, a post he held until 1977.

Carl "Toby" Solberg | Chief Civ. Div., S.D.N.Y.

Terrorism Litigation

1. Individual Terrorist
   - Immig. / Natural laws -
   - Extradition / Deportation / Exclusion

Doherty Case

- Extradition Magistrate
  - Not an Article III Judge -
    - not final order of Court
    - not appealable -
  - Ind. may appeal on writ of habeas corpus - if ordered to be extradited

- Deportation
  - Can't control country where person goes.

- Karl Linnas -
  Second Circuit decision
  - Commandant of a death camp in Estonia

- Foreign Sovereign Immun. Act.

- Foreign Agents Registration Act.

- RICO

He then returned to New York City, where he was a partner in the law firm of Patterson, Belknap, Webb and Tyler until he was named Associate Attorney General.

As a partner at Patterson, Belknap, Webb and Tyler, Mr. Giuliani was involved primarily in civil litigation. From 1978 to 1981, he also was the federal court appointed Receiver of Aminex Resources Corporation, a public corporation, and its fifteen subsidiaries. As the court appointed chief operating officer of Aminex, Mr. Giuliani ran all the companies, which were principally involved in the coal business in Eastern Kentucky.

On February 20, 1981, Mr. Giuliani was nominated by President Reagan to the position of Associate General of the United States, the third highest position in the United States Department of Justice. He was confirmed by the United States Senate on April 2, 1981.

As the Associate Attorney General, Mr. Giuliani was responsible for supervising a wide range of criminal enforcement activities -- including the work of the Criminal Division of the Department of Justice, the Drug Enforcement Administration, the

o RICO

-Gov. Civil Remedies-

Enterprise to engage in pattern of racketeering activities

-requires 2 acts.- predicate acts-

- divestiture
- disolut / reorg.
- injunc. / restrain ord.

- Applies to terrorists

-no political exception-

- May be able to use against groups supporting terror.

ninety-four United States Attorney's Offices, the Immigration and Naturalization Service, the Bureau of Prisons, the Marshals Service and Interpol.

Mr. Giuliani has testified frequently before Congress, has lectured on a variety of legal topics at New York University School of Law, Harvard Law School and elsewhere. He has published law review, magazine and op-ed articles on a wide variety of subjects including criminal law, immigration reform and tax law.