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Panel V

Commentary—The Road Ahead

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I will begin by saying a few words about the United Nations and terrorism before September 11, 2001, the impact of September 11th, and where the United Nations seems to be headed.² UN Member States have always had, at best, an ambivalent relationship with terrorism. Some delegates have preferred to see it as a social phenomenon, not as a criminal instrument for advancing a political or other agenda. Indeed, at a UN terrorism symposium in Vienna in 2002, over fifty delegates spoke, and almost all of them talked about terrorism as a social phenomenon; only one speaker addressed terrorism as a weapon. Part of the difficulty arises from the fact that wars of independence often involved acts of terrorism. It is difficult for participants in such struggles to admit

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2. See my *Before and After: The Changed UN Response to Terrorism since September 11th*, 35 CORNELL INT'L L.J. 476 (2002) and Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism*, 97 AM. J. INT'L L. 333 (2003).

to having used terrorist tactics. And, of course, in the debates about the Arab-Israeli conflict and the Pakistani-Indian conflict over Kashmir, Arabs and Pakistanis and others deprecate the use of the term “terrorist” to describe any acts undertaken against “foreign occupation.”³ In contrast, there is substantial evidence, including in the Arab-Israeli warfare since September 2000, that terrorism is a weapon. The evidence of terrorism’s political effectiveness with many governments, inter-governmental institutions, and commentators has been accumulating for decades; as UN Secretary General Kofi Annan has said on many occasions, terrorism, although itself unjustifiable under any circumstances, does not invalidate legitimate grievances.⁴

Prior to September 11th, UN Member States addressed the issue of terrorism chiefly through the General Assembly and the Sixth (Legal) Committee in particular. The Sixth Committee and other UN bodies have provided the principal forum for negotiating the twelve conventions elaborating particular terrorist acts: handling of nuclear material,⁵ hostage taking,⁶ maritime navigation,⁷ and the like.⁸

3. See, e.g., Rostow, *supra* note 1, at 475 n. 4 (Pakistani and Syrian positions). Pakistan’s UN Mission website states that “a comprehensive legal definition of terrorism should not only draw a clear distinction between terrorism and people’s legitimate struggle for right of self-determination but must also take into account all forms of terrorism including state-sponsored terrorism.” Available at <http://www.un.int/pakistan/terrorism.html> (last visited June 16, 2003). In addition, on June 4, 2002, Pakistan’s UN Ambassador told a meeting of the Organization of the Islamic Conference (OIC) at the UN that, “After the events of 11 September 2001, India has sought to take undue advantage of the opportunity to portray the Kashmir liberation struggle as terrorism, and to delegitimize the struggle, disregarding the fact that the right of self-determination is a crucial principle of the UN Charter, as is also the people’s right to defend themselves, including by armed resistance. This is true of liberation struggles everywhere including Palestine.” Available at <http://www.un.int/pakistan/20020604.html> (last visited June 16, 2003).

4. See Statement of Secretary-General Kofi Annan to the 20 January Security Council ministerial meeting on terrorism, S/PV.4688 (2003), (“Just as terrorism must never be excused, so must genuine grievances never be ignored. True, it tarnishes a cause when a few wicked men commit murder in its name. But it does not make it any less urgent that the cause be addressed, the grievance heard and the wrong put right. Otherwise, we risk losing the contest for the hearts and minds of much of mankind.”)

5. See Convention on the Physical Protection of Nuclear Material, 1929, 1456 U.N.T.S. 24631.

6. See International Convention Against the Taking of Hostages, Dec. 17, 1979, 1361 U.N.T.S. 206.

7. See Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, S. Treaty Doc. No. 101-1 (1988), *reprinted in* 27 I.L.M. 672 (1988).

8. All the Conventions, including in addition some regional conventions, are reprinted in a UN publication, INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM (2001).

The United Nations first began to look seriously at terrorism after the massacre of the Israeli athletes at the 1972 Munich Olympics. On the initiative of the then–Secretary General, the General Assembly began attempting to negotiate a comprehensive convention on terrorism. The fact that, thirty years later, such a convention still does not exist highlights the fundamental problems the international community confronts in terms of reaching consensus on how to define terrorism and whether it is unacceptable in all circumstances. The Security Council did not begin dealing with terrorism until the end of the twentieth century. When Russia held the presidency of the Security Council in October 1999, the Russian UN delegation proposed Resolution 1269, a strong condemnation of terrorist attacks as threats to international peace and security.⁹ At the same time, the General Assembly’s Sixth Committee continued its work on outlawing specific terrorist acts such as terrorist bombings and the financing of terrorism.¹⁰ The events of September 11th changed the Security Council’s focus, making terrorism one of the Council’s central concerns.

The Security Council’s immediate response was the adoption of Resolution 1368, a severe condemnation of the attacks recognizing that such attacks give rise to the inherent right to use force in self-defense.¹¹ The Resolution does not include any language about the causes of terrorism. That was a sign that the attacks of September 11, 2001, had shaken everyone. Secondly, without much ado, the Resolution uses the word “terror” instead of the phrase “acts of terrorism.” September 11 thus caused delegates to put to one side their usual use of the subject of terrorism in order to engage in political warfare over the Arab-Israeli and India-Pakistan conflicts. Then, on September 28, 2001, the Security Council adopted Resolution 1373.

Resolution 1373 is one of the most far reaching Security Council resolutions ever adopted. It calls on all member states to take the kind of action normally set forth in multilateral conventions. Indeed, a number of paragraphs dealing with the financing of terrorism mirror provisions of the Terrorist Financing Convention.¹² Without defining terrorism, the Resolution requires all

9. See S.C. Res. 1269, U.N. SCOR 54th Sess., U.N. Doc. S/1269 (1999).

10. See e.g. International Convention for the Suppression of Terrorism Bombings, G.A. Res. 165, U.N. GAOR, 52d Sess, U.N. Doc. A/52/164 (1998); International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR 6th Comm., 54 Sess., 76th mtg., Agenda Item 160, U.N. Doc. A/54/109 (1999).

11. See S. C. Res. 1368, U.N. SCOR, 56th Sess., U.N. Doc. S/1368/(2001).

12. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 37 ILM 249 (1998).

states to cease active and passive assistance to terrorists, including by prohibiting the harboring of terrorists. States are to make criminal the transit of their territory by terrorists as well as financial transactions on behalf of terrorists. The Resolution requires States to freeze assets of terrorists and their collaborators. It calls on States to strengthen border controls, take measures to make the forging of identity documents more difficult than it is, and cooperate internationally against terrorism, including through sharing information. In addition, the Resolution notes with concern the connection between terrorism and other criminal activity such as narcotics trafficking.

Security Council Resolution 1373 established the Counter-Terrorism Committee (CTC) to monitor implementation. Membership is the whole Security Council. The Committee named itself and established its own procedures for carrying out its mandate. It also has developed relations with the UN membership that have been path-breaking in Security Council terms. Both the first Chairman, the British Permanent Representative, and his successor, the Spanish Permanent Representative, have reported at least once a month to all Member State delegations on the activities of the CTC. This practice of transparency has enhanced Member States' understanding and acceptance of the CTC.¹³ One result is that the CTC has received more than 300 self-evaluations by Member States of their implementation of Resolution 1373. The CTC responds to each such report, continuing an open-ended dialogue with Member States that has made the CTC the center of world-wide efforts to build counter-terrorist capacity. As part of its work, the CTC has forged relations with international, regional, and sub-regional organizations, encouraging them to establish counter-terrorist priorities for their members and to assist their members in improving their counter-terrorist capabilities. The work focuses on infrastructure, rather than operations, but it is infrastructure that permits successful counter-terrorism operations.

The CTC, like other Security Council committees, operates by consensus. Each member therefore has a veto. As a result, the CTC has not yet been able to overcome the political differences about terrorism, including how to define terrorism, among its members. Nevertheless, the Committee has progressed from engaging in a paper dialogue with UN Members to consideration of site visits to determine if States are doing what they claim. And, in the

13. A refrain at the United Nations is the complaint that the Security Council does not act with "transparency." The CTC has avoided this criticism through the device of frequent Chairman's briefings. The CTC thus has created a model other committees and, indeed, the Security Council itself may follow.

future, the CTC may conclude that it has to refer recalcitrant Members to the Security Council.

Terrorist sanctions constitute another prong of the Security Council's attack on terrorism. The original sanctions regime on terrorism in Afghanistan was established in Resolution 1267.¹⁴ This resolution was aimed at that part of Afghanistan under the control of the Taliban, Osama bin Laden and al Qaeda and demanded that bin Laden be turned over to "appropriate authorities." After the collapse of the Taliban regime, the Security Council removed the territorial focus from the Resolution.¹⁵ This change also constituted a Security Council innovation. Hitherto, the Council had adopted sanctions as a means to influencing a government. Resolution 1390 (2002) and its successor Resolution 1455 (2003) target Taliban and al Qaeda personnel in whatever form they may take in whatever location they may be. Members provide the Security Council Committee charged with monitoring terrorist sanctions—the 1267 Committee—with names of persons and entities identified as engaged in terrorism or terrorism-related activities to be adopted so that the entire international community can take action against them. While this system raises some procedural and due process concerns, it has resulted in worldwide action against al Qaeda members and collaborators.¹⁶

The attacks of September 11, 2001, have had a transforming effect. Americans see the world differently as a result. Other countries have been slower to change their perceptions; some have yet to do so. The United Nations, as an organization and as a collectivity of independent States, has changed its habits. Some of the changes have enhanced the international community's capacity to combat terrorism, and some have enhanced the international community's ability to undertake anti-terrorist operations. All have increased the role of the United Nations in counter-terrorism, including in relation to other international organizations. All also have increased in UN institutional expertise on terrorism. These actions are not the solution to the terrorism crisis; they are important and useful steps in the international struggle to combat terrorism.

14. See S. C. Res. 1267, U.N. SCOR, 54th Sess., U.N. Doc. S/1267/(1999).

15. See S. C. Res. 1390, U.N. SCOR, 57th Sess., U.N. Doc. S/1390/(2002).

16. See the discussion of these issues in the Proceedings of the American Society of International Law annual meeting, April 3, 2003, panel entitled "An Imperial Security Council? Implementing Security Council Resolutions 1373 and 1390."